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## *Zobrest v. Catalina Foothills School District: A Victory for Disabled Children, A Snub for the Lemon Test*

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## *Zobrest v. Catalina Foothills School District:* A Victory for Disabled Children, A Snub for the *Lemon* Test

It is not at all easy . . . to apply this Court's various decisions construing the [Establishment] Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions we have expressly or implicitly acknowledged that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."<sup>1</sup>

### I. INTRODUCTION

Many had hoped that *Zobrest v. Catalina Foothills School District*<sup>2</sup> would be the case in which the Supreme Court clarified its framework for evaluating the permissibility of government aid to religious institutions under the Establishment Clause.<sup>3</sup> Instead, the Court only added to existing confusion by ignoring, though not discarding, the infamous three-prong *Lemon* test.<sup>4</sup> Nevertheless, the *Zobrest* Court did take the opportunity to bolster the rights of disabled children.

The Supreme Court has evaluated under the Establishment Clause many state programs that either directly or indirectly grant aid to children attending sectarian schools.<sup>5</sup> Yet before *Zobrest*, the Court had never examined the constitutionality of state aid granted to sectarian schools under the Individuals with Disabilities Education Act ("IDEA").<sup>6</sup> Scholars had predicted that a conflict between the IDEA

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1. *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

2. 113 S. Ct. 2462 (1993).

3. See, e.g., Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 860 (1993) (stating that *Zobrest* would be an excellent case for the Court to begin to "clear away the underbrush of two decades of adverse precedents growing out of *Lemon*"). The Establishment Clause requires that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I, cl. 1.

4. The test was introduced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *infra* notes 47-60 and accompanying text for discussion of the *Lemon* test.

5. See cases cited *infra* note 61.

6. 20 U.S.C. §§ 1400-85 (1988 & Supp. IV 1992). See 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, 261 (1989) (observing that the Court had not yet considered the constitutionality of state aid to disabled children in sectarian schools under the IDEA's predecessor).

and the Establishment Clause would arise when parents chose to enroll children who qualify for IDEA assistance in sectarian schools.<sup>7</sup> These predictions became a reality in *Zobrest*, in which the Supreme Court held that the Establishment Clause does not prohibit a school district receiving funding under the IDEA from providing a sign-language interpreter to a deaf student enrolled in a sectarian school.<sup>8</sup>

This Note critically analyzes the *Zobrest* decision and explores the Court's current approach to evaluating government aid to sectarian schools under the Establishment Clause. First, the Note discusses the requirements of the IDEA and the possibilities for conflict between the IDEA and the Establishment Clause.<sup>9</sup> Next, the Note examines the evolution of the Court's framework for evaluating Establishment Clause issues.<sup>10</sup> It then reviews the majority and dissenting opinions in *Zobrest*.<sup>11</sup> Next, the Note analyzes the *Zobrest* decision in light of the policies reflected in the IDEA and the Court's increasing dissatisfaction with the present framework for evaluating Establishment Clause challenges.<sup>12</sup> The Note then proposes an approach for deciding Establishment Clause questions.<sup>13</sup> Finally, this Note predicts that the Court will refine the framework under which it evaluates Establishment Clause issues and continue to broadly interpret the IDEA.<sup>14</sup>

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In 1970, Congress passed the Education of the Handicapped Act ("EHA"). Pub. L. No. 91-230, 84 Stat. 175 (1970). Congress amended the EHA in 1975 with the Education for All Handicapped Children Act ("EAHCA"). Pub. L. No. 94-142, 89 Stat. 773 (1975). In 1990, Congress amended the EAHCA, renaming it the Individuals with Disabilities Education Act ("IDEA"). Pub. L. No. 101-476, 104 Stat. 1103 (eff. Oct. 30, 1990) (codified as amended at 20 U.S.C. §§ 1400-85 (1988 & Supp. IV 1992)). The IDEA employs the term "children with disabilities instead of handicapped children," the term used in the EHA and the EAHCA. *Id.* This Note will use the term the "IDEA" unless the sources cited specifically refer to the "EHA" or the "EAHCA." For a discussion of the IDEA's purpose and provisions, see *infra* part II.A-B.

7. Guernsey & Sweeney, *supra* note 6, at 260-61. Guernsey and Sweeney predicted that the Court would eventually encounter a conflict between the EHA and the Establishment Clause; however, at the time the authors made this comment, they believed that the constitutionality of EHA on-site programs was doubtful. *Id.* at 261. Contrary to what the authors expected, the *Zobrest* Court deemed constitutional the on-site placement of a governmental employee under the IDEA. See *infra* part III.B.

8. 113 S. Ct. at 2469.

9. See *infra* part II.A-B.

10. See *infra* part II.C-E.

11. See *infra* part III.

12. See *infra* part IV.A-B.

13. See *infra* part IV.C.

14. See *infra* part V.

## II. BACKGROUND

### A. *The IDEA: Educational Rights for Disabled Children*

The IDEA provides state and local agencies with federal assistance for the education of disabled children, conditioned upon a state's compliance with federal goals and procedures.<sup>15</sup> To receive IDEA funding, a state must show that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public education."<sup>16</sup> A "free appropriate public education" ("FAPE")<sup>17</sup> includes special education<sup>18</sup> and related services<sup>19</sup> specially designed to meet the

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15. 20 U.S.C. § 1412 (Supp. IV 1992). See *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982).

16. 20 U.S.C. § 1412(1) (Supp. IV 1992). The IDEA defines "children with disabilities" as children "(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, need special education and related services." *Id.* § 1401(a)(1)(A).

The terms used in this definition are in turn defined in the Code of Federal Regulations. For example, "deafness" is defined as "a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance." 34 C.F.R. § 300.7 (1993).

17. The IDEA defines "free appropriate public education" as follows:

[S]pecial education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18) (1988).

The IDEA requires states providing special education and related services to "mainstream" disabled children by establishing "procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled." 20 U.S.C. § 1412(5)(B) (Supp. IV 1992). See *Honig v. Doe*, 484 U.S. 305 (1988).

18. The IDEA defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." 20 U.S.C. § 1401(16) (Supp. IV 1992).

19. The IDEA specifies that "related services" consist of the following:

[T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation

unique needs of a disabled child.<sup>20</sup> Once a child qualifies for a FAPE, local school district representatives, teachers, the child's parents or guardian, and, where appropriate, the child, meet to formulate an Individualized Educational Program ("IEP").<sup>21</sup> The public school system must provide the child with an education that comports with the child's IEP;<sup>22</sup> if it does not, the school system thereby fails to provide a FAPE as a matter of law.<sup>23</sup>

Although the IDEA itself defines a FAPE,<sup>24</sup> the Court has found it necessary to examine congressional intent in order to determine the

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counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, [including] the early identification and assessment of disabling conditions in children.

*Id.* § 1401(17).

20. *Id.* § 1401(16). The purpose of the IDEA is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." *Id.* § 1400(c).

21. The IDEA defines "individualized education program" as follows:

[A] written statement for each child with a disability developed in any meeting . . . which statement shall include—

(A) a statement of the present levels of educational performance of such child,  
(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities [sic] or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

*Id.* § 1401(20) (Supp. IV 1992) (footnote omitted); see 34 C.F.R. §§ 300.343-.346 (1993).

22. 34 C.F.R. § 300.341; see *supra* note 21.

23. See, e.g., *Board of Educ. v. Rowley*, 458 U.S. 176, 203 (1982) (holding that in order to meet the requirement of providing a FAPE to a disabled child, a state must provide personalized instruction and support services that "comport with the child's IEP"). See Michael F. Tomasek, Comment, *Let's Get off the Floor: The Call for Illinois to Adopt a Higher Substantive Standard for Special Education*, 24 LOY. U. CHI. L.J. 375, 385 (1993).

24. See *supra* note 17.

precise meaning of FAPE.<sup>25</sup> In *Board of Education v. Rowley*,<sup>26</sup> the Court formulated a two-prong test for evaluating whether a school system has provided a child with a FAPE.<sup>27</sup> First, a court must look to whether the state has complied with IDEA procedures.<sup>28</sup> Second, it must look to whether the child's IEP was "reasonably calculated to enable the child to receive educational benefits."<sup>29</sup> By meeting both requirements, states comply with their IDEA obligations, and courts cannot require them to do more.<sup>30</sup>

### B. IDEA-Required Services Provided in Private Schools

The services required by the IDEA need not be provided in a public school setting. In certain circumstances, the IDEA permits children to attend a private school and still receive special education and related services from the state.<sup>31</sup> The IDEA provides that when a public educational facility cannot provide a child with needed services, the state may, at no cost to the parents or guardian, place the child in a private facility that will provide the services.<sup>32</sup> Still, the IDEA does

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25. *Rowley*, 458 U.S. at 188.

26. 458 U.S. 176 (1982). *Rowley* represents the Court's first interpretation of a provision of the EAHCA. *Id.* at 187. At the time of *Rowley*, the IDEA was still known as the EAHCA.

27. *Id.* at 206-07.

28. *Id.* at 206.

29. *Id.* at 207.

30. *Rowley*, 458 U.S. at 207. *Rowley* concerned a partially deaf child, Amy Rowley, who was an excellent lip reader. *Id.* at 184. Amy's IEP required that she be placed in a regular public school first-grade classroom providing her with a hearing aid and the instruction of a tutor and a speech therapist. *Id.* Amy's parents believed that Amy also needed a sign-language interpreter in her classes. *Id.* After observing Amy in class with an interpreter for a two-week trial, however, the school determined that she did not need the interpreter's services. *Id.* at 185. Nevertheless, Amy's parents decided to pursue their request through proceedings specified by the IDEA. *Rowley*, 458 U.S. at 185.

On review, the Court disagreed with a district court's finding that although Amy was performing well, she was denied a FAPE unless she was afforded an opportunity to meet her full potential. *Id.* at 185-86. The Court stressed that Congress designed the IDEA more to "open the door of public education to [disabled] children" than "to guarantee any particular level of education once inside." *Id.* at 192. It ruled that Amy's IEP met both requirements of the two-prong test because she was receiving "personalized instruction and related services" calculated by the school to meet her educational needs. *Id.* at 210. Accordingly, the Court determined that the IDEA did not require the state to provide a sign-language interpreter for Amy. *Id.* The Court reasoned that Amy was receiving an "adequate" education because she was performing at an above-average level and advancing easily from grade to grade. *Rowley*, 458 U.S. at 209-10.

31. 20 U.S.C. § 1413(a)(4)(B)(i) (Supp. IV 1992).

