

April 2001

Moving the Baseline: The Contradiction at the Core of Constitutional Discourse over State Aid to Parochial Schools

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Andrew Stark, *Moving the Baseline: The Contradiction at the Core of Constitutional Discourse over State Aid to Parochial Schools*, 42 Wm. & Mary L. Rev. 1437 (2001), <https://scholarship.law.wm.edu/wmlr/vol42/iss4/7>

MOVING THE BASELINE: THE CONTRADICTION AT THE CORE OF CONSTITUTIONAL DISCOURSE OVER STATE AID TO PAROCHIAL SCHOOLS

ANDREW STARK*

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INTRODUCTION

At the heart of constitutional debate over government aid for parochial schools lies the Establishment Clause of the First Amendment—"Congress shall make no law respecting an establishment of religion." And at the heart of Establishment Clause jurisprudence lies the so-called "primary effects" test, articulated in 1971's *Lemon v. Kurtzman*. If the aid in question has a primary effect that either advances or inhibits religion, then it violates the Constitution.¹

It is true that the much-maligned but still influential *Lemon* case actually requires courts to execute three tests to determine whether a challenged program of aid to parochial schools runs afoul of the Establishment Clause, whether it be state-subsidized textbooks or state-financed field trips, state-supported counseling services or state-underwritten remedial instruction, vouchers or tuition-tax credits. Specifically, *Lemon* directs judges to ask not only whether the aid program in question has the primary effect of advancing or inhibiting religion, but also whether it reflects a clearly secular purpose and whether it avoids excessive entanglement with religion.² But as one commentator has noted, "the primary effect standard has emerged as the essence of establishment clause analysis."³ As far as the entanglement test is concerned, as Justice Thomas put it in the most recent Supreme Court parochial-school

1. 403 U.S. 602, 612 (1971).

2. *See id.*

3. Case Comment, *Statute Granting Tax Deduction for Tuition Paid By Parents of Sectarian and Nonsectarian School Children Does Not Violate the Establishment Clause: Mueller v. Allen*, 61 WASH. U. L.Q. 269, 284 (1983); *see also* *Porta v. Klagholz*, 19 F. Supp. 2d 290, 297 (D.N.J. 1998) (stating that the Supreme Court has "essentially collapsed the *Lemon* test so that the focus is on whether the challenged activity has the effect of advancing religion"); Richard E. Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57, 73 (1973) (stating that the entanglement test deals with a "secondary evil"); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 331-32 (1986) ("The three-part *Lemon* test thus becomes a modified one-part 'effects' test . . . the real issue in any religion clause case."). Although Justice O'Connor has advanced a competing "endorsement" test to determine the existence of an Establishment Clause violation, the Court has never used it in a government-aid-to-school case. *See* Eric J. Segall, *Parochial School Aid Revisited: The Lemon Test, the Endorsement Test and Religious Liberty*, 28 SAN DIEGO L. REV. 263, 280, 286 (1991).

aid case, *Mitchell v. Helms*, “[w]e acknowledged that our cases discussing excessive entanglement [apply] many of the same considerations as . . . our cases discussing primary effect, and we therefore [have] recast *Lemon*’s entanglement inquiry as simply one criterion relevant to determining a statute’s effect.”⁴ As for the “secular purpose” test, in *Mitchell*—as in all post-*Lemon* cases—those challenging the aid did not raise it as an issue; hence, as Justice Thomas said, “we will consider only [the aid’s] effect.”⁵

Indeed, having essentially refined the *Lemon* test down to one of its three prongs (the primary-effects test) the Supreme Court has further refined that prong itself. First, as one state supreme court noted as early as 1974 while summing up the evolution of recent U.S. Supreme Court doctrine: “In applying the ‘primary effects test,’ we must be guided by the realization . . . that this is no longer a primary effects test, but an ‘any effects test.’”⁶ As long as one of the aid’s effects (even if not its most significant effect) is to advance or inhibit religion, then it risks violating the Establishment Clause. Second, the Court has, to use Douglas Laycock’s term, “disaggregated” the test, deciding the question of whether a particular form of state aid “advances” religion in a manner

4. 120 S. Ct. 2530, 2540 (2000).

