



University of Arkansas at Little Rock Law Review

Volume 16 | Issue 3

Article 3

1994

Constitutional Law—*Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993): An Answered Prayer to Students with Disabilities in Religious Schools

Mardi L. Blissard

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>

 Part of the [Constitutional Law Commons](#)

Recommended Citation

Mardi L. Blissard, *Constitutional Law—Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993): *An Answered Prayer to Students with Disabilities in Religious Schools*, 16 U. ARK. LITTLE ROCK L. REV. 449 (1994).

Available at: <https://lawrepository.ualr.edu/lawreview/vol16/iss3/3>

This Note is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

NOTES

ZOBREST v. CATALINA FOOTHILLS SCHOOL DISTRICT, 113 S. Ct. 2462 (1993): AN ANSWERED PRAYER TO STUDENTS WITH DISABILITIES IN RELIGIOUS SCHOOLS

I. INTRODUCTION

In *Zobrest v. Catalina Foothills School District*, the United States Supreme Court held that the Establishment Clause of the First Amendment of the United States Constitution¹ did not prevent a public school district from providing a hearing-impaired student with a certified sign-language interpreter² to facilitate his education in a sectarian school.³ In doing so, the Court reversed the Ninth Circuit Court of Appeals' decision that the provision of such aid in the context of a parochial school is a violation of the Establishment Clause because its primary effect would be to advance religion.⁴ As a further refinement of the "parochial doctrine,"⁵ the Court's decision removes a constitutional barrier to certain modes of delivering special education and related services in religious schools. The Court's analysis also marks a significant departure from decades of Establishment Clause jurisprudence based on a three-part purpose-effect-entanglement analysis.⁶

1. The Establishment Clause is the first of the two Religion Clauses in the First Amendment; it provides that "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I. It is followed by a second, Free Exercise Clause forbidding Congress from "prohibiting the free exercise thereof. . . ." *Id.* The conflict between the two is obvious. On the one hand, Congress may not establish religion; on the other, it may not impede its practice.

2. A certified sign-language interpreter has been certified by the Registry of Interpreters for the Deaf and is bound by the Registry's Code of Ethics. The Code defines "interpret" as translating spoken English to American Sign Language or American Sign Language to spoken English. Interpreters must transmit everything in the manner intended by the speaker and are responsible for conveying accurately. If the interpreter is influenced by his own feelings, the Code requires that he withdraw from the situation. Petitioner's Brief, *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (citing Joint Appendix, *petition for cert.* at 73-74) available in LEXIS, Genfed Library, Briefs [hereinafter Petitioner's Brief].

3. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2463 (1993).

4. *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1196 (9th Cir. 1992), *rev'd*, *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2463 (1993).

5. Commentators frequently use the term "parochial" to refer to state aid to parochial schools. See, e.g., Thomas F. Guernsey & M. Grey Sweeney, *The Church, the State, and the EHA: Educating the Handicapped in Light of the Establishment Clause*, 73 MARQ. L. REV., 259, 267 n.65 (1989).

6. See discussion *infra* part III.A.

II. FACTS

In 1987, James Zobrest, a 14-year-old junior high school student, deaf since birth, enrolled in Salpointe Catholic High School in Tucson, Arizona, for the school year commencing August, 1988.⁷ Larry and Sandra Zobrest, his parents, asked Catalina Foothills School District, their local district, to supply James with a sign-language interpreter to accompany him to classes at Salpointe as provided by the Education of the Handicapped Act and its Arizona counterpart, Arizona Revised Statutes Annotated Section 1400.⁸

Prior to that time, James had attended both public and non-religious private schools, including a school for the deaf during grades one through five and a public junior high school in grades six through eight.⁹ At the junior high level, the school district had furnished James with a mainstream program¹⁰ on public school premises that included a speech therapist and an interpreter for all his classes.¹¹

When James was ready to enter high school, the Zobrests, who are Roman Catholic, believed it was essential that their adolescent son transfer to a religious school where daily worship is held and religious values are encouraged.¹² Salpointe's curriculum included a required religion class, and students were strongly encouraged to attend daily mass.¹³ Moreover, the faculty's mission was to illustrate how "[t]he presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum."¹⁴

In response to the Zobrests' request, the school district replied that it would supply an interpreter for James in any Arizona public high school.¹⁵ However, it referred the question of whether the school district would provide an interpreter at Salpointe to the Pima County,

7. Petitioner's Brief.

8. *Id.*

9. *Zobrest*, 113 S. Ct. at 2464.

10. Mainstreaming seeks to place children with disabilities into the mainstream of education, which is the regular classroom. The concept is harmonious with the "least restrictive environment" approach to special education which strives to educate children with disabilities and nondisabled children together to the maximum extent appropriate. LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* 102 (1992).

11. Petitioner's Brief, n.1.

12. Petitioner's Brief.

13. *Zobrest*, 113 S. Ct. at 2472 (citing Appendix at 90).

14. *Id.* (quoting Appendix at 92).

15. Respondents' Brief, *Zobrest*, 113 S. Ct. 2462, available in LEXIS, Genfed Library, Briefs [hereinafter Respondents' Brief].

Arizona, Attorney's Office.¹⁶ That office issued an opinion that to grant the Zobrests' request would violate both the United States Constitution and the Arizona State Constitution.¹⁷ The Arizona Attorney General concurred.¹⁸

The Zobrests then filed suit against the school district in federal district court.¹⁹ The district court granted summary judgment for the school district and dismissed the suit on constitutional grounds.²⁰ The Court of Appeals for the Ninth Circuit affirmed the decision.²¹

The United States Supreme Court reversed the court of appeals.²² It held that state aid neutrally providing benefits to a broad class defined without reference to religion is not readily subject to an Establishment Clause challenge just because a religious institution receives an incidental benefit.²³ The Court also ruled that the prudential rule of avoiding constitutional questions if there is a non-constitutional basis for decision was inapplicable in this case.²⁴

16. *Id.*

17. *Id.*

18. *Zobrest*, 113 S. Ct. at 2464 (citing Appendix to Petition for *cert.* A-137). The Arizona Constitution mandates that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or to the support of any religious establishment." ARIZ. CONST. art. II, § 12.

19. *Zobrest*, 963 F.2d 1190.

20. *Zobrest*, 113 S. Ct. at 2464. The district court found that the "interpreter would act as a conduit for the religious inculcation of James—thereby, promoting James' religious development at government expense." *Id.* (quoting Appendix to Petition for *cert.* A-35).

21. *Zobrest*, 963 F.2d at 1197. The Court of Appeals affirmed by a divided vote, ruling that if the school district supplied funds for an interpreter at a religious school, the "primary effect" would be to advance religion in violation of the Establishment Clause. *Id.* at 1196.

The dissenting judge took the position that because this type of aid was neutrally available to all students, it did not violate the clause. *Id.* at 1206 (Tang, J., dissenting).

22. *Zobrest*, 113 S. Ct. at 2469. During the pendency of the litigation, James completed his high school studies and graduated from Salpointe in 1992; however, the Court ruled the case presented a continuing controversy because in appealing the Circuit Court of Appeals decision, the Zobrests sought reimbursement of the \$7000 they spent furnishing an interpreter for James throughout high school. *Id.* at 2464 n.3.

23. *Id.* at 2469. Chief Justice Rehnquist delivered the majority opinion, joined by Justices White, Scalia, Kennedy, and Thomas. Justices O'Connor and Stevens joined the majority as to the Establishment Clause issue but dissented on other grounds. *Id.* at 2463-64.

24. *Id.* at 2466. The Court refused to invoke the prudential rule because the school district failed to raise nonconstitutional grounds in the school district's arguments to the district court and court of appeals.