32. 20 U.S.C. § 1413(a)(4)(B) (1988 & Supp. IV 1992); 34 C.F.R. § 300.401 (1993).

not give states the power to place children in sectarian schools.<sup>33</sup> Such placement by parents, however, is specifically allowed for under federal regulations.<sup>34</sup>

Nonetheless, if parents choose to enroll their child in a sectarian private school, the state is not required to pay in full for the child's education.<sup>35</sup> The state need only provide the special education and related services appropriate to the child's IEP.<sup>36</sup> This combination of state aid under the IDEA and the parents' placement of a disabled child in a private sectarian school triggers Establishment Clause issues.<sup>37</sup>

### C. The Establishment Clause

The Establishment Clause of the First Amendment dictates that "Congress shall make no law respecting an establishment of religion."<sup>38</sup> The Supreme Court first applied the clause to the issue of state aid to sectarian schools in *Everson v. Board of Education*.<sup>39</sup> In *Everson*, the Court held that to satisfy the Establishment Clause, a state must act *neutrally* toward both the nonreligious and the religious.<sup>40</sup> Specifically, the *Everson* Court ruled that a state could reim-

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33. 34 C.F.R. § 300.348; see 34 C.F.R. §§ 76.532, 300.400-.401, 300.341 (prohibiting use of funds for religious instruction); see also Guernsey & Sweeney, *supra* note 6, at 260 & n.8 (citing Matter of Jennifer M., 1986-87 EHLR Decisions 508:259 (SEA Wash. 1986), in which the state authority concluded that the placement of a disabled child in a sectarian school pursuant to the IDEA violated the Establishment Clause and federal regulations).

34. See 34 C.F.R. §§ 300.403, 300.341 (allowing parents to place their disabled children in private religious or nonreligious schools and requiring states to make appropriate special educational services available to those children).

35. *Id.* § 300.403(a) (1993).

36. *Id.* §§ 300.403(a), 300.341(b)(2), 300.451-.452 (1993). The Supreme Court has not yet addressed whether the IDEA requires states to provide special education and services to disabled children on-site at private schools chosen by parents. See Allan G. Osborne, Jr., *Providing Special Education and Related Services to Parochial School Students in the Wake of Zobrest*, 87 Educ. L. Rep. 329 (West) (Feb. 10, 1994). Several lower federal courts have held that the IDEA does not require a school district to provide these services on-site when the school district has offered a FAPE in the local public schools. See, e.g., *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 369 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 188 (1991); *Tribble v. Montgomery County Bd. of Educ.*, 798 F. Supp. 668 (M.D. Ala. 1992); see also *infra* notes 188-90 and accompanying text.

37. Guernsey & Sweeney, *supra* note 6, at 260-61.

38. U.S. CONST. amend. I, cl. 1.

39. 330 U.S. 1 (1947). The First Amendment applies to the states through the Fourteenth Amendment. *Id.* at 8 (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

40. *Id.* at 18. In *Everson*, the Court declared that the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.* Before arriving at this conclusion, the Court examined the origins of the Establishment Clause in order to

burse parents of both public and sectarian schoolchildren for the expense of bus transportation to and from school.<sup>41</sup> In reaching this conclusion, the Court emphasized that the state did not direct funds to the schools themselves.<sup>42</sup> The Court opined that because the program instead distributed funds directly to parents without regard to religion and in order to transport children, the program was neutral and thus constitutional.<sup>43</sup>

During the next twenty-four years, the Court followed the *Everson* neutrality test and further refined its application of the Establishment Clause as applied to both school-aid and other cases.<sup>44</sup> In school-aid cases decided during those years, the Court shifted its focus from *whether* states may provide benefits to sectarian schools to *how* those benefits may be provided.<sup>45</sup> Then, in 1971, the Court announced an approach to Establishment Clause analysis that became the model for school-aid cases and influenced Establishment Clause analysis in

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discern the Framers' original purpose. It focused on the early settlers' flight from Europe to escape from religious persecution and government-established churches. *Id.* at 8-9. The Court recognized the writings of James Madison and Thomas Jefferson as indications of the original purpose of the First Amendment because both men played leading roles in the amendment's adoption. *Everson*, 330 U.S. at 13. The *Everson* Court then cited the famous words commonly attributed to Jefferson: that the Establishment Clause was "intended to erect 'a wall of separation between church and State.'" *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). For a discussion of the "wall of separation," its origins, and its use in Establishment Clause jurisprudence, see Stephen J. Safranek, *Can Science Guide Legal Argumentation? The Role Of Metaphor In Constitutional Cases*, 25 LOY. U. CHI. L.J. 357, 371-99 (1994).

41. *Everson*, 330 U.S. at 16-17.

42. *Id.* at 18.

43. *Id.*

44. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (holding that property tax exemptions for religious organizations are constitutional); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (holding that a state could provide textbooks to private school students); see Raymond W. Mitchell, Comment, *A Small Departure from the Truth: When Private Religious Speech Runs Afoul of the Establishment Clause*, 23 LOY. U. CHI. L.J. 867, 872 (1992).

45. *Guernsey & Sweeney*, *supra* note 6, at 269. In *Everson*, the Court indicated that it could not prohibit the state from providing general state law benefits to all citizens without regard to religion. *Everson*, 330 U.S. at 16. Thus, with *Everson* the Court acknowledged the need for states to provide benefits in public, private, or sectarian schools through statutes like the IDEA. However, the Court continued to examine the process by which benefits are provided to determine if the Establishment Clause had been violated. See *Mueller v. Allen*, 463 U.S. 388, 397, 399 (1983) (reasoning that the availability of tax deductions to all parents without direct financial assistance to schools is an important factor in finding a program constitutional under the Establishment Clause); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (emphasizing that direct assistance to sectarian schools "inescapably results in the direct and substantial advancement of religious activity, and thus constitutes an impermissible establishment of religion") (citation and footnote omitted); *Guernsey & Sweeney*, *supra* note 6, at 269; *infra* note 61.



general.<sup>46</sup> In *Lemon v. Kurtzman*,<sup>47</sup> the Court set forth a three-prong test for evaluating governmental programs that touch sectarian schools.<sup>48</sup> Under *Lemon*, a program is valid if it possesses the following characteristics: (1) it has a clear secular purpose; (2) it has a primary effect that neither advances nor inhibits religion; and (3) it does not generate an "excessive government entanglement with religion."<sup>49</sup>

*Lemon* concerned two state statutes. The first, a Rhode Island statute, authorized the state to supplement the salaries of nonpublic school teachers who taught secular subjects by directly paying teachers up to fifteen percent of their annual salaries.<sup>50</sup> The second, a Pennsylvania statute, reimbursed nonpublic schools for teachers' salaries, textbooks, and instructional materials that related to secular subjects taught in public schools.<sup>51</sup>

In evaluating these statutes, the *Lemon* Court mentioned *Everson* in recognizing the difficulties presented by Establishment Clause questions, but did not rely on the *Everson* test.<sup>52</sup> Instead, the Court

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46. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 601-02 (1989) (holding that a courthouse display of a crèche failed the effect prong of the *Lemon* test and thus violated the Establishment Clause by conveying a message of government endorsement of religion); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (holding that exempting religious organizations from Title VII's prohibition of religious discrimination in employment does not violate the Establishment Clause under the *Lemon* test); *Wallace v. Jaffree*, 472 U.S. 38, 59-60 (1985) (holding that a state statute authorizing a daily period of silence in public schools for meditation or voluntary prayer failed the purpose prong of the *Lemon* test and thus violated the Establishment Clause because the statute's sole purpose was to endorse prayer activities at the beginning of each school day).

See *infra* note 61 for a summary of the Court's rulings on the constitutionality of state aid that touches sectarian schools.

47. 403 U.S. 602 (1971).

48. *Id.* at 612-13.

49. *Id.* The *Lemon* Court cited *Allen*, 392 U.S. at 243, for the secular purpose prong and the neutral effect prong, and *Walz*, 397 U.S. at 674, for the excessive entanglement prong. *Lemon*, 403 U.S. at 612-15.

In *Allen*, the Court deferred to the state's legislative intent to improve the quality of secular education. *Allen*, 392 U.S. at 243. The Court determined that secular and sectarian teachings were not so intertwined that the state's provision of secular textbooks furthered the teaching of religion. *Id.* at 248.

In *Walz*, the Court upheld a state statute that gave tax exemptions to religious organizations for real property that the organizations owned and used for religious services. *Walz*, 397 U.S. at 680. The Court required close scrutiny of the entanglement between the state and religious organizations to determine the amount of intrusion of each on the other. *Id.* at 674-75.

50. *Lemon*, 403 U.S. at 607-08.

51. *Id.* at 609-10.

52. *Id.* at 611-12. The only other time the Court mentioned *Everson* was in its analy-

employed its newly formulated test to strike down both statutes,<sup>53</sup> concluding that they violated the third prong of the test by excessively entangling state government and religion.<sup>54</sup> The Court reasoned that the Rhode Island statute created a danger that the teachers whose salaries were supplemented would not be able to separate secular and religious subjects during class sessions.<sup>55</sup> It concluded that to alleviate this danger, the state would have to continuously monitor teacher performance, which in turn would necessitate an excessive and impermissible entanglement of state and religion.<sup>56</sup>

The Court found that the Pennsylvania statute created the same danger, plus one more.<sup>57</sup> It stressed that the Pennsylvania statute provided financial aid directly to the sectarian school rather than to students and parents,<sup>58</sup> which would allow the state to inspect school financial records to determine whether aid was spent for religious or secular purposes.<sup>59</sup> This, the Court reasoned, created too "intimate" a relationship between church and state.<sup>60</sup>

Since *Lemon* was decided, the Court has applied its three-prong test to deliver a variety of rulings on the constitutionality of state support touching sectarian schools.<sup>61</sup> Two recent cases have focused on three

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sis of the Pennsylvania statute. *Id.* at 621. The Court noted that the Pennsylvania statute provided state aid directly to the sectarian school, in contrast to the *Everson* statute, which provided aid to the student and his parents. *Id.*

53. *Lemon*, 403 U.S. at 607.

54. *Id.* at 615. The Court set forth detailed criteria for determining if a statute creates excessive entanglement. *Id.* The criteria included "the character and purposes of the institutions that are benefited; the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.*

55. *Id.* at 617.

56. *Lemon*, 403 U.S. at 619. The Court added that teachers, unlike books, would require continuous inspections, rather than just one inspection, to determine the extent of entanglement. *Id.*; see also *Allen*, 392 U.S. at 238 (upholding a state program that provided sectarian school students with secular textbooks).

57. *Lemon*, 403 U.S. at 620-21.

58. *Id.* at 621.

59. *Id.* at 621-22.