5. *Id.*

6. *Minnesota Civil Liberties Union v. State*, 224 N.W.2d 344, 353 (Minn. 1974). For a similar analysis, see Justice Powell’s opinion in *Committee for Public Education & Religious Liberty v. Nyquist*, where he stated:

Appellees, focusing on the term “principal or primary effect” which this Court has utilized in expressing the second prong of the three part test . . . have argued that the Court must decide in these cases whether the “primary” effect of New York’s tuition grant program is to subsidize religion. . . . We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a “primary” effect to promote some legitimate end under the State’s police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. . . . Any remaining question about the contours of the “effect” criterion [note that Justice Powell has even dropped the modifier “primary”] were resolved by the Court’s decision in *Tilton*, in which the plurality found the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might “in part have the effect of advancing religion.”

413 U.S. 756, 783 n.39 (1973). Likewise, in *Mitchell*, Justice Thomas dropped the modifier “primary” and speaks simply of determining an aid package’s effect. See *Mitchell*, 120 S. Ct. at 2540.

separate and apart from the approach it takes to the issue of whether it "inhibits" religion.⁷ Laycock offers a compelling criticism of this kind of disaggregation, but my purpose here is to accept it as a given, and then look far more closely at how courts determine whether, in fact, a particular form of state aid to parochial schools "advances" (as opposed to inhibits) religion. It is this question that is now the *sine qua non* of Establishment Clause jurisprudence.

More specifically, in this Article I critically examine the rhetorical structure of the arguments typically wielded by either side in cases involving state-supplied aid to parochial schools—from state-supported bus transportation to free textbooks, from vouchers to tuition tax credits, from state-financed test administration to state-sponsored supplemental instruction. Critics of the particular aid program at issue of course claim that such aid does have the effect of advancing religion, and defenders deny any such thing. In undertaking this analysis, I bring to light a contradiction that, in mirror-image form, lies at the heart of each camp's argumentation. I say "mirror-image," because in debating the first of what I shall identify as the effects test's two main issues, the pro-aid side embraces one particular set of assumptions and the anti-aid side a competing set. Yet in debating the test's second issue, they exchange positions, each now embracing what it had previously denied, and denying what it had previously embraced. I thus operate here within a tradition of commentary that exposes deep, structural "contradictions that . . . pervade the whole legal framework" in particular constitutional domains.⁸

In showing how each of the two competing positions on state aid for parochial schools rests on the same kind of contradiction (albeit one the mirror image of the other), I do not myself vindicate one of the two sides over its opponent. Following Michael Walzer, I resist imposing my own moral yardstick on Establishment Clause

7. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1007 (1990).

8. William E. Forbath, *Taking Lefts Seriously*, 92 YALE L.J. 1041, 1044 (1983) (reviewing THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982)); see also Andrew Stark, *Strange Bedfellows: Two Paradoxes in Constitutional Discourse over Corporate and Individual Political Activity*, 14 CARDOZO L. REV. 1343, 1343-44 (1993) (noting and rejecting the tendency of scholars to place great emphasis on the contradictions in the law and to take sides).

discourse; rather, I operate in an interpretive mode, one that struggles to find meaning in the text of constitutional discourse, in the way in which people explain and justify what they do, the stories they tell.⁹ As A.B. Atkinson puts it, it can often prove more fruitful when our concern lies with "the grammar of arguments about policy not with the advocacy of policies themselves."¹⁰

I take this approach principally because constitutional discourse over state aid to parochial schools is radically open; cases on the subject have been decided by slim majorities, justices themselves have shifted positions over time, and lower courts continue to produce conflicting decisions.¹¹ In fact, the only thing that remains stable is the rhetoric, the argumentation, that each side invariably advances no matter what kind of aid is at issue. Hence, it makes more sense to look at the enduring structural arguments both sides advance than to account for the current state of the law, which is anything but settled.

It is no small matter to show what it is that aid proponents and opponents are actually arguing about, for they themselves are often confused about exactly where it is they engage each other. In Part I, preliminary to my main argument, I show that the effects test actually resolves itself into two tests, which I call the "incentive" and "fungibility" tests, and it is over how to apply them in any given case that aid proponents and opponents divide. In Part II, I look at the core assumptions animating either side in debate over the

9. See MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987).

10. A.B. ATKINSON, *SOCIAL JUSTICE AND PUBLIC POLICY* 199 (1983) (internal quotations omitted).

11. See *Mitchell*, 120 S. Ct. at 2538-39. Justice Thomas noted the considerable "degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle. [Lower courts have] abandoned any effort to find coherence in our case law or divine the future course of our decisions." *Id.* Even *Mitchell* itself was not supported by a single majority opinion, as Linda Greenhouse noted in reporting the case for the *New York Times*: "[T]he court's jurisprudence on the subject of permissible public aid to religious schools has been in turmoil for years . . . and the justices' failure to settle on a single majority opinion after seven months showed that the turmoil was likely to continue." Linda Greenhouse, *Justices Approve U.S. Financing of Religious Schools' Equipment*, N.Y. TIMES, June 29, 2000, at A27; see also Kathleen M. Sullivan, *A Court Not Easy to Classify*, N.Y. TIMES, June 29, 2000, at A31 (stating that in *Mitchell*, "the court . . . divid[ed] rigidly into two camps, and . . . future outcomes do hang by one vote. [The] four justices [who formed the plurality] do not yet have a clear fifth vote for the constitutionality of vouchers" and other forms of aid).