Justices Blackmun, Souter, O'Connor and Stevens dissented from this holding. Writing for the dissent, Justice Blackmun noted that the Court could refrain from

III. HISTORY OF THE ESTABLISHMENT CLAUSE AS APPLIED TO GOVERNMENT AID TO RELIGIOUS SCHOOLS

The deceptively simple wording of the Establishment Clause assumes an element of complexity when applied in the contemporary context of state aid to religious schools. Stated succinctly, disputes over government funding to parochial schools²⁵ typically focus on whether the Establishment Clause forbids such aid as an unconstitutional advancement of the particular religious sect which supports the school.

The policy underlying the Establishment Clause is a belief in the necessity of separation of church and state, an idea with historical links to Thomas Jefferson, James Madison, and the colonists who fled England because of religious persecution.²⁶ With regard to state aid to religious schools, Jefferson's familiar "wall of separation" metaphor has come to symbolize the dividing line between the permissible and the proscribed.²⁷

deciding the constitutional claim and remand the case for consideration on statutory and regulatory grounds. He emphasized that "regardless of the Court's views on the Establishment Clause, petitioners will not obtain what they seek if the federal statute does not require or if the federal regulations prohibit providing a sign-language interpreter in a sectarian school." *Id.* at 2470 (Blackmun, J., dissenting).

25. For an examination of other contexts in which the Establishment Clause has been applied, see *County of Allegheny v. ACLU*, 492 U.S. 573, 578 (1989) (stating that a creche in the county courthouse violated the Establishment Clause but a menorah and a Christmas tree in the city-county office building a block away did not); *Lynch v. Donnelly*, 465 U.S. 668 (1984), *reh'g denied*, 466 U.S. 994 (1984) (holding that a city park's nativity scene used with nonreligious symbols of the holidays was not done for any purpose which threatened Establishment Clause values); and *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (holding that opening benedictions for legislative sessions did not violate the Establishment Clause).

26. See *Everson v. Board of Educ.*, 330 U.S. 1, 8-12 (1946). *Everson* refers to the ideas of James Madison and Thomas Jefferson, both of whom were instrumental in the drafting of the First Amendment. The Court appended the *Memorial and Remonstrance against Religious Assessments* in which Madison explained why he opposed the Virginia tax levy supporting the established church. Among his arguments was the theory that religion is a matter of reason, conviction, and personal liberty and thus should not be subjected to the authority of a legislative body. *Id.* at 64-65.

27. But see Mark Fischer, *The Sacred and the Secular: An Examination of the "Wall of Separation" and Its Impact on the Religious World View*, 54 U. PITT. L. REV. 325, 331-32 (1992) (noting that while Jefferson feared that a state church would endanger individual liberty, the view expressed by Roger Williams was that without a separation, the world would corrupt the church. Interestingly, Jefferson's wall of separation metaphor was borrowed from Williams. The author suggests that Williams's metaphor more accurately reflects the prevalent sentiments of the colonial period.)

See also *Engel v. Vitale*, 370 U.S. 421, 431 (1962). In *Engel*, the Court used both points of view to formulate its policy that cohesion of government and religion tends to be detrimental to both.

Beginning with the earliest cases examining this issue, the Court has continually defined and redefined the scope of the Establishment Clause. In *Everson v. Board of Education*,²⁸ the Court developed the child benefit theory as a classification within the neutrality principle. The Court explained that the First Amendment requires simply that the state remain neutral, not hostile, in its relations with religious and nonreligious groups alike.²⁹

A. The Genesis of the Lemon Test

From the neutrality principle and other unambiguous premises, the Court has progressed to a complicated system of Establishment Clause principles. The confusion results from two factors. The first is a change in the character of the Court from separationist to accommodationist.³⁰ The second factor is the *Lemon* test, a three-pronged approach to answer the question of whether government aid to religious schools is permissible under the Establishment Clause.³¹ Despite its widespread influence, the *Lemon* test, which one critic has observed is aptly named,³² has had its share of detractors,³³ in

28. 330 U.S. at 17. The Court held free bus transportation to all school children did not aid religion even though it was provided to students attending religious schools. The Court compared the provision of bus fare to services like state-paid policemen assigned to protect children going to and from church schools. Legislation promoting such programs which are of general benefit to children, regardless of religion, are permissible under the Establishment Clause. *Id.* at 18.

29. *Id.* at 18. In one of the earliest cases deciding the issue of state aid to religious schools, Justice Black, writing for the majority, stated: "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." *Id.* at 15.

See also Guernsey, *supra* note 5, at 269. The author asserts that if the neutrality approach of the Court in *Everson* had survived, fewer questions would arise about the validity of state aid to handicapped children in parochial schools. *Id.*

30. Joseph R. McKinney, Commentary, *Special Education and the Establishment Clause*, 65 EDUC. L. REP., 19-20 (1991). The author suggests that former President Ronald Reagan's political agenda included removing obstacles to government aid to religious schools, a goal facilitated by adding three new justices to the United States Supreme Court during the 1980s. Those three plus a conservative Bush appointee in 1990 augmented the existing accommodationist camp of Justices Rehnquist and White, both of whom have embraced a less rigid interpretation of separation of church and state. On the other hand, the separationists adhere to a strict separation of church and state, a viewpoint with dwindling Supreme Court support.

31. See generally *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

32. Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 654 (1992).

33. See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149-50 (1993) (Scalia, J., dissenting), in which Justice Scalia launched

part because of the confusing system of rules it has left in its wake.

In *Lemon v. Kurtzman*, the Court formulated the purpose-effect-entanglement test³⁴ in holding that two state laws granting salary supplements to teachers in religious schools were unconstitutional.³⁵ The Court's basis for this test was a composite of two previous rulings on Establishment Clause issues:³⁶ *Board of Education v. Allen*³⁷ and *Walz v. Tax Commission*.³⁸

The Court's formula in *Lemon* borrowed the purpose and effect prongs from *Allen*³⁹ and the involvement prong from *Walz*.⁴⁰ In testing a law to see if it passes Establishment Clause scrutiny, the *Lemon* rule dictates that the law must have a secular legislative purpose, its primary effect must neither advance nor inhibit religion, and it must avoid excessive government entanglement with religion.⁴¹ On the basis of this test, the *Lemon* Court found that both state laws violated the excessive entanglement prong.⁴²

B. The Purpose Prong

Between 1971 and 1993, the Court applied the *Lemon* test to every Establishment Clause case except two.⁴³ During that period,

his most recent attack on *Lemon*, comparing it to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried [N]o fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart. . . ."

34. *Lemon*, 403 U.S. at 615.

35. *Id.* at 607.

36. *Id.* at 612-13.

37. 392 U.S. 236 (1968).

38. 397 U.S. 664 (1970).

39. *Allen*, 392 U.S. at 242-43 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (citing *Everson v. Board of Educ.*, 330 U.S. 1, 14-15 (1946) and *McGowan v. Maryland*, 366 U.S. 420, 442 (1961))). The Court in *Allen* upheld the provision of loaning secular textbooks free of charge to parochial students under a purpose and effects test which helped to draw the line between neutrality and state support of religion. *Id.* at 243-44.

40. *Walz*, 397 U.S. at 668. The *Walz* Court first articulated the entanglements prong of the *Lemon* test in ruling that a state law exempting religious organizations from property and income tax was not unconstitutional. *Id.* at 667. The Court noted the three main evils against which the Establishment Clause was intended to protect: "[s]ponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 668.

41. *Lemon*, 403 U.S. at 612-13.

42. *Id.* at 613. The invalidated laws included protections of the separation between secular and religious educational functions to ensure that state financial aid supported only the secular, but the laws failed the test because the required surveillance actually created a church-state relationship involving excessive government entanglement. *Id.* at 613-14, 619-21.