60. *Id.*

61. Several broad propositions have arisen from these decisions: Government programs do not automatically violate the Establishment Clause because sectarian schools indirectly benefit. See *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); see also *Wolman v. Walter*, 433 U.S. 229 (1977). Yet direct aid subsidizing typical costs of a sectarian school does violate the Establishment Clause. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973). Programs that supply aid to students and parents rather than directly to a sectarian school may also be unconstitutional. *Ball*, 473 U.S. at 395; see also *Witters*, 474 U.S. at 487; *Wolman*,

factors in assessing the constitutional propriety of state-aid programs under the effect prong: (1) whether the program neutrally benefits a broad class of citizens defined without reference to religion; (2) whether it directly or indirectly subsidizes sectarian schools; and (3) whether any benefits received by sectarian schools under the program are triggered by a private choice.<sup>62</sup> In both cases, the Court applied the *Lemon* test; however, it examined the effect prong more closely than the other two prongs.<sup>63</sup>

*Mueller v. Allen*<sup>64</sup> involved a challenge to a Minnesota statute that permitted all parents to deduct from their state income tax certain educational expenses of their children.<sup>65</sup> The Court found the statute constitutional under the three-prong *Lemon* test.<sup>66</sup> As for the first prong—whether the statute had a clear secular purpose—the Court deemed acceptable the state's purpose of defraying the cost of education in both secular and sectarian schools.<sup>67</sup> Turning to the second prong—whether the primary effect of the statute neither advanced nor inhibited religion—the Court concluded that the statute withstood scrutiny because the deductions were available to *all* parents, not just those with children in sectarian schools.<sup>68</sup> The Court also noted that rather than providing financial assistance directly to the schools them-

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433 U.S. at 250. Finally, the Court has ruled that a state program that places a public employee in a sectarian school or that provides teachers to sectarian schools violates the Establishment Clause. See *Wolman*, 433 U.S. at 243-44, 247-48; see also *Aguilar v. Felton*, 473 U.S. 402, 410 (1985); *Ball*, 473 U.S. at 385; *Meek*, 421 U.S. at 371; *Mitchell*, *supra* note 44, at 873 n.32. *Zobrest*, however, may indicate a retreat from this view. See *infra* part V.B.

62. See *Zobrest*, 113 S. Ct. at 2466 (referring to *Mueller* and *Witters* as examples where the Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit").

63. See Stuart W. Bowen, Jr., *Is Lemon a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129, 151 (1990) ("While putatively adhering to the *Lemon* test, the Court instead has emphasized state neutrality towards religion by expanding the test's 'effects prong.'") (footnote omitted).

64. 463 U.S. 388 (1983).

65. *Id.* at 397.

66. *Id.* at 404.

67. *Id.* at 395.

68. *Mueller*, 463 U.S. at 396-97. Although the petitioners in *Mueller* argued that the statute primarily benefited those parents whose children attended sectarian schools, the Court did not consider this alleged consequence in detail. *Id.* at 400-01.

The Court noted that the effect prong presented a more difficult question than the purpose prong, primarily, "whether the Minnesota statute has the 'primary effect of advancing the sectarian aims of the nonpublic schools.'" *Id.* at 396 (quoting *Committee for Pub. Educ. v. Regan*, 444 U.S. 646 (1980)). The Court did not elaborate on why it had greater difficulty addressing the effect prong. *Id.*

selves, the statute made funds available to the schools only as a result of parents' choices to send their children to sectarian schools.<sup>69</sup> Finally, addressing the third prong, the Court concluded that the statute did not create an excessive entanglement between the state and religion.<sup>70</sup> It reasoned that the only government surveillance required by the statute was determining whether textbooks claimed as deductible were truly secular in nature.<sup>71</sup>

Three years later, in *Witters v. Washington Department of Services for the Blind*,<sup>72</sup> the Court examined the constitutionality of a state vocational rehabilitation program, under which a blind person could have received financial assistance to study at a private Christian college in preparation for a career as a pastor or missionary.<sup>73</sup> The Court again invoked the *Lemon* test.<sup>74</sup> Applying the first prong, the Court acknowledged the program's secular purpose of promoting the vocational rehabilitation of disabled persons.<sup>75</sup> Turning to the second prong, the Court concluded that the program's primary effect was not the advancement of religion because the program provided funds directly to students rather than to sectarian schools.<sup>76</sup> The Court also noted that the program made funds available without reference to whether the student attended a secular or sectarian institution; thus, it offered no financial incentive to attend one school or another.<sup>77</sup> The Court held that the program did not violate the Establishment Clause based on this analysis of the first and second prongs of the *Lemon* test.<sup>78</sup> The Court specifically left open the opportunity for the Washington Supreme Court to analyze the program under the entanglement prong of the *Lemon* test on remand.<sup>79</sup>

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69. *Id.* at 399.

70. *Mueller*, 463 U.S. at 403.

71. *Id.*

72. 474 U.S. 481 (1986).

73. *Id.* at 483-85.

74. *Id.* at 485.

75. *Id.* at 485-86.

76. *Witters*, 474 U.S. at 486-88. The Court observed that "[v]ocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.* at 487. The Court also noted that the second prong required a much more challenging analysis than the first. *Id.* at 486. The Court did not state a reason for this difference, but did state that its analysis under the first prong was straightforward. *Id.* at 485.

77. *Witters*, 474 U.S. at 487-88.

78. *Id.* at 489.

79. *Id.* at 489 n.5. Because the Washington Supreme Court had not addressed the entanglement prong of the *Lemon* test, the Court declined to address that issue, leaving open the possibility of the state court considering it on remand. *Id.* The Court reasoned that it would be inappropriate to discuss the entanglement issue without the "benefit" of

In determining whether the statutes at issue in *Mueller* and *Witters* had the primary effect of advancing religion, the Court noted that both provided funds to sectarian schools only as a consequence of parents deciding to send their children to such schools.<sup>80</sup> Thus, state officials played no role in the decision that caused the funds to be directed to the schools.<sup>81</sup> The *Witters* Court specifically posited that a student's choice to use neutrally available government funds to help pay for religious education does not "confer any message of state endorsement of religion" and thus does not violate the Establishment Clause.<sup>82</sup> This principle of favorably viewing state aid delivered as a consequence of a private choice has greatly influenced the Court in subsequent cases.<sup>83</sup>

Governments usually exceed the limits of the Establishment Clause, however, when they directly subsidize the general operating costs of a sectarian school. A statute struck down in *Meek v. Pittenger*,<sup>84</sup> for example, provided "massive aid" to private schools by directly loaning them teaching materials and equipment.<sup>85</sup> Applying the *Lemon* test, the Court accepted as secular the state's legislative purpose of advancing educational opportunities.<sup>86</sup> The Court ruled, however, that the statute violated the second *Lemon* prong—whether its primary effect advanced religion—because more than seventy-five percent of the schools that benefited were sectarian.<sup>87</sup> The Court reasoned that the aid was "neither indirect or incidental," but was instead a "direct" and "substantial" subsidy to sectarian schools.<sup>88</sup> Furthermore, the Court maintained that the character of the equipment loaned—maps, charts, and laboratory equipment—made it difficult to separate secular and sectarian use of the equipment.<sup>89</sup>

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a decision by the court below. *Id.* The Court deferred to the state supreme court's conclusion that "analysis could be more fruitfully conducted on a more complete record." *Witters*, 474 U.S. at 489 n.5.

80. *Id.* at 488; *Mueller*, 463 U.S. at 399.

81. *See Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 399.

82. *Witters*, 474 U.S. at 489. Similarly, the *Mueller* Court noted that "a program like [the Minnesota statute] that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller*, 463 U.S. at 398-99.

83. *See, e.g., Zobrest*, 113 S. Ct. at 2468-69; *see also infra* text accompanying notes 153-54 and part IV.B-C.

84. 421 U.S. 349 (1975).

85. *Meek*, 421 U.S. at 354-55, 365.

86. *Id.* at 363.

87. *Id.* at 363-64.

88. *Id.* at 365-66.

89. *Id.* at 365. The Court did not address the entanglement prong of the *Lemon* test when invalidating the equipment provision of the statute since it had already found a violation of the primary effect prong of the test. *Meek*, 421 U.S. at 363 n.13.

The *Meek* Court also invalidated state funding for sectarian school counselors and teachers of remedial and exceptional students because of the danger that religious and secular subjects might be intertwined.<sup>90</sup> The Court emphasized that its prior decisions made clear that a state cannot assume that teachers in sectarian schools will succeed in keeping their religious beliefs separate from their secular educational responsibilities.<sup>91</sup> The Court determined that government surveillance would be needed to control the use of state-provided funds and that the resulting political and administrative entanglement would violate the Establishment Clause.<sup>92</sup>

#### D. *Lemon and the Endorsement Test*

In recent years, the Court has modified the primary effect prong of the *Lemon* test, referring to it as the "endorsement" prong.<sup>93</sup> Justice O'Connor suggested this change in her concurring opinion in *Lynch v. Donnelly*.<sup>94</sup> She proposed that when applying the effect prong, a court should inquire whether "the practice under review in fact conveys a message of endorsement or disapproval."<sup>95</sup>

The Court began to embrace the endorsement concept in *School District of Grand Rapids v. Ball*,<sup>96</sup> ruling that providing public employees to teach classes in private sectarian schools violated the

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90. *Id.* at 370.

91. *Id.* at 370 n.20. The Court recognized that its prior decisions make clear that courts cannot rely entirely on "the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." *Id.* at 369 (citing *Lemon*, 403 U.S. at 618-619; *Public Funds for Pub. Sch. v. Marburger*, 358 F. Supp. 29, 40-41 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974)). In *Lemon*, the Court concluded that state surveillance would "inevitably be required" to determine whether teachers separated religious issues from secular subjects. *Lemon*, 403 U.S. at 619. The Court reasoned that the potential for teachers to promote religion in secular classes is great, and that the state must make certain that this does not happen. *Id.* at 618-19. Necessary surveillance, the Court concluded, would require "excessive and enduring entanglement between state and church." *Id.* at 619.

In *Marburger*, the district court reaffirmed the Supreme Court's determination in *Lemon* that excessive entanglement would be required in order for the state to be certain that personnel do not advance religion in their secular duties. 358 F. Supp. at 40-41.

92. *Meek*, 421 U.S. at 372.

93. See Mitchell, *supra* note 44, at 874.

94. 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

95. *Id.* at 690 (O'Connor, J., concurring). In formulating this test, Justice O'Connor noted that the meaning of a statement depends not only on the intent of the speaker but also on the objective content of the statement. *Id.* Justice O'Connor later refined the endorsement test to ask whether a "reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring).

96. 473 U.S. 373 (1985).

Establishment Clause.<sup>97</sup> The Court concluded that the two programs in *Ball* violated the second prong of the *Lemon* test by having the primary effect of advancing religion.<sup>98</sup> Specifically, the Court found that the programs violated this prong in three ways.<sup>99</sup> First, state-paid teachers in a sectarian school may have the opportunity to include religious beliefs in their classes at the expense of the state.<sup>100</sup> Second, by providing secular instruction in sectarian school buildings, the programs unavoidably created a "symbolic union of church and state," thereby sending a message to both students and the public that the state supports religious activity.<sup>101</sup> Finally, the programs directly subsidized the sectarian schools by assuming part of their responsibility for teaching the secular subjects covered in the program.<sup>102</sup>

The Court explicitly adopted the endorsement concept as a means of determining whether a governmental action advances religion in *County of Allegheny v. American Civil Liberties Union*., a case not involving school aid.<sup>103</sup> In the *Allegheny* Court's view, Justice O'Connor's concurrence in *Lynch* offered a "sound analytical framework" for Establishment Clause issues.<sup>104</sup> Specifically, the *Allegheny* Court ruled that a courthouse display of a crèche violated the Establishment Clause, whereas the display of a menorah next to a Christmas tree did not.<sup>105</sup>

The Court examined the settings surrounding each display to determine if the displays conveyed a message of government endorsement.<sup>106</sup> The Court reasoned that the items surrounding the crèche—an angel saying "Glory to God in the Highest!" and a sign disclosing the ownership of the crèche by a Roman Catholic organization—demonstrated that the government was endorsing a religious message.<sup>107</sup> As for the menorah, the Court maintained that because it stood next to a Christmas tree and a sign saluting liberty, the government's message was to recognize the winter-holiday season, which has attained secular status.<sup>108</sup>

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97. *Id.* at 389-92, 397.