incentive test, and in Part III, I do the same with the fungibility test. In Part IV, I tie up one loose end and then, in Part V and the conclusion, I show what will have become mounting evidence in the previous sections, namely, that the arguments that aid advocates typically make in urging that a particular aid program meets the first (incentive) test contradict, at a fundamental level, the claims they make in urging that it meets the second (fungibility) test. And, in a kind of mirror-image way, the same is true of aid-opponents: The arguments they habitually advance to show that a given program fails the first test contradict those they put forward in demonstrating that it fails the second test. Paradoxically, then, at the deepest level a converse set of contradictions underlies the arguments typically advanced by each side. My conclusion is that for constitutional debate in this arena ever to advance, each side is going to have to address the internal contradiction that lies at its heart.

I. MONEY, PURPOSES, INCENTIVES, AND FUNGIBILITY

To uncover the assumptions underlying the clashing stances taken by participants in debate over public aid to parochial schools, one must first characterize those stances. What, exactly, are opponents and defenders of aid arguing about when they debate the "effect" of any given aid program?

Here is a first cut: Aid opponents must (and indeed they invariably do) portray the program in question as one that illegitimately channels "*public* money [into] *private* purpose[s]," in particular, the parochial purposes of the private schools.¹² If the aid

12. *State ex rel. Reynolds v. Nusbaum*, 115 N.W.2d 761, 771 (Wis. 1962) (emphasis added). Although aid programs are invariably directed to private schools, parochial or not, in all jurisdictions where cases have arisen, parochial schools constitute the "vast majority of private schools." CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 308 (1993). Hence, as the Supreme Court put it in *Everson*, a case concerning the constitutionality of a New Jersey plan to extend free busing to private school students:

To say that New Jersey's appropriation and her use of the power of taxation for raising the funds appropriated are not for public purposes but are for private ends, is to say that they are for the support of religion and religious teaching. Conversely, to say that they are for public purposes is to say that they are not for religious ones [or for] the private character of the function of religious education.

can be so described, then the foundation for establishing its unconstitutionality has been laid. Aid defenders, for their part, can be understood as attempting to reverse that portrayal by depicting the money in question as private, not public, and/or the purposes in question as public, not private. After all, there can be nothing unconstitutional about the disposition of private money—whether it serves public and/or private purposes—nor can there be any constitutional violation *per se* when public purposes receive money, regardless of whether that money itself is better understood as public or private.

But how exactly do opponents and defenders engage the twin questions as to whether (a) the aid money and (b) its purposes are better understood as public or private? Although there is confusion on both scores which I try to dispel, I argue here that the first—the question of whether the money is public or private—boils down to what I will call the “incentive” test; and the second—the question of whether its purposes are public or private—resolves itself into what I will term the “fungibility” test.

A. The “Incentive” Test

How do aid defenders and opponents go about arguing this first question, the question of whether aid money is better understood as public or private? What’s at issue here?

When an aid defender conceives the money as private—*notwithstanding* its origins in the public treasury—it is *not* because the funds flow through the hands of private individuals (that is, parents) before they reach any parochial school. After all, although much aid—from tuition tax credits to assistance for purchasing certain kinds of instructional material—does flow through parental hands, not all aid does: think, for example, of state support for the administration of exams at parochial schools. And in any case, the court has said that mere “[p]ayment to the parent for transmittal to the denominational school does not have a cleansing effect and somehow cause the funds to lose their identity as public funds.”¹³

Everson v. Board of Educ., 330 U.S. 1, 51 (1947).