43. Isabel M. Humphrey, Note, *Establishment Clause Prohibits Provision of*

the Court rarely invalidated a law under the purpose prong if the issue was state aid to religious schools.⁴⁴ In the context of the *Lemon* test, the Court examines the primary purpose of legislation as determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency.⁴⁵ If legislation either uses or attempts to use the symbolic and financial support of government to achieve a religious purpose, the statute violates the clause.⁴⁶

C. The Primary Effect Prong

In contrast to the purpose prong, the Court has frequently applied the effect prong of the *Lemon* test to find that a law violates the Establishment Clause when the context is state aid to religious schools.⁴⁷ Because of the very nature of the relationship, any state funding to religious schools, no matter how broad or unbiased its purpose, has an inherent potential for advancing religion instead of, or in addition to, providing aid to the students.

D. Casualties of the Effect Prong

In 1977, opponents challenged several different forms of state aid to religious schools in *Wolman v. Walter*.⁴⁸ In that decision,

State-Paid Sign Language Interpreter to Student Attending Pervasively Religious High School: Zobrest v. Catalina Foothills School District, 963 F.2d 1190 (9th Cir. 1992), cert. granted, 113 S. Ct. 52 (1992), 25 ARIZ. ST. L.J. 449, 459 (1993). The Court did not apply the test in *Marsh v. Chambers*, 463 U.S. 783 (1983) (using a traditional analysis to rule that opening benedictions for legislative sessions did not violate the Establishment Clause), or in *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (applying instead a controlling precedents test in holding that a benediction at a middle school graduation was unconstitutional because the state was, in effect, enforcing a religious orthodoxy).

44. See, e.g., U.S. Supreme Court decisions invalidating laws for lack of a secular purpose: *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (stating that the primary purpose of Louisiana's Creationism Act was to advance a particular religious belief in violation of the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding the purpose prong of the *Lemon* test most clearly implicated in a state law authorizing a one-minute period of silence in all public schools for meditation or prayer); and *Stone v. Graham*, 449 U.S. 39 (1980) (holding that Kentucky's law requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose).

45. *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987).

46. *Id.* at 597.

47. See Humphrey, *supra* note 43, at 454. The article discusses the narrow and broad interpretations of the primary effect prong, noting that the majority of the Court's cases in this area has examined state programs as a whole rather than concentrating on the particular facts of a case.

48. 433 U.S. 229 (1977).

the Court permitted a number of forms of state aid, including diagnostic services on the premises of nonpublic schools; the Court ruled that, unlike teaching or counseling, these services are not closely associated with the educational mission of the nonpublic school and the opportunity to express sectarian views is absent.⁴⁹ Moreover, no impermissible effect or entanglement existed in therapeutic services offered off the premises of the religious schools because the neutral location assured the absence of pressure from a religious environment.⁵⁰

However, on the basis of *Meek v. Pittenger*,⁵¹ the Court held that the *Lemon* primary effect prong did forbid the loan of instructional materials and equipment⁵² and transportation for field trips.⁵³ The rationale for the proscription of both forms of aid was that they contributed to the sectarian enterprise, an impermissible effect.⁵⁴

Another casualty of *Lemon's* effect prong occurred in 1985 when the Court ruled that two Grand Rapids School District programs violated the Establishment Clause.⁵⁵ The Court in *Grand Rapids* decided that the programs had the impermissible effect of aiding religion in three ways: (1) state-paid teachers in sectarian environments may inadvertently inculcate religious teachings; (2) the programs create the appearance of a symbolic union of church and state because of the close relationship; and (3) the core-curriculum supplement program relieved the nonpublic school of its primary responsibility. Thus, they functioned as direct subsidies or aids to the enterprise rather than as an incidental benefit to the school.⁵⁶

49. *Id.* at 244.

50. *Id.* at 247.

51. 421 U.S. 349 (1975).

52. *Wolman*, 433 U.S. at 251. The Ohio program allowed loans of instructional material and equipment directly to parents or children in the nonpublic schools rather than to the schools themselves, but the Court decided that channeling the aid directly through the students rather than the schools did not absolve the program of its unconstitutionality. *Id.* at 250.

53. *Id.* at 255.

54. *Id.* at 250, 253. In the case of field trips, the Court observed that not only is there an aid to the enterprise, but also the danger exists that field trips led by teachers may be opportunities for fostering religion, another impermissible effect. *Id.* at 254.

55. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985). The Shared Time and Community Education programs provided classes to nonpublic school students through public funding. *Id.* at 375. Shared time supplemented Michigan's core curriculum with remedial and enrichment courses, while Community Education offered children and adults classes at the close of the regular school day at religious schools as well as other sites in the community. *Id.* at 375-76.

56. *Id.* at 397. *But see* Chopko, *supra* note 32, at 658-59 (discussing the Court's

E. Cases Surviving Establishment Clause Scrutiny

Despite the effect prong's lethal blow to many programs granting government aid to religious schools, occasionally such laws have survived constitutional scrutiny. Significant among those have been a Minnesota law challenged in *Mueller v. Allen*⁵⁷ and a Washington law examined by the Court in *Witters v. Washington Department of Services for the Blind*.⁵⁸

In *Mueller*, the Court refused to invalidate a Minnesota law allowing taxpayers to deduct the costs of tuition, textbooks and transportation for their children attending elementary and secondary schools.⁵⁹ Applying the *Lemon* test, the Court decided the law's effect did not advance sectarian aims because the tax deductions were available to all parents, not just parents of nonpublic school children.⁶⁰ The opinion advances the theory that if any aid to the parents flows to the school, it does so as a result of private, as opposed to government, choices.⁶¹ Therefore, a stamp of state approval does not exist.⁶²

The Court in *Witters* unanimously agreed that the First Amendment did not preclude a state vocational rehabilitation program from assisting a blind student enrolled at a private Christian college in order to become either a pastor, missionary, or youth director.⁶³ In finding that no impermissible effect of advancing religion existed, the Court echoed some of the same reasoning applied in *Mueller*. First, because the assistance was paid directly to the student, the

“metaphorical distinction” that the primary effect prong proscribes a symbolic union between religion and government. The author states that the Court's distinction is perverse since it is not the symbolic union but the actual union of church and state that violates the Constitution.)

57. 463 U.S. 388 (1983).

58. 474 U.S. 481 (1986).

59. *Mueller*, 463 U.S. at 391.

60. *Id.* at 397.

61. *Id.* at 399.

62. *Id.* at 399 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)). In *Widmar*, the Court held that a university's policy allowing access to meeting facilities to both religious and nonreligious groups did not violate the Establishment Clause because access was available to a broad spectrum of nonreligious and religious groups. 454 U.S. 263, 275.

See also *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990). The Court held that a high school student requesting school officials' permission to form a Christian Club was entitled to do so because a broad spectrum of groups may organize, counteracting any message of endorsement of one club. *Id.* at 252.

63. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 482 (1986).

fact that it supported an education at a religious school was a matter of private choice, and the aid itself offered no incentive for the student to choose a religious school.⁶⁴ Second, nothing in the program indicated that this was a direct subsidy to the college itself because no significant portion of the aid flowed to religious education.⁶⁵ Third, the program was neutral in offering educational assistance to a class defined without reference to religion.⁶⁶

F. The Excessive Entanglement Prong

In the *Lemon* test framework, if a law providing state aid to sectarian schools safely escapes the Scylla of the primary effect prong, it must also withstand the Charybdis of the excessive entanglement test.⁶⁷ The excessive entanglement prong has been characterized as the "Catch 22" of the *Lemon* test: to prevent an impermissible effect of providing funds to inculcate religion, monitoring of the programs becomes necessary; this monitoring, in turn, causes excessive entanglement between church and state.⁶⁸

Two cases illustrate how the Court has applied this prong in proscribing governmental aid to religious schools. The decision in *Meek v. Pittenger*⁶⁹ examined Pennsylvania's aid to nonpublic elementary and secondary schools in the form of textbook loans, loans of instructional materials, and auxiliary services.⁷⁰

64. *Id.* at 488; See also *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (illustrating how a religious institution may participate in a publicly sponsored social welfare program without violating the Establishment Clause. In *Bowen*, the Court found no facial violation by an act granting federal funds to religious organizations and other groups to provide counseling related to family life and premarital adolescent sexual relations).