98. *Id.* at 397.

99. *Id.*

100. *Id.*

101. *Ball*, 473 U.S. at 397.

102. *Id.*

103. 492 U.S. 573, 592 (1989).

104. *Id.* at 595.

105. *Id.* at 621.

106. *Id.* at 598.

107. *Id.* at 598-600.

108. *Allegheny*, 492 U.S. at 614, 616.

Although the *Allegheny* Court treated the endorsement concept as a modification of the *Lemon* effect prong, it did not examine the purpose and entanglement prongs of the *Lemon* test.<sup>109</sup> The Court did not address these prongs because the court of appeals had not considered them.<sup>110</sup> Thus, the essential three-part structure of the *Lemon* test was not disturbed by *Allegheny*.

### E. A Retreat from the Lemon Test?

The Court's decisions over the past twenty years have somewhat eroded the original *Lemon* test and have created uncertainty regarding the test's viability. This occurred as the Court effectively collapsed the three-prong test into a two-prong test. Under the secular purpose prong, the Court has rarely found a statute unconstitutional.<sup>111</sup> Instead, the Court tends to defer to the legislature and accept its pronounced secular purpose.<sup>112</sup> Thus, the secular purpose prong has proved to be an unimportant part of the analysis.<sup>113</sup> In lieu of in-depth examination of the secular purpose prong, the Court has focused much of its attention on the *Lemon* effect prong.<sup>114</sup> For example, in *Mueller* and *Witters*, the Court identified specific factors it sought in order to satisfy the effect prong and thus hold the statutes at issue constitutional.<sup>115</sup>

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109. *Id.* at 594 n.45.

110. *Id.*

111. *Meek*, *Mueller*, and *Witters* all demonstrate a succinct discussion by the Court of the secular purpose prong and ultimate acceptance of the state's purpose. See *Witters*, 474 U.S. at 485-86; *Mueller*, 463 U.S. at 395; *Meek*, 421 U.S. at 363.

112. *Guernsey & Sweeney*, *supra* note 6, at 271 n.90. See, e.g., *Ball*, 473 U.S. at 383 ("As has often been true in school aid cases, there is no dispute as to the first test."); *Nyquist*, 413 U.S. at 773 ("We do not question the propriety, and fully secular contents, of New York's interest . . .").

Language in *Lemon* itself suggests the deference the Court chooses to give to the legislature:

[T]he statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. . . . [The State] must therefore be accorded appropriate deference.

*Lemon*, 403 U.S. at 613. But see *Wallace v. Jaffree*, 472 U.S. 38, 59-60 (1985) (holding that a state statute authorizing a daily period of silence in public schools for meditation or voluntary prayer violated the purpose prong because its sole purpose was to endorse prayer at the beginning of each school day).

113. *Guernsey & Sweeney*, *supra* note 6, at 271 n.90.

114. See *supra* notes 62-63, 76-77, 93-110 and accompanying text.

115. See *supra* note 62 and accompanying text. In *Ball* and *Allegheny*, the Court embraced Justice O'Connor's modification of the effect prong, referring to it as the



Furthermore, the Court has called the validity of the *Lemon* test into question by refraining from applying it. On several occasions prior to *Zobrest*, the Court resolved Establishment Clause issues without employing the *Lemon* test at all. In *Marsh v. Chambers*,<sup>116</sup> the Court held that providing state legislative chaplains and opening legislative sessions with a prayer did not violate the Establishment Clause.<sup>117</sup> Although a lower court had found an Establishment Clause violation under the *Lemon* test,<sup>118</sup> the Court neither applied nor mentioned the test in reversing.<sup>119</sup> Instead, the Court surveyed the 200 years of history surrounding the practice of opening congressional sessions with prayer.<sup>120</sup> Because the practice began when the First Congress drafted the First Amendment, the Court reasoned, the drafters must not have believed that opening sessions with prayer transgressed the Establishment Clause.<sup>121</sup> Accordingly, the Court concluded that the practices of the state legislature at issue did not offend the Constitution.<sup>122</sup>

The Court avoided the *Lemon* test again in *Lee v. Weisman*,<sup>123</sup> while holding that including a clergy member's prayer in a public school graduation violated the Establishment Clause.<sup>124</sup> Although specifically stating that it would not reconsider *Lemon*,<sup>125</sup> the Court relied on "settled rules pertaining to prayer exercises for students"<sup>126</sup> instead of the *Lemon* test. The Court reasoned that state involvement in school prayers created a coercive pressure on students, who have little choice but to participate in graduation ceremonies.<sup>127</sup> To allow a religious exercise at a public school graduation ceremony, the Court noted, would suggest that a public school could compel a student to participate in such an exercise.<sup>128</sup>

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"endorsement" prong. See *supra* part II.D.

116. 463 U.S. 783 (1983).

117. *Id.* at 792-95.

118. *Chambers v. Marsh*, 675 F.2d 228, 234-35 (8th Cir. 1982).

119. *Marsh*, 463 U.S. at 795.

120. *Id.* at 786, 791-92.

121. *Id.* at 790-91.

122. *Id.* at 795.

123. 112 S. Ct. 2649, 2655 (1992) ("We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured.").

124. *Id.* at 2661.

125. *Id.* at 2655.

126. *Id.*

127. *Id.* at 2656.

128. *Lee*, 112 S. Ct. at 2661. *Lee* provided the foundation for the coercion standard now favored by Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy. See

Although *Marsh* and *Lee* demonstrate that the Court has departed from automatic application of the *Lemon* test, the Court has recently urged that "*Lemon*, however frightening it might be to some, has not been overruled."<sup>129</sup> The Court may not have overruled the *Lemon* test, but as the Court's comment and its decisions in *Marsh* and *Lee* suggest, the Court does recognize the limits of the test and seems hesitant to apply it to all Establishment Clause controversies.<sup>130</sup>

### III. DISCUSSION

#### A. *Zobrest: The Facts and the Opinions Below*

In *Zobrest v. Catalina Foothills School District*,<sup>131</sup> a deaf child, James Zobrest, and his parents sued<sup>132</sup> a local school district that refused to provide James with a sign-language interpreter while he attended a Roman Catholic high school.<sup>133</sup> The Zobrests contended that the IDEA and its Arizona counterpart required the school district to provide the interpreter and that the Establishment Clause did not prevent the district from doing so.<sup>134</sup> For the three years prior to high school, James had attended a public school, during which time the district provided him with an interpreter.<sup>135</sup> When James enrolled in a private sectarian high school, the district discontinued the

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*infra* notes 214, 217, 219 and accompanying text for a discussion of the coercion standard.

129. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 n.7 (1993).

130. Many members of the Court have directly criticized the *Lemon* test. See, e.g., *Allegheny*, 492 U.S. at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order . . ."); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting) (criticizing the entanglement prong of the test); see *infra* notes 214-16 and accompanying text.

131. 113 S. Ct. 2462 (1993).

132. The IDEA grants the district courts jurisdiction over disputes arising from parents' dissatisfaction with the services provided to their disabled child. 20 U.S.C. § 1415(e)(4)(A) (1988). The IDEA provides parents and guardians with a two-level administrative hearing process before a state agency; however, parents have the right to sue in state or federal court when they are aggrieved by the state agency's decision. *Id.* § 1415(b)-(c), (e)(2) (1988 & Supp. IV 1992). See *Board of Educ. v. Rowley*, 458 U.S. 176, 204-206 (1982) (holding that these reviewing courts have the authority to make "independent decision[s] based on a preponderance of the evidence"); Tomasek, *supra* note 23, at 385-86. In *Zobrest*, the parties stipulated that pursuing administrative remedies would be futile. *Zobrest*, 113 S. Ct. at 2464 n.2.

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

134. *Id.*

135. *Id.*

interpreter.<sup>136</sup>

The trial court granted the school district summary judgment,<sup>137</sup> concluding that state funding of a sign-language interpreter in a sectarian school would be an impermissible "entanglement of church and state."<sup>138</sup> The court reasoned that the interpreter would be a "conduit" for religious messages and would promote the student's "religious development at government expense," thereby violating the Establishment Clause.<sup>139</sup> The Ninth Circuit affirmed.<sup>140</sup> Applying the *Lemon* test,<sup>141</sup> it held that a district-provided interpreter would create a "symbolic union of government and religion" prohibited by *School District of Grand Rapids v. Ball*.<sup>142</sup> The court stated that placing a public employee in a sectarian school creates "the appearance that [the government is] a 'joint sponsor' of the school's activities."<sup>143</sup>

### B. *The Opinion of the United States Supreme Court*

In a five-to-four decision, the Supreme Court held that the Establishment Clause of the First Amendment does not prevent a public school district from providing a sign-language interpreter to a deaf child attending a sectarian school.<sup>144</sup> Before reaching the Establishment Clause issue, the Court addressed the rule of *United States v. Locke*,<sup>145</sup> which requires courts to resolve questions on non-constitutional rather than constitutional grounds wherever possible.<sup>146</sup> The Court concluded that this rule did not apply because the parties

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136. *Id.* Before refusing to provide an interpreter for James, the school district received advice from both the County Attorney and the Arizona Attorney General that the provision of an interpreter would violate the United States Constitution. *Id.*

137. *Zobrest v. Catalina Foothills Sch. Dist.*, No. 88-516 (D. Ariz. Oct. 19, 1989) (order granting summary judgment).

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

139. *Id.*

140. *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1197 (9th Cir. 1992).

141. *Id.* at 1193 (citing *Lemon*, 403 U.S. at 613).

142. *Id.* at 1194. See *supra* notes 96-102 and accompanying text for a discussion of *Ball*.

143. *Zobrest*, 963 F.2d at 1194-95.

144. *Zobrest*, 113 S. Ct. at 2469. Chief Justice Rehnquist's majority opinion was joined by Justices White, Scalia, Kennedy, and Thomas. *Id.*

145. 471 U.S. 84 (1985).