13. Wolman v. Essex, 342 F. Supp. 399, 415 (S.D. Ohio 1972), *vacated*, 421 U.S. 982 (1975); see Witters v. Washington Dep’t of Servs. for the Blind, 474 U.S. 481, 487 (1986) (“Aid

Instead, what matters—and what aid proponents are better understood as arguing—is that the particular quantum of aid in question, though perhaps originating in the public treasury, flows to the parochial school only because of the private choices parents make as to where to educate their children. Whether it flows indirectly to the parochial school, as do vouchers, or directly, as with per capita state aid for test administration, it goes to the parochial school in the first place only because parents have chosen to send their children there. The money flows at parental discretion, not that of the state, or so aid proponents urge;¹⁴ it reaches the parochial school only through “multiple layers of private choice” and is “completely devoid of state intervention or direction.”¹⁵ “Where . . . aid to parochial schools is available only as a result of decisions of individual parents,” the Supreme Court declared in *Mueller v. Allen*, “no ‘imprimatur of state approval’ can be deemed to have been conferred on any particular religion, or on religion

may have [unconstitutional] effect even though it takes the form of aid to students or parents.”).

Appellees seek to avoid *Meek* by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue [here] are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek* Despite the technical change in legal bailee, the program in substance is the same as before

Wolman v. Walter, 433 U.S. 229, 250 (1977), *overruled by Mitchell v. Helms*, 120 S. Ct. 2530 (2000).

14. See *Kotterman v. Killian*, 972 P.2d 606, 612-14 (Ariz. 1999).

Our more recent cases address [the effects test] not through the direct/indirect distinction but rather through the principle of private choice Although the presence of private choice is easier to see when aid literally passes through the hands of individuals . . . there is no reason why the Establishment Clause requires such a form.

Mitchell, 120 S. Ct. at 2544-45.

[B]ecause Chapter 2 [a federal block grant program for the purchase of books, reference materials, and computer hardware and software] provides equal expenditures for private and public school students, the program, it can be argued, ties a certain amount of aid to the back of each child. Therefore, any benefit that goes to a religious school [even if it doesn't flow through parental hands] does so “only as a result of the genuinely independent and private choices of individuals.”

Brief *Amici Curiae* of the Institute for Justice, et al. at 24, *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) (No. 98-1648), LEXIS, 1998 U.S. Briefs 1648.

15. *Kotterman*, 972 P.2d at 614.

generally.”¹⁶ Or, as Justice Souter memorably declared in *Rosenberger*, a case involving the payment of mandatory student fees to help underwrite campus religious publications, when aid flows to religious ends only as a result of the intermediating and genuinely independent choices of private individuals, it “break[s] the circuit” between “the government and the ultimate religious beneficiary” and therefore makes public money into “private money.”¹⁷

The argument over whether the money can best be understood as public or private, then, comes down to this question: How much “choice” do parents actually have? For as aid opponents typically point out, if the aid program itself somehow influences parents to send their children to parochial school—if it sufficiently skews their choices—then parents would seem to relapse into mere “conduits” for purposes the state aggressively wants to pursue, not “circuit breakers” with discretion of their own, and the money would then be better understood as public, not private.¹⁸ “For an individual’s choice to be truly voluntary and autonomous of government”¹⁹—for the parent “not [to be] a mere conduit, but free to spend the money he received in any manner”²⁰—“the state may not attempt to influence that choice.”²¹

The debate between the two sides thus becomes most heated, and identifies the true border area between public and private money, when the question is whether the aid program creates an “incentive” for parents to choose private as opposed to public school.

16. 463 U.S. 388, 399 (1983) (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

17. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 886 (1995) (Souter, J., dissenting). In *Mueller*, the Court stated:

[P]ublic funds become available [to religious schools] only as a result of numerous private choices of individual parents of school-age children. . . . The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

463 U.S. at 399-400.

18. See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 350 F. Supp. 655, 668 (S.D.N.Y. 1972) (“[T]he parent is a mere conduit for a payment of tuition.”).

19. Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV. L. REV. 696, 697 (1979) [hereinafter *Government Neutrality*].

20. *Minnesota Civil Liberties Union v. State*, 224 N.W.2d 334, 351 (Minn. 1974).

21. *Government Neutrality*, *supra* note 19, at 697.

As the Court put it in *Agostini v. Felton*, a case dealing with aid to parochial schools for supplemental instruction in secular subjects, if the aid "criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination," the money is more public than private.²² That is, when "the state create[s] . . . incentives for students to select sectarian schools" and thus plays a "role in the decisionmaking process that ultimately determine[s] where the funds [will] be spent," then "religious institutions" do not "receive vocational assistance 'only as a result of the genuinely independent and private choices of aid recipients.'"²³ In the presence of such incentives, the money is better understood as public, not private.