65. *Witters*, 474 U.S. at 488.

66. *Id.* at 490-91.

67. *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 788 (1973).

68. *Fisher*, *supra* note 27, at 336. The author's tongue in cheek explanation of the Court's use of the excessive entanglements prong begins with the Court's premise that since public school employees in religious schools have a tendency to lapse into indoctrination outlawed by the First Amendment, they must be closely monitored. The problem, the author comments, is that, "lo and behold, such monitoring is forbidden by the excessive entanglement test. Thus, the religious schools are caught in the loop." *Id.*

69. 421 U.S. 349 (1974).

70. *Id.* at 351-53. The auxiliary aid included counseling, testing, psychological services, speech and hearing therapy, and related support for exceptional, remedial, and educationally disadvantaged students.

The Court permitted the textbook loan to students on the basis of *Allen*, 421 U.S. at 361, but in applying the effect prong of the *Lemon* test, the Court ruled that supplying instructional materials directly to the schools violated the Establishment Clause as an impermissible aid to the enterprise. *Id.* at 366.

In examining the auxiliary services, the Court recognized that without continuing state surveillance, there was a likelihood of an inadvertent fostering of religion.⁷¹ But the Court reasoned that monitoring would create excessive administrative entanglement and, in a broader sense, excessive political entanglement. The Court envisioned a state of affairs where annual reconsideration of the appropriation would provide yearly opportunities for political and religious division.⁷²

The excessive entanglement prong of *Lemon* was also the instrument the Court employed in *Aguilar v. Felton*⁷³ to invalidate New York City's use of federal funds to pay public school employees to teach low-income children in parochial schools.⁷⁴ In that case, the Court ruled that the program required a pervasive state presence to ensure against the primary effect of advancing religion.⁷⁵ The pervasive state presence, in turn, would lead to excessive entanglement.⁷⁶

IV. STATUTORY SOURCES OF GOVERNMENT AID TO STUDENTS WITH DISABILITIES IN RELIGIOUS SCHOOLS

Congress has enacted legislation granting access to special education⁷⁷ programs and related services⁷⁸ to students with disa-

71. *Id.* at 371.

72. *Id.* at 372.

73. 473 U.S. 402 (1985).

74. *Id.* at 414.

75. *Id.* at 409.

76. *Id.* See Allan G. Osborne, Commentary, *Special Education and Related Services for Parochial School Students*, 81 EDUC. L. REP. 1, 1-2 (1993) (observing that at the time of the *Aguilar* decision, most education law commentators assumed the case would also control state funding of programs for students with disabilities in religious schools because the situation was similar to administration of Title I funds for low income students in parochial schools. As a result, most public school districts have provided special education to disabled parochial students at off-campus locations to avoid implicating the excessive entanglement prong.)

See also Guernsey, *supra* note 5, at 276-77, for a similar discussion of the *Aguilar* holding as a basis for determining whether state aid to parochial school children with disabilities could be administered at the religious school.

77. 20 U.S.C. § 1401(16) (Supp. III 1991) defines "special education" as specially designed instruction, at no cost to parent or guardian, to meet the unique needs of a child with a handicap. Special education may include physical education and instruction in classrooms, homes, hospitals, and other institutions and settings.

78. 20 U.S.C. § 1401(a)(17) (Supp. III 1991) provides that related services include: "[T]ransportation and other developmental, corrective and supportive services . . . including speech pathology and audiology, psychological services, physical and occupational therapy, . . . to assist the child with a disability to benefit from special education. . . ."

bilities. In the context of state aid to religious schools, this body of law contains three federal statutes applicable to parochial aid issues: The Rehabilitation Act,⁷⁹ the Americans with Disabilities Act,⁸⁰ and the Individuals with Disabilities in Education Act (IDEA).⁸¹

The Rehabilitation Act, which took effect in 1973, was the first major comprehensive federal law involving persons with handicaps.⁸² Section 504 forbids exclusion of persons from any federally funded program if the sole basis of the exclusion is that person's handicap.⁸³

By contrast, the Americans with Disabilities Act (ADA) prohibits various types of public and private entities from discriminating against persons with disabilities, whether or not the entity receives federal funds.⁸⁴ The statute relates both to services provided by agencies such as public schools⁸⁵ and to public accommodations privately operated, such as those offered by private schools.⁸⁶ Although there is some overlap among the provisions of ADA, the Rehabilitation Act, and the IDEA, each statute also addresses certain situations not covered by the other.⁸⁷ For example, ADA requires the removal of architectural barriers in private schools but neither the Rehabilitation Act nor the IDEA so provide.⁸⁸

A. Background and Purposes of the IDEA

Four related purposes constitute the IDEA⁸⁹ framework. First, the law seeks to ensure that all "children with disabilities have available to them . . . a free appropriate public education⁹⁰ which

79. 29 U.S.C. §§ 701-796 (1988 & Supp. IV 1992).

80. 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

81. 20 U.S.C. §§ 1400-1484 (Supp. IV 1992).

82. LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* 84 (1992).

83. 29 U.S.C. § 794(a) (1988).

84. 42 U.S.C. § 12101 (Supp. IV 1992).

85. *Id.* §§ 12131-12165.

86. *Id.* §§ 12181-12189.

87. LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* 90 (1992).

88. *Id.* at 90-91.

89. The IDEA is the progeny of the Education for All Handicapped Children Act of 1975, which in turn was an amendment to the Education of the Handicapped Act of 1970. Rothstein, *supra* note 82, at 91. The EHA provided the funding for special education while EAHCA added the procedural safeguards for the programs, adopting constitutionally mandated procedures of evaluation, placement, hearing rights, records, and notice in cases involving education and children with disabilities. Rothstein, *supra* note 82, at 86-88.

90. This requirement is often abbreviated as "FAPE." It is defined as "special education and related services . . . provided at public expense, under public supervision . . . without charge, . . . [to] meet the standards of the State educational agency, include an appropriate . . . education in the State involved, and . . . [conform] with the [individual] education program." 20 U.S.C. § 1401(a)(18) (1988).

emphasizes special education and related services designed to meet their unique needs.”⁹¹ Meeting these needs necessitates the development of an individualized education program. This program is a statement prepared by a representative of the educational agency responsible for instructing the child. It sets out the level of educational performance of the child, annual goals, educational services to be provided, duration of the services, transition services, and evaluation procedures.⁹²

Second, the IDEA protects the rights of these children and their parents or guardians.⁹³ Third, it assists state and local administrators in providing special education. Finally, it assesses and assures the effectiveness of special education for children with disabilities.⁹⁴

B. Related Services

Under the IDEA, children with disabilities are not only entitled to a free public education, but one supplemented by related services when needed.⁹⁵ Additionally, when auxiliary aids such as a sign-language interpreter are necessary to assist a child with a disability in benefitting from special education, the Court ruled in *Board of Education of Hendrick Hudson Central School District v. Rowley* that such aids are part of the student’s access to an education.⁹⁶

The standard enunciated in *Rowley* is to be applied to all cases involving interpreters.⁹⁷ It requires that the school district satisfy the IDEA’s purpose of affording a free appropriate public education by providing “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”⁹⁸ Significantly, the Court did not hold that all hearing impaired children can benefit educationally only if provided an interpreter.

91. 20 U.S.C. § 1400(c) (Supp. III 1991) (footnote added).

92. *Id.* § 1401(a)(20).