146. *Id.* at 92. In *Locke*, the Court recognized that an "entire case" on appeal includes both nonconstitutional and constitutional questions and concluded that the nonconstitutional questions should be addressed first. *Id.* The *Zobrest* Court recognized this principle in stating that "federal courts will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible by which the constitutional question can be avoided." *Zobrest*, 113 S. Ct. at 2465 (citing *Locke*, 471 U.S. at 92).

had raised only First Amendment issues below.<sup>147</sup> The Court thereby avoided deciding whether the IDEA itself authorized the sign-language interpreter and, accordingly, devoted its opinion to the Establishment Clause issue.<sup>148</sup>

Although the Ninth Circuit had applied the *Lemon* test to evaluate the Establishment Clause issue,<sup>149</sup> Chief Justice Rehnquist's majority opinion never mentioned the test. The Court focused instead on the characteristics shared by the IDEA and the educational assistance programs upheld in *Mueller* and *Witters*.<sup>150</sup> The Court reaffirmed the principles underlying those decisions,<sup>151</sup> concluding that aid under the IDEA constitutes part of a broad government program that distributes benefits "neutrally" to children who qualify as disabled.<sup>152</sup>

The Court identified several aspects of the IDEA that paralleled those found to support the programs approved in *Mueller* and *Witters*. It stressed that the IDEA allows a parent, not the state, to choose a child's school.<sup>153</sup> Furthermore, the Court noted that the IDEA offers no financial incentive for parents to select a sectarian school over a public one because children receive the same benefits either way.<sup>154</sup> The Court also emphasized that James Zobrest's sectarian high school would benefit only incidentally from IDEA support directed to him.<sup>155</sup> The Court noted with approval that no funds traceable to the government would be directly received by James's high school under the IDEA.<sup>156</sup> In this respect, the Court opined, the IDEA presented even

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147. *Zobrest*, 113 S. Ct. at 2466. Because the parties had only raised First Amendment issues in the Ninth Circuit, the Court addressed only constitutional issues. *Id.* The Court reasoned that although there may have been nonconstitutional grounds for a decision "buried" in the record of the case, that was not enough to invoke the *Locke* rule. *Id.* (citing *Board of Airport Comm'rs. v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987)). The Court stated that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Id.* (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

In dissent, Justice Blackmun disagreed with the majority's analysis, arguing that purportedly insufficient briefing of statutory and regulatory issues by the parties did not justify the Court's examination of the constitutional claim. *Id.* at 2471 (Blackmun, J., dissenting) (citing *Youakim v. Miller*, 425 U.S. 231 (1976); *Escambia County v. McMillan*, 466 U.S. 48, 51-52 (1984); *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 157-58 (1983)); see *infra* notes 167-71 and accompanying text.

148. *Zobrest*, 113 S. Ct. at 2466.

149. See *supra* notes 141-43 and accompanying text.

150. *Zobrest*, 113 S. Ct. at 2466-67.

151. See *supra* notes 64-83 and accompanying text.

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

153. *Id.*

154. *Id.*

155. *Id.* at 2468-69.

156. *Id.* at 2467-68.

less of a constitutional problem than the programs upheld in *Mueller* and *Witters*.<sup>157</sup>

The Court then distinguished *Zobrest* from *Meek*<sup>158</sup> and *Ball*,<sup>159</sup> two cases relied on by the school district as well as by Justice Blackmun in his dissent.<sup>160</sup> The Court identified two major differences between the IDEA and the government programs challenged in *Meek* and *Ball*.<sup>161</sup> First, the IDEA would not relieve James Zobrest's high school of an expense it otherwise would have borne, as had the direct grants to sectarian schools in *Meek* and *Ball*.<sup>162</sup> The Court again emphasized that the high school would benefit only incidentally from an interpreter provided for James under the IDEA.<sup>163</sup>

Second, the Court determined that the role of a state-provided sign-language interpreter differs from that of the teachers and guidance counselors involved in *Meek* and *Ball*.<sup>164</sup> The Court reasoned that the interpreter James Zobrest sought would "do [nothing] more than accurately interpret" any material presented in his classes, and thus would neither enhance nor diminish the sectarian environment of the school.<sup>165</sup> Stressing that the Establishment Clause creates "no absolute bar to the placing of a public employee in a sectarian school," the Court ruled that providing a state-funded sign language interpreter to James Zobrest at his sectarian high school was permissible under the Constitution.<sup>166</sup>

### C. The Dissenting Opinions

In separate dissenting opinions, both Justice Blackmun<sup>167</sup> and Justice O'Connor<sup>168</sup> criticized the majority's failure to resolve the statutory and regulatory issues presented in *Zobrest* before addressing the constitutional issue.<sup>169</sup> The Justices reasoned that addressing the

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157. *Zobrest*, 113 S. Ct. at 2467-68.

158. 421 U.S. 349 (1975). See *supra* notes 84-92 and accompanying text.

159. 473 U.S. 373 (1985). See *supra* notes 96-102 and accompanying text.

160. *Zobrest*, 113 S. Ct. at 2468-69, 2473 (Blackmun, J., dissenting).

161. *Id.* at 2468-69.

162. *Id.*

163. *Id.* at 2469.

164. *Id.*

165. *Zobrest*, 113 S. Ct. at 2469.

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

167. Justice Souter joined in Justice Blackmun's dissenting opinion. Justices Stevens and O'Connor joined in Part I of the dissent. *Id.* at 2469 (Blackmun, J., dissenting).

168. Justice Stevens joined in Justice O'Connor's dissenting opinion. *Id.* at 2475 (O'Connor, J., dissenting).

169. *Id.* at 2469 (Blackmun, J., dissenting), 2475 (O'Connor, J., dissenting).

nonconstitutional issues may have made a resolution of the Establishment Clause question unnecessary.<sup>170</sup> Accordingly, they concluded, the case should have been disposed of on nonconstitutional grounds pursuant to the *Locke* principle.<sup>171</sup>

Notwithstanding this contention, in his dissent Justice Blackmun went on to address the Establishment Clause issue.<sup>172</sup> He criticized the majority for authorizing for the first time a public employee's direct involvement in religious education.<sup>173</sup> He observed that in the Catholic school attended by James Zobrest, secular education and sectarian beliefs were "inextricably intertwined."<sup>174</sup> Justice Blackmun concluded that in such a school, a state-provided sign-language interpreter would be required to communicate religious material, secular

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170. *Zobrest*, 113 S. Ct. at 2475 (O'Connor, J., dissenting). Both justices acknowledged that "[i]t is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Id.* (O'Connor, J., dissenting) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984)); *see id.* at 2470 (Blackmun, J., dissenting).

171. *Zobrest*, 113 S. Ct. at 2470 (Blackmun, J., dissenting), 2475 (O'Connor, J., dissenting). Justice Blackmun maintained that the case could be vacated and remanded for consideration of two statutory and regulatory issues argued by the respondent school district. *Id.* at 2470 (Blackmun, J., dissenting). The first issue was whether the IDEA requires a school district to provide a sign-language interpreter at any private school when the necessary special education services are available at a public school. *Id.* (Blackmun, J., dissenting); *see* 20 U.S.C. §§ 1400-85 (1988 & Supp. IV 1992). Justice Blackmun noted that several courts have ruled that the IDEA does not require this. *Zobrest*, 113 S. Ct. at 2470 (Blackmun, J., dissenting) (noting *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 188 (1991); *McNair v. Oak Hills Local Sch. Dist.*, 872 F.2d 153 (6th Cir. 1989)).

The second issue discussed by Justice Blackmun was whether the regulations promulgated under the IDEA prohibit providing a sign-language interpreter in a sectarian school. *Id.* at 2470 (Blackmun, J., dissenting) (noting 34 C.F.R. § 76.532(a)(1) (1992), which prohibits the use of government money to fund religious activities). *But see* 34 C.F.R. § 300.403(a) (1993) (requiring that states make educational services available to disabled children placed in private schools by their parents).

Justice Blackmun criticized the majority for justifying its decision with the fact that the parties had not properly briefed the nonconstitutional issues. *Zobrest*, 113 S. Ct. at 2471 (Blackmun, J., dissenting). He stated that the Court has previously taken the route of remanding cases "for consideration of statutory issues not presented to or considered by [a] lower court." *Id.* (Blackmun, J., dissenting) (citing *Youakim v. Miller*, 425 U.S. 231 (1976); *Escambia County v. McMillan*, 466 U.S. 48 (1984)).

172. *Zobrest*, 113 S. Ct. at 2471 (Blackmun, J., dissenting). Justice O'Connor limited her dissent to the *Locke* issue; unlike Justice Blackmun, she did not address the merits of the Establishment Clause issue. *See id.* at 2475 (O'Connor, J., dissenting).

173. *Id.* at 2471 (Blackmun, J., dissenting).

174. *Id.* at 2472 (Blackmun, J., dissenting) (quoting Case Appendix at 92). Justice Blackmun highlighted the Salpointe High School's Faculty Employment Agreement, which stated that religious programs "are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other." *Id.* at 2472 n.2 (Blackmun, J., dissenting) (quoting Case Appendix at 90-91).

material from a religious perspective, and daily Masses that the school encouraged students to attend.<sup>175</sup>

Justice Blackmun further urged that a specific application of a general program that distributes benefits neutrally may violate the Establishment Clause.<sup>176</sup> Relying on past decisions, he noted that a general program that grants assistance to disadvantaged students in both secular and sectarian schools would violate the Establishment Clause if the program provided teachers to schools.<sup>177</sup> Such a program, he emphasized, would still be invalid even if the teachers were provided directly to students and parents rather than to sectarian schools.<sup>178</sup> Thus, Justice Blackmun concluded, the constitutionality of the IDEA-sponsored aid challenged in *Zobrest* depended on the presence of any dispositive difference between a teacher and a sign-language interpreter.<sup>179</sup>

Justice Blackmun first recognized that the Court has "always proscribed" government benefits that provide "the opportunity for the transmission of sectarian views."<sup>180</sup> He added that past decisions make it clear that the government may not provide a "medium for communication of a religious message."<sup>181</sup> Justice Blackmun maintained that a sign-language interpreter in a sectarian school would be a "conduit" for religious messages, and that providing an interpreter, unlike merely providing funds, fosters intimate, daily government participation.<sup>182</sup> This participation, he contended, creates an appearance that the government is supporting particular religious

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175. *Zobrest*, 113 S. Ct. at 2472 (Blackmun, J., dissenting).

176. *Id.* at 2473 (Blackmun, J., dissenting). The Court has made a similar point before. See *Bowen v. Kendrick*, 487 U.S. 589, 618-622 (1988) (holding that on its face the Adolescent Family Life Act did not violate the Establishment Clause, but remanding for a determination whether particular applications of the statute had the primary effect of advancing religion).

177. *Zobrest*, 113 S. Ct. at 2473 (Blackmun, J., dissenting) (citing *Aguilar v. Felton*, 473 U.S. 402, 410 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985); *Meek v. Pittenger*, 421 U.S. 349, 371 (1975)).

178. *Id.* (Blackmun, J., dissenting) (citing *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986); *Wolman v. Walter*, 433 U.S. 229, 250 (1977)).

179. *Id.* (Blackmun, J., dissenting).

180. *Id.* (Blackmun, J., dissenting) (quoting *Wolman*, 433 U.S. at 244).

181. *Id.* at 2474 (Blackmun, J., dissenting). Justice Blackmun relied on the Court's decision in *Wolman*, which prohibited government provision of instructional equipment such as slide projectors and tape recorders that could be used to convey religious messages. *Zobrest*, 113 S. Ct. at 2474 (Blackmun, J., dissenting) (citing *Wolman*, 433 U.S. at 249). He also relied on *Meek*, which prohibited government provision of teachers and counselors in sectarian schools for fear they would further religious views. *Id.* (Blackmun, J., dissenting) (citing *Meek*, 421 U.S. at 371).

182. *Zobrest*, 113 S. Ct. at 2474 (Blackmun, J., dissenting).

influences.<sup>183</sup> In conclusion, Justice Blackmun expressed concern that the Court had strayed from nearly fifty years of Establishment Clause jurisprudence.<sup>184</sup>

#### IV. ANALYSIS

Although it arguably side-stepped *Locke*,<sup>185</sup> the *Zobrest* Court reached a sound result in light of the intent of Congress to "open the door" to education for disabled children.<sup>186</sup> At the same time, by once again ignoring *Lemon*, the Court compounded the confusion surrounding the dubious three-prong test. These aspects of the *Zobrest* decision are examined below, followed by a proposal of a more flexible alternative to the *Lemon* test.

##### A. The IDEA Supports the Zobrest Result

As noted above, *Locke* requires that whenever possible, courts resolve cases on nonconstitutional grounds before considering constitutional questions.<sup>187</sup> Nonetheless, the *Zobrest* Court brushed this rule aside to reach the Establishment Clause issue and did not specifically decide whether the IDEA required the state to provide services on-site in a sectarian school chosen by parents.<sup>188</sup> Had the Court inquired into the requirements of the IDEA, a reading of the regulations promulgated thereunder would have suggested that the state was obligated to provide a sign-language interpreter for James Zobrest.<sup>189</sup> In sum,

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183. *Id.* (Blackmun, J., dissenting).

184. *Id.* at 2475 (Blackmun, J., dissenting).

185. *See id.* at 2469-71 (Blackmun, J., dissenting).

186. *See* Board of Educ. v. Rowley, 458 U.S. 176, 192 (1982); *see also supra* note 30.

187. *See supra* notes 145-48, 167-71 and accompanying text.

188. *See Zobrest*, 113 S. Ct. at 2466; *supra* note 36.

189. Federal regulations require public agencies to make special education and related services available to children placed in private schools by their parents. 34 C.F.R. § 300.403 (1993). Under the heading "Children with Disabilities Enrolled by Their Parents in Private Schools," the Code of Federal Regulations provides in part:

The [state educational agency] shall ensure that—

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services . . . .

34 C.F.R. § 300.451(a) (1993). This provision relies on the authority of 20 U.S.C. § 1413(a)(4)(A) (Supp. IV 1992).

Furthermore, IDEA regulations require public agencies to meet the requirements of Education Department General Administrative Regulations ("EDGAR"). *See* 34 C.F.R. § 300.451(b) (1993) (incorporating EDGAR regulations at 34 C.F.R. §§ 76.651-.662). EDGAR regulations provide that "[t]he program benefits that a subgrantee [state]



though the Court reached a result suggested by IDEA requirements, by avoiding *Locke* the Court neglected an opportunity to affirmatively comment on the powers and funding the IDEA provides to state and local agencies.

In addition to comporting with regulatory provisions, the *Zobrest* result supports the policy behind the IDEA. The Court's own language demonstrates its desire to not unnecessarily sacrifice the needs of disabled children under the Establishment Clause: "*If a child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education.*"<sup>190</sup> The Court's decision is supported by the purpose behind the IDEA and the IDEA's aim to make disabled children the primary beneficiaries of

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provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools." 34 C.F.R. § 76.654 (1993). In addition, EDGAR regulations provide that "[a] subgrantee [state] may use program funds to make public personnel available in other than public facilities—(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and (b) If those benefits are not normally provided by the private school." 34 C.F.R. § 76.659 (1993). These regulations suggest that at least some IDEA services must be provided on-site at sectarian schools. See Dixie S. Huefner and Steven F. Huefner, *Publicly Financed Interpreter Services for Parochial School Student with IDEA-B Disabilities*, 21 J.L. & EDUC. 223, 230-31 (1992); see also Joseph R. McKinney, *Special Education and the Establishment Clause in the Wake of Zobrest: Back to the Future*, 85 Educ. L. Rep. 587 (West) (Dec. 2, 1993).

Still, federal regulations prohibit the use of federal funds to pay for "[r]eligious worship, instruction, or proselytization." 34 C.F.R. § 76.532 (1993). The *Zobrest* Court accepted the United States' interpretation in its amicus curiae brief that 34 C.F.R. § 76.532(a)(1) "merely implements the Secretary of Education's understanding of (and thus is coextensive with) the requirements of the Establishment Clause." *Zobrest*, 113 S. Ct. at 2465 n.7 (citing Brief for United States as *Amicus Curiae* 23; Brief for United States as *Amicus Curiae* in *Witters v. Washington Dept. of Servs. for the Blind*, O.T.1985, No. 84-1070, p. 21, n.11). The Court also commented that the decision in *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 369 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 188 (1991) that the regulation prohibits provision of a sign-language interpreter to a sectarian school student was reached without the benefit of the United States' views. *Id.* See *supra* notes 36, 171. Thus, the Court seems to say that 34 C.F.R. § 76.532 does not bar the provision of at least some IDEA services in sectarian schools. For additional discussion of IDEA requirements, see *supra* part II.A-B.

190. *Zobrest*, 113 S. Ct. at 2469 (emphasis added).

the statute.<sup>191</sup> Given both the importance of education<sup>192</sup> and the great needs of disabled children,<sup>193</sup> the *Zobrest* ruling properly incorporates public policy.

### B. Another Snub for the Lemon Test

The *Lemon* Court specifically fashioned its test to evaluate government programs that touch sectarian schools.<sup>194</sup> It would seem that because James Zobrest participated in such a program,<sup>195</sup> the Court should have directly applied the *Lemon* test to his case. Yet the Court looked to other decisions, which had elaborated upon the three prongs set forth in *Lemon*, as specific benchmarks for deciding *Zobrest*.<sup>196</sup> In so doing, the Court suggested reliance upon critical factors, not particularly stressed in *Lemon*, that have informed post-*Lemon* Establishment Clause cases addressing state aid to sectarian schools: Programs that are made neutrally available to students and parents without reference to religion, and that benefit sectarian schools only incidentally, indirectly, and as a consequence of private choices, generally satisfy constitutional standards.

In lieu of a rote application of the *Lemon* test, the *Zobrest* Court had available for comparative analysis two pairs of cases representing two distinct lines of thought in sectarian school aid controversies. The Court's selection of cases to apply reflected a belief that private choice

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191. *Id.* The Court specifically recognized that "[h]andicapped children, not sectarian schools, are the primary beneficiaries of the IDEA." *Id.* In addition, the Court determined that "the function of the IDEA is hardly 'to provide desired financial support for nonpublic, sectarian institutions.'" *Id.* (quoting *Witters*, 474 U.S. at 488). See 20 U.S.C. § 1400 (c) (Supp. IV 1992) (stating that the IDEA's purpose is "to assure that all children with disabilities have available to them . . . a free appropriate public education").

192. As one commentator expressed:

Education has been viewed by the Supreme Court in *Brown v. Board of Education* as perhaps the most important function of state and local governments. Therefore, the importance of the right to an education has often tipped the balance between states and individuals in favor of individual rights.

Cynthia Pearson Purvis, Comment, *The Eleventh Amendment Controversy Continues: The Availability and Scope of Relief Against State Entities Under the Education of the Handicapped Act*, 22 IND. L. REV. 707, 729 (1989) (citation omitted).

193. According to congressional findings preceding the IDEA, "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law." 20 U.S.C. § 1400(b)(9) (Supp. IV 1992).

194. See *supra* notes 46-60 and accompanying text.

195. See *supra* notes 35-37 and accompanying text for a discussion of how IDEA funding touches sectarian schools through parents' decisions to place their children in such schools.

196. See *supra* notes 149-66 and accompanying text.

is a critical aspect of school aid propriety. First, the Court could have followed the decisions of *Meek*<sup>197</sup> and *Ball*,<sup>198</sup> each of which struck down statutes that provided teachers and teaching equipment in sectarian schools.<sup>199</sup> By analogizing a sign-language interpreter to the teachers in *Ball* or the communication instruments in *Meek*, the Court might have readily concluded that providing a sign-language interpreter in a sectarian school violates the Establishment Clause.<sup>200</sup>

Instead, the Court chose to follow another pair of cases, *Mueller*<sup>201</sup> and *Witters*.<sup>202</sup> Those decisions upheld general programs that touched sectarian schools, yet did so neutrally and only as a consequence of students' and parents' private choices.<sup>203</sup> The *Zobrest* Court invoked this causal aspect of *Mueller* and *Witters* in stressing the Zobrests' personal decision to enroll their child in a Catholic school.<sup>204</sup> The *Zobrest* Court also placed great weight on whether government funds will support only students or instead may be diverted to support a school's religious purposes.<sup>205</sup> The Court noted with approval that only an individual deaf child would have directly benefited had a sign-language interpreter been provided to James Zobrest under the IDEA.<sup>206</sup>

### C. A More Flexible Alternative

*Zobrest* highlights the Court's struggle to settle on an effective approach for analyzing state aid to schools under the Establishment Clause.<sup>207</sup> The characteristics of the instrument of state aid at issue in *Zobrest*, a sign-language interpreter, illustrate the limitations of the Court's current framework: A sign-language interpreter is not a teacher, and thus does not control the content of the messages directed to schoolchildren.<sup>208</sup> Instead, an interpreter conveys messages generated by others, much like a mechanical communication device.

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197. 421 U.S. 349 (1975).

198. 473 U.S. 373 (1985).

199. See *id.* at 386-87; *Meek*, 421 U.S. at 370.

200. See *Zobrest*, 113 S. Ct. at 2473-74 (Blackmun, J., dissenting).

201. 463 U.S. 388 (1983).

202. 474 U.S. 481 (1986).

203. *Id.* at 487-89; *Mueller*, 463 U.S. at 399.

204. *Zobrest*, 113 S. Ct. at 2467-68.

205. *Id.* at 2469 & nn.10-11.

206. *Id.* at 2469; see *supra* text accompanying notes 155-56.

207. See *infra* notes 214-16, 248-49 and accompanying text for discussion further illustrating the difficulties the Court has encountered.

208. See *Ball*, 473 U.S. at 388 (discussing how "a teacher may knowingly or unwillingly tailor the content of the course to fit the school's announced goals").