93. *Id.* § 1400(c).

94. *Id.*

95. *Id.*

96. Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200-01 (1982). The issue in *Rowley* was whether a kindergarten student who was hearing impaired should have been supplied with a sign-language interpreter in all her academic classes in lieu of other related services even though she was achieving academic success without such assistance. The Court ruled that the child in this case did not need an interpreter because she was performing above grade level without one. *Id.* at 210.

97. Rothstein, *supra* note 82, at 120.

98. *Rowley*, 458 U.S. at 203.

C. How IDEA Functions in a Parochial School Context

The IDEA extends the state's responsibility to include educating children with disabilities who are enrolled in private schools.⁹⁹ The act provides that such children may participate in special education and related services, and that the state will pay for expenses incurred if the state has actually referred or placed the disabled child in the private school.¹⁰⁰ But even if placement in a private school is solely based on a unilateral decision made by the parents of the child with disabilities, the child is still entitled to access to special education programs and related services provided by the state.¹⁰¹

However, in the narrower context of private religious schools, the regulations interpreting the law become ambiguous. The Secretary of the Department of Education has promulgated regulations specifically forbidding the use of a grant of federal funds to pay for religious worship, instruction, or proselytization; equipment or supplies related to religious worship, instruction or proselytization; construction or maintenance of facilities used for religious purposes; or an activity of a school or department of divinity.¹⁰²

The conflict is obvious. On the one hand, the public school district is responsible for providing special education to students with disabilities enrolled in private schools. On the other hand, public schools may not fund instruction or other specified forms of

99. 20 U.S.C. § 1413(a)(4)(A) (Supp. IV 1992).

100. *Id.* § 1413(a)(4)(B).

101. 34 C.F.R. § 300.452 (1993). The regulation dictates that "[e]ach LEA [local educational agency] shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency."

See *McNair v. Oak Hills Local Sch. Dist.*, 872 F.2d 153, 156 (6th Cir. 1989); *Work v. McKenzie*, 661 F. Supp. 225, 229 (D.D.C. 1987). These two cases illustrate how courts have limited providing related services to private school students. In *McNair*, the court denied transportation to a hearing impaired student enrolled in a private school by parental choice, because the child's need for transportation to the private school was unrelated to her disability. 872 F.2d at 156. In *Work*, the court considered whether EHA required transportation to and from school to be provided for a child with multiple handicaps attending private school. 661 F.Supp. at 227. The court denied transportation to this child because her placement in a private school was the result of a unilateral decision by the parents when an appropriate alternative public education was possible. *Id.* at 229.

102. 34 C.F.R. § 76.532 (1993). The Secretary's source of authority to issue this regulation is 20 U.S.C. §§ 1221e-3(a)(1), 2974(b) (1988), which allows each administrative head of an education agency to issue rules and regulations governing the manner and operation of programs administered by the agency of which he is head, and 20 U.S.C. §§ 2831(a), 2974(b), 3474 (1988), each of which authorizes the Secretary to issue regulations considered necessary to ensure compliance with requirements or manage the functions of the Department.

aid to private religious schools if potential Establishment Clause violations exist.

D. The Conflict Between Mandatory Special Education and the Establishment Clause

Prior to the Supreme Court's decision in *Zobrest*, only the lower federal courts had attempted to resolve the apparent conflict between mandatory special education and proscribed state aid to religious schools.¹⁰³ Two such cases, *Felter v. Cape Girardeau Public School District*¹⁰⁴ and *Goodall v. Stafford County School Board*,¹⁰⁵ arrived at opposing resolutions.

In *Felter*, a federal district court considered whether a child with a disability enrolled in a parochial school and provided with transportation to and from her special education classes at a public school location violated the Establishment Clause.¹⁰⁶ In holding the transportation was constitutional, the court applied the three-pronged *Lemon* test.¹⁰⁷

On the basis of contrasting fact patterns, the court in *Felter* distinguished its holding from that of *Goodall*.¹⁰⁸ In *Goodall*, the parents of a hearing impaired child enrolled in a religious school requested that the school district provide a speech interpreter to be present full time in the child's classroom.¹⁰⁹ The school district refused the request, but offered the service at a public school in the county.¹¹⁰

The court referred to the U.S. Department of Education's statement that the school district was not required to provide services on the premises of private schools unless the specific situation made

103. See, e.g., *Pulido v. Cavazo*, 934 F.2d 912 (8th Cir. 1991); *Walker v. San Francisco Unified Sch. Dist.*, 761 F. Supp. 1463 (N.D. Cal. 1991) (holding that state-provided vans adjacent to or on religious school campuses to serve disabled students did not violate the Establishment Clause).

104. 810 F. Supp. 1062 (E.D. Mo. 1993).

105. 930 F.2d 363 (4th Cir. 1991).

106. 810 F. Supp. at 1067.

107. *Id.* The court's analysis listed four factors to determine if a parent's unilateral placement of a child in a private school precludes the child from transportation services. The factors were: (1) the child is handicapped; (2) transportation is a related service; (3) the related service meets the child's needs resulting from the handicap; and (4) the school district is responsible for the related services under EHA, the regulations, and the circumstances of the particular case. *Id.* at 1066 (citing *McNair v. Oak Hills Local Sch. Dist.*, 872 F.2d 153, 156 (6th Cir. 1989)).

108. *Id.* at 1068. *Goodall* involved aids to hearing impaired students working on-site in parochial schools, distinguishable from transportation services, which are not conduits for the inculcation of religion.

109. 930 F.2d at 364.

110. *Id.* at 365.

on-site services necessary to meet the state's obligation.¹¹¹ Further, the court found that providing an interpreter at a parochial school site violated the Code of Federal Regulations¹¹² and that it infringed on the Establishment Clause¹¹³ because of the pervasive religious content of the message to be translated by an interpreter.¹¹⁴

Obviously, then, courts must judge the issue of state aid to children with disabilities in parochial schools against a complicated backdrop of constitutional rights, federal statutes and regulations, Establishment Clause jurisprudence, and policy considerations favoring the education of all children with disabilities. It is this complex milieu that spawned the Court's significant decision in *Zobrest*.

V. REASONING OF THE COURT

Writing the majority opinion, Chief Justice Rehnquist borrowed from previous Establishment Clause decisions¹¹⁵ to formulate two rules dispositive in *Zobrest*. First, neutral government programs benefitting a broad class of citizens not defined by religion do not violate the Establishment Clause just because a sectarian institution receives an incidental or attenuated benefit as well.¹¹⁶ Second, the fact that a public employee will be present on the site of a religious school does not make this aid impermissible per se under the Establishment Clause.¹¹⁷

The Court prefaced its analysis with the generalized pronouncement that religious institutions may participate in publicly sponsored social welfare programs.¹¹⁸ Furthermore, the Court noted that such institutions have never been absolutely barred from receiving general government benefits.¹¹⁹

111. *Id.* at 368.

112. *Id.* at 369 (citing 34 C.F.R. § 76.532). *But see* *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2465 n.7 (1993) (interpreting the same regulation as "merely implement[ing] the Secretary of Education's understanding . . . of the requirements of the Establishment Clause" and contrasting that view with the *Goodall* court's reading that the regulation itself bars state funding of an interpreter to a student in a sectarian school).

113. *Goodall*, 930 F.2d at 371.

114. *Id.* at 371.

115. 113 S. Ct. 2462, 2463. The majority cited as controlling precedents *Mueller v. Allen*, 463 U.S. 388 (1983), and *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and distinguished *Meek v. Pittenger*, 421 U.S. 349 (1975), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). *Id.*

116. *Zobrest*, 113 S. Ct. at 2467.

117. *Id.* at 2468-69.

118. *Id.* at 2466 (citing *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988)).

119. *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981)).

Relying principally on the holdings of *Mueller* and *Witters* as authority, the Court characterized a program as neutral if it benefits a broad spectrum of groups without reference to religion,¹²⁰ and if it provides no incentive to participate in sectarian education.¹²¹ The Court found that a program is likely to be neutral if enrollment in a religious school results from private choice rather than from any incentive supplied by the program itself.¹²² The Court then reasoned that benefits to the religious school resulting from individual choice rather than government motives were permissible under the Establishment Clause.¹²³

Applying these factors to *Zobrest*, the Court asserted that the IDEA distributes benefits neutrally to qualifying children with disabilities.¹²⁴ The Court reasoned that the aid retains an element of neutrality because the recipients do not compose a group defined by either their religion or the religious or nonreligious nature of the schools they attend, but rather by their status as children with disabilities.¹²⁵ The requested interpreter would be present in the school because of the private choice of James Zobrest's parents rather than any incentive offered as a result of state policy or decision-making.¹²⁶

Further, the Court emphasized that the school itself would receive no direct benefit by way of an IDEA grant.¹²⁷ The Court explained that in the case of James Zobrest, the only indirect benefit to the school would be James's tuition, assuming that the school made a profit on each student and that the child would have attended school elsewhere had the interpreter not been made available.¹²⁸

The Court also held that a public employee's presence in a religious school did not automatically preclude government aid under the Establishment Clause.¹²⁹ The school district argued that the Court's holdings in *Meek* and *Grand Rapids* necessitated a contrary holding.¹³⁰

120. *Id.* at 2467 (quoting *Mueller*, 463 U.S. at 398; *Widmar*, 454 U.S. at 274) (citing *Witters*, 474 U.S. at 491; Board of Educ. of Westside Community Schs. (Dist. 66) v. Mergens, 496 U.S. 226, 248 (1990)).

121. *Id.* (quoting *Witters*, 474 U.S. at 488).

122. *Id.*

123. *Id.* (quoting *Witters*, 474 U.S. at 488) (citing *Wolman v. Walter*, 433 U.S. 229, 244 (1977)).

124. *Id.* at 2468.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 2468-69.

130. *Id.* at 2468. The Court in *Meek* invalidated the law allowing funds for

In distinguishing the facts in *Zobrest* from *Meek* and *Grand Rapids*, the Court stated that the rulings in those cases were inapplicable to *Zobrest* for two reasons. First, the state laws in *Meek* and *Grand Rapids* provided substantial direct aid to the schools, relieving the schools of costs they would otherwise have had to bear and thus granting a direct subsidy.¹³¹ The Court viewed this subsidy as impermissible aid to the sectarian enterprise, in contrast to the facts in *Zobrest*, in which Salpointe was not relieved of any of its obligations to its students and in which the aid to one of its students afforded only an incidental benefit to the school itself.¹³²

Second, the Court distinguished between the on-site services in *Zobrest* and those provided in *Meek* and *Grand Rapids*.¹³³ The Court explained that a sign-language interpreter differs from a teacher or guidance counselor because the interpreter only interprets the material presented to the class as a whole.¹³⁴

Justice Blackmun, writing for the dissent, countered the majority's two-part holding.¹³⁵ He rejected the argument that because the IDEA is a general, neutrally applied program aiding parents and students rather than schools, there is no constitutional violation.¹³⁶

remedial and accelerated instruction and guidance counseling on the campus of the religious schools. *Meek v. Pittenger*, 421 U.S. 349, 368 (1975). In *Grand Rapids*, the Court ruled that the state could not provide on-site teaching services. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985).

131. *Zobrest*, 113 S. Ct. at 2468.

132. *Id.*

133. *Id.* at 2469. The Court observed that the Establishment Clause is not an absolute barrier to state-paid employees on religious school premises. It further noted that its holding in *Wolman* rejected the First Amendment challenge to diagnostic speech and hearing services. *Id.* at 2469 n.10.

134. *Id.* at 2469. The Court explained that the interpreter "will neither add to nor subtract from the [pervasively sectarian] environment."

135. *Id.* at 2469 (Blackmun, J., dissenting). In addition to objecting to the majority's decision on the Establishment Clause question, the dissent took issue with the Court's refusal to decide the case on nonconstitutional grounds not previously raised in the lower court. The school district's nonconstitutional grounds were that: (1) 34 C.F.R. § 76.532(a)(1) (1992), a regulation promulgated under the IDEA, precluded using federal funds to provide an interpreter in a parochial school; (2) even if there was no bar, the school district was not required by statute or regulation to furnish interpreters to students at sectarian schools; and (3) the Arizona Constitution art. II, § 12, prohibited such a service. *Id.* at 2465.

The dissent cited several federal court cases which have held that the IDEA does not establish an entitlement to services if the individual attends a private school by choice. *Id.* at 2470 (Blackmun, J., dissenting) (citing *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991); *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd sub nom.* *McNair v. Oak Hills Local Sch. Dist.*, 872 F.2d 153 (6th Cir. 1989); *Work v. McKenzie*, 661 F. Supp. 225 (D.D.C. 1987)).

136. *Zobrest*, 113 S. Ct. at 2473 (Blackmun, J., dissenting).

The dissent asserted that even a general welfare program may have constitutionally prohibited applications, such as the state providing on-site teachers.¹³⁷ Such a related service would be invalid regardless of whether the aid was paid directly to the parents and students, or to the school.¹³⁸

More importantly, the dissent observed that the pivotal point in the Court's argument was the distinction between a teacher and a sign-language interpreter.¹³⁹ Justice Blackmun noted the Court's consistent ruling in previous cases that the Establishment Clause absolutely forbids government-financed religious indoctrination¹⁴⁰ through state-subsidized teachers.¹⁴¹

The dissent also explained that in broader applications of this principle, the Court has consistently rejected government subsidy of resources advancing a school's religious mission.¹⁴² The dissent argued that advancing a school's religious message is precisely what the Court permitted in ruling that the school district was required to supply the medium or conduit for that message¹⁴³ in the form of a sign-language interpreter.¹⁴⁴

VI. SIGNIFICANCE

Zobrest effectively removes a constitutional barrier to the delivery of certain forms of related services to children with disabilities

137. *Id.* (citing *Aguilar v. Felton*, 473 U.S. 402, 410 (1985); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985); *Meek v. Pittinger*, 421 U.S. 349, 371 (1985)).

138. *Id.* Such a distinction would "exalt form over substance." *Id.* (quoting *Wolman v. Walter*, 433 U.S. 229, 250 (1977)).

139. *Id.*

140. *Id.* (quoting *Grand Rapids*, 473 U.S. at 385).

141. *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)).

142. *Id.* at 2473-74. The dissent reasoned that the proscription of supplying resources to advance the school's religious mission was the basis for upholding bus transportation in *Everson* but rejecting buses for field trips in *Wolman*; permitting secular textbooks in *Allen* while proscribing instructional aids like tape recorders in *Wolman*; allowing diagnostic testing in religious schools in *Wolman* while forbidding remedial teachers and counselors in *Meek*. *Id.* (citing *Meek v. Pittinger*, 421 U.S. 349, 371 (1985); *Wolman v. Walter*, 433 U.S. 229, 241-42 (1977); *Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1946)).

143. *Id.* at 2474. The dissent noted that a sectarian school violates the Establishment Clause when it uses "the machinery of the State to enforce a religious orthodoxy." *Id.* (quoting *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992)).

144. *Id.* at 2472. The dissent further found that "[a] state-employed sign-language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Masses at which Salpointe encourages attendance for Catholic students." *Id.*

in parochial schools. Furthermore, the Court's abandonment of the traditional *Lemon* terminology in this decision may represent the commencement of a trend in Establishment Clause analysis. Reasoning that dispenses with an inflexible, purpose-effect-entanglement approach while still applying the most apposite precedents could result in a less stringent test. The test will likely permit more state aid to religious schools to evade the threat of the Establishment Clause.