Yet interpreters are individuals capable of self-generated expression, unlike tape recorders or film-strip projectors.<sup>209</sup> In sum, the program at issue in *Zobrest* defied ready analysis because it shared attributes with statutes the Court has deemed both constitutional and unconstitutional.<sup>210</sup>

Although the Court has not overruled *Lemon*,<sup>211</sup> *Zobrest* is only one of several Establishment Clause decisions in recent years to ignore the *Lemon* test.<sup>212</sup> As in earlier cases, the *Zobrest* Court had options other than avoiding the test that would have alleviated the uncertainty surrounding school-aid cases: the Court could have applied, revised, or rejected *Lemon*. Instead, the Court passed on an opportunity to clarify the test's much-questioned status. In response to the Court's inaction, both the need to reexamine *Lemon* and a better alternative to the *Lemon* test are explored below.

The limits of the *Lemon* test and the inconsistency with which it has been applied are substantial.<sup>213</sup> Since the early years of the test, the Court and its individual members have recognized its limitations and questioned its value.<sup>214</sup> Indeed, in *Lemon* itself, the Court conceded

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209. See *Wolman*, 433 U.S. at 247 (discussing how a therapist might have opportunities to transmit religious views).

210. For example, the provision of a sign-language interpreter to a disabled child in a sectarian school is the result of the private decision of parents to place the child in a sectarian school, as with the statute upheld in *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). See *supra* notes 72-83 and accompanying text. On the other hand, a sign-language interpreter is a government employee who would be involved in a child's sectarian environment, as with the statute struck down in *Aguilar v. Felton*, 473 U.S. 402 (1985), which provided special education services for deprived children taught by public school teachers in sectarian school classrooms. *Id.* at 406.

211. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 n.7 (1993) ("*Lemon*, however frightening to some, has not been overruled.").

212. See *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228, 252 (1982); *supra* notes 116-28 and accompanying text.

213. Compare *Meek*, 421 U.S. 349 (1975) (holding that public employees entering a sectarian school to provide auxiliary services violates the Establishment Clause) with *Wolman*, 433 U.S. 229 (1977) (concluding that providing auxiliary services by public employees to sectarian students outside the sectarian school does not violate the Establishment Clause). The *Lemon* test has been greatly criticized by legal scholars for the confusion it has produced. See, e.g., Mitchell, *supra* note 44, at 874 & n.34 ("[T]he most compelling criticism of the three-part test is the fact that it has failed to generate any clear or consistent First Amendment jurisprudence." (quoting DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES 106 (1991))); Bowen, *supra* note 63, at 155 ("The inherent weaknesses of the *Lemon* test became apparent in the inconsistent results the test produced in cases with relatively similar facts and issues." (footnote omitted)); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5, 6 (1987) ("It is fair to say that [decisions subsequent to *Lemon*] have produced a conceptual disaster area.").

214. "While this principle [the three-part test] is well settled, our cases have also

that it could "only dimly perceive the lines of demarcation" in Establishment Clause jurisprudence.<sup>215</sup> This elusiveness is apparent in the *Lemon* test's effective evolution from a three-prong test to a two-prong test.<sup>216</sup>

Recently, the Court has split into two opposing factions concerning Establishment Clause analysis. One side advocates reformulating the Court's approach into a "coercion test,"<sup>217</sup> while the other advocates refining and focusing principally on the current endorsement inquiry.<sup>218</sup> The coercion test would ask whether the government has "coerce[d] anyone to support or participate in any religion or its exercise."<sup>219</sup> The endorsement test would ask whether a "reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief."<sup>220</sup>

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emphasized that it provides 'no more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges." *Mueller*, 463 U.S. at 394 (alteration in original) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

Eight of the Justices presently on the Court have expressed their dislike for the structure and the application of the *Lemon* test. Justice Scalia adamantly opposes the test, calling it "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel*, 113 S. Ct. at 2149 (Scalia, J., concurring); see Linda P. Campbell, *High Court OKs New Look at Guidelines*, CHI. TRIB., Nov. 30, 1993, §1, at 1.

While Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy favor a test that would allow "governmental religious practices as long as nonbelievers did not feel coerced," Justices O'Connor, Blackmun, Stevens, and Souter favor the endorsement test first formulated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*. Linda Greenhouse, *God and Country: A School Case Goes to the Heart of a Great Issue*, N.Y. TIMES, Dec. 5, 1993, § 4 (Late Edition), at 1. Justice Ginsburg's views are not yet known. *Id.*

215. *Lemon*, 403 U.S. at 612.

216. For a discussion of this evolution, see *supra* notes 111-15 and accompanying text.

217. This group includes Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy. See *supra* note 214.

218. This group includes Justices O'Connor, Blackmun, Stevens, and Souter. See *supra* note 214.

219. *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., dissenting).

220. *Witters*, 474 U.S. at 493 (O'Connor, J., concurring). See also *supra* notes 93-95 and accompanying text. If it revises *Lemon*, the Court will not likely revert to the *Everson* neutrality standard, for the Court has repeatedly emphasized that even though a statute may neutrally distribute benefits, it still may violate the Establishment Clause. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). Under *Everson*, almost any provision of the IDEA that touched a sectarian school would be upheld as constitutional, for the IDEA is a statute that "distributes benefits neutrally" to disabled children without regard to religion. See *Zobrest*, 113 S. Ct. at 2467; see also Guernsey & Sweeney, *supra* note 6, at 269 (noting that if the neutrality approach were used today, fewer questions would arise about the validity of state aid under the EHA).

An advantage of both tests is that each would simplify the Court's inquiry by restricting it to a specific issue. Still, each test is flawed: The endorsement test may not always uphold historical practices previously found constitutional by the Court.<sup>221</sup> The coercion test does not consider the "subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others."<sup>222</sup>

The coercion test also possesses another, more serious fault. Even its advocates must admit that it "would permit Congress to enact a law declaring Christianity to be the official religion of the United States—so long as the law did nothing to compel anyone to support this official religion by attendance, or financial support, or some other means."<sup>223</sup> Since *Everson*,<sup>224</sup> the Court has held that the First Amendment, at a minimum, prohibits both the federal government and state governments from establishing a church.<sup>225</sup> This was one of the ultimate dangers that the Framers attempted to eliminate as they drafted the Establishment Clause.<sup>226</sup> Thus, the coercion test cannot provide the protection required by the Framers and the Court.

As the rise of these two tests and the setting aside of *Lemon* in recent cases demonstrate, the Court is reluctant to evaluate government action with a rigid three-prong test. This reluctance demonstrates the need for a comprehensive new test. Such a test can be formulated by condensing the three-prong test into a sole criterion that calls for close scrutiny of the *effects* that a statute may have on the relationship between government and religious groups. Specifically, for the reasons discussed below, the effect prong of the *Lemon* test should be refined, while the secular purpose and entanglement prongs should be abandoned.

First, as mentioned above, the Court's application of the secular purpose prong of the *Lemon* test has become an empty exercise.<sup>227</sup> Second, the Court's application of the entanglement prong has led to an "insoluble paradox."<sup>228</sup> The Court has indicated that state aid to

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221. *Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring in part, dissenting in part).

222. *Id.* at 627-28 (O'Connor, J., concurring in part and concurring in the judgment).

223. Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 968 (1993).

224. 330 U.S. 1 (1947).

225. *Id.* at 15.

226. *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting); *Everson*, 330 U.S. at 12-13.

227. See *supra* notes 111-15 and accompanying text.

228. *Wallace*, 472 U.S. at 109 (Rehnquist, J., dissenting) (citing *Roemer v.*

sectarian schools should be monitored to prevent its being used for sectarian purposes.<sup>229</sup> Yet at the same time, the Court has determined that a state's close supervision of a sectarian school constitutes entanglement.<sup>230</sup> This dilemma renders the entanglement prong of limited value.

The effect prong is the only part of the *Lemon* test that provokes fruitful analysis of interactions between church and state.<sup>231</sup> The Court can refine this prong to account for the dangers that the purpose and entanglement prongs were created to protect against. Indeed, the Court's recent treatment of the coercion and endorsement tests suggest that it now recognizes the utility of the effect prong.<sup>232</sup> Both the coercion and endorsement tests ultimately turn on the *effects* caused by a challenged program,<sup>233</sup> although each recognizes a different threshold of when a program violates the Establishment Clause.

*Zobrest* illustrates how, without relying on the *Lemon*, endorsement, or coercion tests, the Court can reach the right result on an Establishment Clause issue. Despite the presence on the Court of proponents of both the coercion and endorsement tests, in *Zobrest* the Court did not expressly inquire into the presence of coercive pressure or endorsement. Moreover, under either the coercion or endorsement

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Maryland Bd. of Pub. Works, 426 U.S. 736, 768-69 (1976) (White, J., concurring in the judgment)). Justice White first identified the "insoluble paradox" raised by the entanglement prong in his concurring opinion in *Lemon*. 403 U.S. at 668 (White, J., concurring in the judgment).

In *Wallace*, Justice Rehnquist criticized the entanglement prong for its self-defeating character. 472 U.S. at 110 (Rehnquist, J., dissenting). After expressing his dislike for *Lemon*, Justice Rehnquist advocated a historical test that affords more flexibility in government involvement in religion as long as the government does not assert a preference for one religious group over another. *See id.* at 113.

229. *Wallace*, 472 U.S. at 109 (Rehnquist, J., dissenting).

230. *Id.* (Rehnquist, J., dissenting).

231. *See generally* Paulsen, *supra* note 3, at 804 ("It is not the motivation or identity of a law's supporters, but the *effects* of a law that properly determine its constitutionality.").

232. *See Lee v. Weisman*, 112 S. Ct. 2649, 2655-61 (1992) (declining to specifically apply the *Lemon* test, but focusing in substance on the effects of a religious exercise at a public school graduation, *i.e.*, public pressure and compulsion to participate in the religious exercise); *Allegheny*, 492 U.S. at 592-98 (applying Justice O'Connor's concurring opinion in *Lynch* and focusing on her endorsement concept as it applied to the effect prong of *Lemon*).

233. *See Mitchell*, *supra* note 44, at 874 (discussing how Justice O'Connor refined the effect prong of the *Lemon* test with her endorsement concept); Paulsen, *supra* note 3, at 823 (discussing the origin of the coercion test in Justice Kennedy's discussion of the effect prong in his *Allegheny* opinion) (citing *Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

test, the *Zobrest* result would most likely be the same.<sup>234</sup> Providing a sign-language interpreter for a deaf child in a sectarian school cannot be said to coerce anyone to adopt a certain religion.<sup>235</sup> In addition, because the IDEA would make interpreters equally available to all students, it would not endorse sectarian schools.

In *Zobrest*, the Court identified the characteristics of the IDEA and analyzed their effect on the relationship between the state and the sectarian school.<sup>236</sup> In so doing, *Zobrest* essentially employed a test that examines the religion-supporting effects of a program in light of the individual interests advanced by the program. *Zobrest*, therefore, exemplifies how a flexible balancing approach allows the Court to abandon *Lemon* and its progeny to uphold a worthy program.