A. Delivery of Related Services

The issue of the constitutionality of parochial aid usually depends on the type of aid and the manner supplied. As one commentator has observed, the constitutional question is frequently not whether, but how, the aid could be supplied.¹⁴⁵

Though the Court has held that various forms of auxiliary aid are impermissible, the form most consistently found unconstitutional in the state aid/parochial school situation is that of the state employee present on the school's site and capable of inculcating a religious message. Until *Zobrest, Aguilar*¹⁴⁶ was considered by special education experts to be the controlling precedent in determining how such instructional services related to special education could be supplied to parochial school students.¹⁴⁷

Because the Court in *Aguilar* ruled that the state could not deliver remedial instruction to educationally deprived children on the site of parochial schools, that same rule was applied to the context of special education. Hence, most school districts since *Aguilar* have met their instructional responsibilities to parochial school students with disabilities by providing related services off-campus, either at a public school or a neutral location.

However, this form of delivery is not an acceptable option for children with certain types of disabilities.¹⁴⁸ James Zobrest and his need for an interpreter in the parochial school classroom is an example. The nature of his special needs rendered an off-campus interpreter useless. Under the IDEA's individualized education program, which tailors related services to the needs and educational goals of each individual child with disabilities, James was entitled to an interpreter. The school district conceded as much, but only

145. Guernsey, *supra* note 5, at 269.

146. 473 U.S. 402 (1985).

147. See Osborne, *supra* note 76, at 1-2; Guernsey, *supra* note 5, at 276-77.

148. See Osborne, *supra* note 76, at 2.

if he enrolled in either a public school in the district or a nonreligious private school. Furthermore, it would seem that James Zobrest met the standard imposed by *Rowley* with regard to interpreters. The IDEA granted him a right to personalized instruction with sufficient support services to permit the child to benefit from that instruction. Without an interpreter, James Zobrest's education was worthless.

Because school districts generally do not provide related services on-site, parents like the Zobrests have faced the same daunting dilemma. They can either pay for the instructional service themselves, or disregard their religious beliefs and any other relevant factors that may have resulted in parochial school placement, and place their children in public schools where the services are available.¹⁴⁹

Furthermore, off-site alternatives may occasionally be unacceptable even when it is otherwise possible to effectively deliver the related services in a neutral location. In *Board of Education of Kiryas Joel Village School District v. Grumet*,¹⁵⁰ members of the separatist religious enclave of Satmar Hasideim refused to send their children with disabilities to public schools for special education because their religious and cultural views were so different from those residing outside the Hasidic Village. Thus, parents of children with disabilities believed all forms of special education delivered away from the village were simply not an option.

In its narrowest interpretation, *Zobrest* gives relief to some children with disabilities by removing the Establishment Clause barrier to state-provided, on-site sign-language interpreters under proper circumstances.¹⁵¹ A very broad reading of the case seems unjustified because *Zobrest* simply does not approve all on-site, state-paid

149. Osborne, *supra* note 76, at 2. The author reasons that parents and their children who have to choose do not have the same freedom of choice that parents of nondisabled children have.

150. 62 U.S.L.W. 4665, 4666 (U.S. June 27, 1994). In the first case decided by the Court after *Zobrest* on the issue of whether state aid to students with disabilities in religious schools violates the Establishment Clause, the Court held that a public school district created by law especially to accommodate children with disabilities in a Hasidic Village was a violation of the Establishment Clause. *Id.* at 4671. In contrast to *Zobrest*, where state aid was neutrally available without regard to a particular religious sect, the Court found that the creation of a school district coterminous with the Satmar Village aided a particular religious community rather than a broad spectrum of groups similarly interested in separate schools. *Id.*

151. See Osborne, *supra* note 76, at 8 (predicting in advance of the *Zobrest* decision that *Zobrest* would involve a narrowly focused issue. The author stated that if the Court equated the interpreter to a mechanical device rather than an instructor, this would only remove constitutional barriers to other such aids like braille printers.) However, the Court in *Zobrest* recognized no such comparison.

employees serving children with disabilities in parochial schools. Significantly, the Court in *Zobrest* chose to distinguish rather than overrule *Meek* and *Grand Rapids* for two reasons: (1) the state aid in *Meek* and *Grand Rapids* directly subsidized the schools,¹⁵² and (2) a sign-language interpreter differs in function from state-supplied teachers and guidance counselors.¹⁵³

By distinguishing these facts, the Court implied that it is still an impermissible violation of the Establishment Clause to place state-paid teachers and guidance counselors in a sectarian school environment. The Court has viewed such support as an impermissible aid to the enterprise, if the state funds personnel the school is otherwise obligated to supply.¹⁵⁴

However, the Court in *Zobrest* did note that in *Wolman* it specifically permitted diagnostic speech and hearing services on sectarian school premises and condoned off-site therapeutic services.¹⁵⁵ Moreover, the Court explained that in *Meek*,¹⁵⁶ it had struck down auxiliary speech and hearing services because they were unseverable from the offending parts of the state's law. The Court in *Meek* emphasized that as part of a general welfare program, such auxiliary services were not readily subject to an Establishment Clause challenge.¹⁵⁷

Thus, in terms of constitutional boundaries, *Zobrest* expands the scope of the IDEA to permit certain on-site, state-paid personnel in parochial schools. The Court, however, drew the line at teachers, guidance counselors, and any other employees the school would otherwise be obligated to pay, as well as personnel who play an instructional role. Within those limits, permissible aid may include providing special education consultants to help plan instruction and coordinate programs for the child with disabilities, psychologists to

152. *Zobrest*, 113 S. Ct. at 2468; See also Arkansas Department of Education, Referral, Placement and Appeal Procedures for Special Education and Related Services 15 (1993) (specifically prohibiting use of Title VI-B funds to the advantage of any private school, including the placement of teachers and other personnel unless the payment is for work outside regular duties).

153. *Zobrest*, 113 S. Ct. at 2469. See T. Page Johnson, *Zobrest v. Catalina Foothills School District: Does the Establishment Clause Bar Sending Public School Employees into Religious Schools?*, 82 EDUC. L. REP. 1, 5, 13 (1993) in which the author contrasts the function of a teacher, who instructs and evaluates, with a sign-language interpreter, who merely transmits the message and is therefore not subject to the three objections to state-paid teachers set out in *Grand Rapids*.

154. *Zobrest*, 113 S. Ct. at 2468 (citing *Meek v. Pittinger*, 421 U.S. 349, 365-66 (1985)).

155. *Id.* at 2469 n.10 (citing *Wolman v. Walter*, 433 U.S. 229, 244 (1977)).

156. *Id.* (citing *Meek*, 421 U.S. at 371 n.21).

157. *Meek*, 421 U.S. at 371 n.21.

treat emotional or other mental problems, physical therapists, and paraprofessionals of various kinds to work one-on-one with the child.¹⁵⁸ If *Zobrest* is the benchmark for aid to children with disabilities in parochial schools, an on-site, certified teacher of children who are visually impaired may also pass the Establishment Clause test. Furthermore, other types of auxiliary aid and related services not specifically provided for by IDEA might now be within reach through the Rehabilitation Act and ADA.

If the Establishment Clause were the only barrier to such state aid, public school districts would now be facing a costly duplication of services in the wake of *Zobrest*. Currently, school districts generally provide related services at centralized locations to accommodate children with disabilities enrolled in private schools in order to economize and efficiently allocate scarce resources.¹⁵⁹ In 1989, 88,522 children between the ages of 3 and 21 were being served by EHA in private schools.¹⁶⁰ Moreover, of the 25,616 private elementary and secondary schools in the United States, 20,682 are sectarian.¹⁶¹ Considering, then, that the overwhelming number of private schools are also religiously affiliated, the Establishment Clause has previously served as an effective means of avoiding costly duplication of services in private schools.

However, the Establishment Clause is not the only hurdle children with disabilities in sectarian parochial schools must overcome in asserting their entitlement to IDEA's special education services on their campuses. Notwithstanding the Supreme Court's constitutional blessing, the federal statute, its regulations, and state laws may prohibit such administration.¹⁶² If statutory and regulatory barriers

158. See Arkansas Department of Education, Program and Standards and Eligibility Criteria for Special Education (1993), for a thorough description of various kinds of special education personnel and auxiliary programs.

159. Allocation of scarce resources is the only policy reason behind the practice of serving private school disabled children at centralized locations in the Little Rock School District. Interview with Patti Kohler, Little Rock School District Special Education Coordinator (October 2, 1993).

160. McKinney, *supra* note 30, at 4 (citing Eleventh Annual Report to Congress on the Implementation of the Education of Handicapped Act, U.S. Department of Education, 1989).

161. McKinney, *supra* note 30, at 4 (citing Bureau of the Census, Statistical Abstract of the U.S. 1989, Digest of Education Statistics).

162. See, e.g., *Zobrest*, 113 S. Ct. at 2470 (Blackmun, J., dissenting). The dissent asserted that "petitioners will not obtain what they seek if the federal statute does not require or the federal regulations prohibit provisions of a sign language interpreter in a sectarian school." *Id.*

See also *Goodall*, 930 F.2d at 366, 369 (holding a parochial school student was not entitled to an interpreter, not only because of Establishment Clause violations, but also because of prohibitions by Virginia's state constitution and code and the federal statutes and regulations).

are based solely on religion, parochial school students then have the option of asserting a constitutional Free Exercise challenge to the statute, assuming there is an absence of any Establishment Clause violation.¹⁶³

B. Establishment Clause Jurisprudence

Zobrest is also significant because of its effect on Establishment Clause jurisprudence.¹⁶⁴ The Court's analysis of the issue represents a rare departure from traditional *Lemon* analysis in that it does not specifically inquire into a legislative purpose, question whether the IDEA has the primary effect of advancing religion, or hypothesize on potential government-church entanglement. In *Lee v. Weisman*,¹⁶⁵ decided the year before *Zobrest*, the Court also refrained from putting the relevant issue through the purpose-effect-entanglement paces of *Lemon*. In order to decide the issue, the Court relied instead on controlling precedents, an approach with remnants of the purpose and effect prongs of *Lemon* analysis, if not its threadbare terminology. It was that method the Court returned to in *Zobrest*.

Both the federal district court and the circuit court of appeals decided against the *Zobrests* on the basis of the *Lemon* test. The Court, however, again explicitly ignored that approach, reaching back instead to the pre-*Lemon* child benefit theory first espoused in *Everson* and *Allen*: If the aid is a neutrally applied program benefitting a group without reference to religion, then it does not violate the Clause; incidental or indirect aid is of no consequence because it stems from private choice rather than government decision-making.¹⁶⁶ In choosing to inquire who is directly benefited, rather

163. An Establishment Clause violation trumps a Free Exercise challenge when the two are asserted by opposing sides in a dispute. The *Zobrests* originally asserted that the IDEA and the Free Exercise Clause of the First Amendment required the school district to provide an interpreter, but did not raise the Free Exercise issue on appeal.

164. In some instances, courts since *Zobrest* have applied the *Lemon* framework more tentatively. See, e.g., *Osteraas v. Osteraas*, 859 P.2d 948, 953 n.4 (Idaho 1993) (emphasizing that while the Court in *Zobrest* did not specifically apply the *Lemon* test, it did not overturn it either); *Warner v. Orange County Dep't of Probation*, 827 F. Supp. 261, 266 (S.D.N.Y. 1993) (noting that the decisions in *Lee* and *Zobrest* imply that the Court seems less inclined to rely on *Lemon*).

165. 112 S. Ct. 2649 (1992).

166. See McKinney, *supra* note 30, at 7, in which the author attacks the child benefit theory as unsound, both analytically and practically-speaking, because even if the aid is provided to the student, it ultimately flows to the school. He theorizes that indirect aid has the same effect as direct aid in establishing a relationship between church and government and alleviating financial burdens to both church

than whether the ultimate effect is to advance religion, the Court may well have been influenced by a persuasive public policy that advocates educating and encouraging persons with disabilities to live productive and independent lives. That policy tips the scales in favor of this type of aid granted in this particular context, but applying the rule in *Zobrest* to dissimilar fact situations is not warranted.

Although the majority did not refer explicitly to *Lemon*, the elements of purpose and effect are evident in the Court's reasoning nonetheless.¹⁶⁷ The emphasis on neutrality signifies the IDEA's acceptable purpose. Because the program benefits children without subsidizing the school, its primary effect also withstands constitutional scrutiny because it does not advance religion. The Court ignored the excessive entanglement prong of *Lemon*, perhaps because it simply was not applicable to *Zobrest*. After all, government surveillance of a single interpreter seems unnecessary, and, therefore, the likelihood of state-church entanglement was remote in the case.

Though the Court used a similar approach in *Lee* and *Zobrest*, the two cases do not constitute a trend.¹⁶⁸ It also should be noted that *Lee* involved the issue of religion in the public schools rather than state aid to religious schools. Nevertheless, the two might foreshadow the Court's eventual phasing out of *Lemon*, incorporating vestiges of *Lemon* as defined by the broad principle of neutrality, or reformulating the test without its lethal excessive entanglement prong.

In fact, Justice O'Connor advocated such approaches as these when she wrote her concurring opinion in the *Grumet* case¹⁶⁹ decided a year after *Zobrest*. Again addressing the Establishment Clause issue involved in granting state aid to children with disabilities in religious schools, the majority in *Grumet* did not specifically apply

and school. The author explains that indirect aid promotes parochial school attendance, thus advancing the mission of the school.

See also Ralph D. Mawdsley, *Emerging Legal Issues in Nonpublic Education*, 83 EDUC. L. REP. 1, 6 (1993), which discusses how resuscitating the child benefit theory circumvents the *Lemon* test and provides a constitutionally acceptable vehicle for government funding of nonpublic schools.

167. See *Gonzales v. North Township*, 4 F.3d 1412, 1419 (7th Cir. 1993) (observing that while the Court in *Zobrest* seemed to avoid the *Lemon* analysis, it relied on *Mueller* and *Witters*, both of which did use the *Lemon* analysis, so that, practically speaking, the three-pronged test is still in effect in *Zobrest*).

168. In fact, only 11 days before *Zobrest* was decided, the Court applied *Lemon* to determine that permitting church access to school premises did not offend the Establishment Clause. *Lamb's Chapel v. Center Moliches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993). The Court emphatically stated that *Lemon* has not been overruled. *Id.* at 2148 n.7.

169. 62 U.S.L.W. 4665 (U.S. June 27, 1994).

the *Lemon* analysis. Justice O'Connor approved because "[t]hese are different categories of Establishment Clause cases, which may call for different approaches."¹⁷⁰ But different analyses do not necessarily translate into a total abandonment of *Lemon* principles.¹⁷¹ In the same vein, *Zobrest* does not toll the death knell for either *Lemon* or the Establishment Clause. It simply establishes a more flexible approach when the issue involves children with disabilities."

Mardi L. Blissard

170. *Id.* at 1674.

171. But see McKinney, *supra* note 30, at 18, in which the author asserts that in *Zobrest*, "what is really at stake is the future of the [E]stablishment [C]lause of the First Amendment." He observes that a liberal judicial policy of allowing more state aid to religiously affiliated schools will result in issues of church-state relations being resolved in the political arena by the legislature rather than by the Court.