The *Zobrest* Court emphasized certain factors it now views as weighing heavily on a program's propriety. The Court characterized the following attributes of the IDEA as supporting constitutionality: (1) the personal decision-making power afforded parents;<sup>237</sup> (2) the lack of reimbursement of normal operating expenses to sectarian schools;<sup>238</sup> (3) the purpose of meeting the educational needs of disabled children;<sup>239</sup> and (4) the neutrality of distribution of IDEA benefits.<sup>240</sup> The Court then balanced these characteristics against the following effects the IDEA would have had in providing James Zobrest a sign-language interpreter: (1) the placement of a government-funded employee in a sectarian school;<sup>241</sup> (2) the interpreter's conveying secular as well as religious material;<sup>242</sup> and (3) an incidental benefit accruing to a sectarian school.<sup>243</sup> The complexity and number of these factors were better accounted for by the balancing test the Court effectively applied than they would have been had the Court applied a rigid three-prong test.

Following the approach manifested in *Zobrest* will allow the Court to effectively consider the changing interests of both the government<sup>244</sup>

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234. See Paulsen, *supra* note 3, at 861.

235. *Id.*

236. *Zobrest*, 113 S. Ct. at 2467-69.

237. *Id.* at 2469.

238. *Id.* at 2468.

239. *Id.* at 2469.

240. *Id.* at 2467.

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

242. *Id.* at 2469.

243. *Id.* at 2468.

244. The IDEA exemplifies a modern interest in rights and protections for the disabled. See 20 U.S.C. § 1400 (b)-(c) (1988 & Supp. IV 1992) (listing congressional findings prior to the IDEA's enactment and stating the IDEA's purpose); *supra* notes 20,



and individuals. Still, the Court should guard against allowing a balancing test to grow so intricate that it obscures the historical purpose of the Establishment Clause.<sup>245</sup> The Court can avoid this danger by grounding each balancing inquiry in the fundamental question of whether the government has effectively asserted a preference for a given religion.<sup>246</sup>

Perhaps the Court has not expressly abandoned the *Lemon* test because it cannot decide what test would be an appropriate replacement.<sup>247</sup> Furthermore, as Justice Scalia has suggested, the *Lemon* test may be a convenience that the Court does not want to sacrifice: the Court can apply the test when it yields a favored result, or ignore the test when it impedes the Court's agenda.<sup>248</sup> Indeed, *Zobrest*, *Marsh*, and *Lee* suggest that in this way the Court has achieved its desired results without expressly overruling *Lemon* or affirmatively replacing it. Yet this arbitrary approach to Establishment Clause issues is not a satisfactory basis for states to predict the constitutionality of their programs or for lower courts to determine the constitutionality of those programs.

## V. IMPACT

### A. *The Confusing Reign of Lemon Continues*

As suggested by Chief Justice Rehnquist, Establishment Clause

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193. Congress continuously faces new national interests and needs. The Court must employ tests that provide sufficient flexibility to accommodate the interests reflected in the legislation it examines. See 20 U.S.C. §§ 1400-85 (1988 & Supp. IV 1992).

245. After examining the historical background of the clause, the *Everson* Court concluded that at the very least, neither the federal government nor a state government can establish a church. 330 U.S. at 8-15. See also *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting) (stating that "[t]he true meaning of the Establishment Clause can only be seen in its history" (citing *Walz v. Tax Comm'r*, 397 U.S. 664, 671-73 (1970))); *Lynch*, 465 U.S. at 673-78).

246. See *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting) ("The Clause was . . . designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

247. See Dixie S. Huefner, *Zobrest v. Catalina Foothills School District: A Foothill in Establishment Clause Jurisprudence?* 87 Educ. L. Rep. 15 (West) (Jan. 27, 1994). Another reason that has been advanced for the Court's reluctance to replace the *Lemon* test is the Court's reliance on "substantial precedent that supports the application of the *Lemon* test to establishment clause controversies." Bowen, *supra* note 63, at 156 (footnote omitted).

248. Justice Scalia, a critic of the *Lemon* test, has frankly observed that "[w]hen we wish to strike down a practice [the test] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely." *Lamb's Chapel*, 113 S. Ct. at 2150 (Scalia, J., concurring in the judgment) (citations omitted). See also Campbell, *supra* note 214, at 1.

jurisprudence is a delicate area of constitutional law.<sup>249</sup> Perhaps this is so because Establishment Clause issues demand a fact-intensive analysis.<sup>250</sup> Based on the facts presented in *Zobrest*, the Court has carved out another appropriate use of public funds in sectarian schools. A novel feature of the use approved by *Zobrest* is the placement of a governmental employee in a sectarian school.<sup>251</sup> This aspect of *Zobrest* may lay the groundwork for future attempts to place public workers in sectarian institutions.

As it stands, *Zobrest* will foster uncertainty for lower courts called upon to apply the *Lemon* test. Some courts may conclude that because the *Zobrest* majority relied on cases that had relied on *Lemon*, the Court did not overrule the three-prong test.<sup>252</sup> Other courts may ignore the *Lemon* test, as did the *Zobrest* Court itself.<sup>253</sup>

Soon the Court's docket will present it with another opportunity to

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249. *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (quoting *Lemon*, 403 U.S. at 612).

250. *Lee*, 112 S. Ct. at 2661.

251. *Zobrest*, 113 S. Ct. at 2469; see also *id.* at 2471 (Blackmun, J., dissenting) (criticizing the majority for authorizing for the first time a public employee's direct involvement in religious education).

252. See, e.g., *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993). In *Gonzales*, the Seventh Circuit held that the display of a crucifix in a public park violated the Establishment Clause. *Id.* at 1422-23. The court found that the crucifix violated the second prong of the *Lemon* test by conveying a primary message of the township's endorsement of Christianity. *Id.*

Before applying the *Lemon* test, the *Gonzales* court assessed the test's precedential value. *Id.* at 1417-18. The court noted that in *Lamb's Chapel* the Supreme Court "reminded" courts that *Lemon* is controlling precedent for analyzing Establishment Clause issues. *Id.* The court also noted that many times the Supreme Court avoids employing the *Lemon* test and instead relies on cases with facts similar to the facts before it. *Gonzales*, 4 F.3d at 1418 (citing *Lee*, 112 S. Ct. at 2655; *Marsh v. Chambers*, 463 U.S. 783 (1983)).

The *Gonzales* court concluded its examination of the recent treatment of *Lemon* with the *Zobrest* case, stating that although the *Zobrest* Court did not mention the *Lemon* test, the test had not been overruled. *Id.* at 1419. The court reasoned that because the *Zobrest* majority relied on cases, such as *Mueller* and *Witters*, that relied on *Lemon*, the *Lemon* test has not been abandoned. *Id.*

253. See, e.g., *Warner v. Orange County Dep't of Probation*, 827 F. Supp. 261, 264-69 (S.D.N.Y. 1993). The *Warner* court denied a defendant's motion to dismiss a claim of an Establishment Clause violation rooted in religious elements of Alcoholics Anonymous meetings that the plaintiff was ordered to attend as part of his probation. *Id.* at 267-69. Before analyzing the plaintiff's claim, the court addressed the *Lemon* test. *Id.* at 266. The court expressed uncertainty over relying on the test, which it attributed to the recent decisions in *Lee* and *Zobrest*. *Id.* According to the court, those two decisions, "although neither directly overturning nor limiting the *Lemon* holding, seem to indicate that the Court does not intend to rely so heavily upon it." *Id.* The court then stated that it would analyze the facts of *Warner* without "undue reliance" on the *Lemon* test and relied instead on *Lee*. *Warner*, 827 F. Supp. at 266-69.

reexamine the *Lemon* test.<sup>254</sup> After avoiding *Lemon* for the third time in ten years,<sup>255</sup> the Court cannot easily pass again on overhauling the three-prong test. What *Zobrest* suggests is that the Court should opt for injecting flexibility into its Establishment Clause framework by adopting a balancing test that focuses on the effect of state aid to sectarian institutions.<sup>256</sup>

### B. Future Interpretations of the IDEA

In *Zobrest*, the Court appeared to endorse a broad reading of the IDEA's reach and requirements. Specifically, *Zobrest* upheld a school district's assisting a child enrolled in a sectarian school under the IDEA, even though the child could have attended a public school.<sup>257</sup> The *Zobrest* Court also approved the placement of a public employee in a sectarian school to assist in communicating religious instruction to a student.<sup>258</sup> After *Zobrest*, the Court provided another broad reading of the IDEA in *Florence County School District Four v. Carter*.<sup>259</sup> In *Florence County*, the Court unanimously held that the IDEA does not bar reimbursing parents for private school tuition where the state has failed to provide appropriate public school education for their child and has failed to place their child in a state-approved private school.<sup>260</sup> The Court also held that parents are not barred from reimbursement merely because they choose to send their child to a private school that is not state-approved.<sup>261</sup> Together, *Zobrest* and *Florence County* suggest

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254. The Court has accepted Board of Educ. of the Kiryas Joel Village Sch. Dist. v. Grumet for argument in 1994. 618 N.E.2d 94 (N.Y. 1993), cert. granted, 114 S. Ct. 544 (1993). The issue in *Grumet* is whether a New York statute that created a separate public school district to educate the disabled children of a Hasidic religious village violates the Establishment Clause. *Id.* at 96. The Court of Appeals of New York held that the statute violated the second prong of the *Lemon* test by "convey[ing] a message of governmental endorsement of religion." *Id.* at 101. The court reasoned that such a message is conveyed because the statute accommodates the Hasidic community's desire to insulate its students. *Id.* The court noted that the statute created an entirely new school district, rather than merely providing special services to disabled children at a neutral site. *Id.*

255. *Lee, Marsh*, and *Zobrest* demonstrate the Court's avoidance of the *Lemon* test in recent years. See *supra* notes 116-28 and accompanying text.

256. See *supra* part IV.C.

257. The *Zobrests* did not enroll their son in a sectarian school because the public school could not provide their child with his IEP; the *Zobrests* decided to enroll him in a Catholic school for religious reasons. *Zobrest*, 113 S. Ct. at 2464.

258. *Id.* at 2471 (Blackmun, J. dissenting).

259. 114 S. Ct. 361 (1993).

260. *Id.* at 365-66.

261. *Id.* at 366. The Court noted, however, that total reimbursement would not be provided if the cost of the private schooling was unreasonable. *Id.*

that the Court will resolve conflicts under the IDEA in favor of disabled children wherever possible.

## VI. CONCLUSION

The Supreme Court's decision in *Zobrest* illustrates two prominent trends. First, it demonstrates the Court's tendency to broadly interpret the IDEA. Second, *Zobrest* adds to the uncertainty over the vitality of the three-prong *Lemon* test. While the *Zobrest* decision may represent a victory for disabled children seeking education in a sectarian school, the Court has only heightened the need to revise the *Lemon* test in order to accommodate today's Establishment Clause controversies.

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