On the other hand, if the money comes with no state-imposed incentives or skewing mechanisms, then its expenditure is entirely up to the discretion of the parents and it becomes more private than public. "When the government offers [aid] that 'is in no way skewed towards religion'"—aid that "creates no financial incentive for parents to choose a sectarian school"—its disposition "cannot be attributed to state decisionmaking" and it "does not offend the Establishment Clause."²⁴ Or as Professor Eugene Volokh colorfully puts it: "No one cares whether government employees or Social Security recipients donate parts of their checks to religious organizations [or whether] [c]ollege students . . . spend G.I. Bill funds or Pell grants or government-subsidized student loans to attend college at Notre Dame or Georgetown, even to study theology."²⁵ No one cares, because those state programs inherently create no incentive for the recipients to spend their money on religious, as opposed to nonreligious, purposes. This means that private discretion remains inviolate and the money becomes truly private.

22. 521 U.S. 203, 231 (1997).

23. *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1200-01 (9th Cir. 1992) (quoting *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986)); see also *Mitchell v. Helms*, 120 S. Ct. 2530, 2543 (2000) (discussing the "close relationship between . . . incentives, and private choice").

24. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (quoting *Witters*, 474 U.S. at 488).

25. Eugene Volokh, *Vouched For*, NEW REPUBLIC, July 6, 1998, at 12, available in 1998 WL 14173424.

It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier²⁶

After all, in the absence of any state-structured incentives, it is no longer public but becomes private money.

The question of whether the money in question is private or public, then, comes down to the question of whether the program will skew the decision making of the parent concerned—whether the aid will make the parent more likely to send his or her child to parochial school.²⁷ If it will, the money necessarily remains public; if not, it becomes genuinely private. It is debate over this issue of “incentive”—over whether it exists in any given case—that I examine in Part II.

B. The “Fungibility” Test

Even if aid opponents are concededly right in describing the money in question as public, not private, aid defenders offer a second kind of reconceptualization: It is better, they say, to understand that aid as devoted not to private but to public purposes. How do they do this, and what exactly is the sticking point here between them and aid opponents? Consider some representative rhetoric.

26. *Witters*, 474 U.S. at 486-87. This is what the *Witters* Court meant when it declared that “[a]ny aid provided under Washington’s program [of aid for post-secondary students at both public and parochial colleges] creates no financial incentive for students to undertake sectarian education [and] is in no way skewed towards religion.” *Id.* at 487-88. Consequently, it “ultimately flows to religious institutions . . . only as a result of the genuinely independent and private choices of aid recipients.” *Id.* at 487. As long as such choice exists, then the state no more directs or controls that money than it does when it “issue[s] a paycheck to one of its employees, [knowing that the employee would] donate all or part of that paycheck to a religious institution.” *Id.* at 486-87; see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 848 (1995) (“The benefit to religion under the program, therefore, is akin to a public servant contributing her government paycheck to the church.”).

27. See Cathy R. Jones, Comment, *Mueller v. Allen: Do Tuition Tax Deductions Violate the Establishment Clause?*, 68 IOWA L. REV. 539, 546 (1983).

Far from taxing "some people to help others carry out their private purposes," the Court declared in the 1947 *Everson v. Board of Education* busing-aid case, "the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools."²⁸ Along similar lines, in *Board of Education v. Allen*, where the state-supported service in question was textbook provision for parochial schools, the Court spoke approvingly of the New York legislature's having found that the "public welfare and safety require that the state and local communities give assistance to [such] educational programs which are important to our national defense and the general welfare of the state."²⁹ Tax credits for private-school tuition, to take yet another example, are reconceived by aid defenders as measures in the public interest, not as means of promoting the private purposes of parochial schools. As William Billings of the National Christian Action Committee put it during a 1981 Congressional hearing: "Some opponents of tuition tax credits have made the charge that the credit in some way subsidizes private schools. It does so no more than a credit for home insulation subsidizes the insulation business. It is in the public interest to have people insulate their homes."³⁰

What presumption underlies these claims? When defenders of aid—whether busing or textbooks or tuition tax credits or anything else—argue that it goes to purposes or serves interests better understood as public rather than private, what they are essentially

28. 330 U.S. 1, 5-6 (1947).

29. 392 U.S. 236, 239 (1968).

30. *Tuition Tax Credits: Hearings on S.550 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance* (Part 2 of 2), 97th Cong. 204 (1981) (statement of William Billings) [hereinafter *Tuition Tax Credits Hearings*]; see also *Roemer v. Board of Pub. Works*, 426 U.S. 736, 746 (1976) ("[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all."); *Everson*, 330 U.S. at 16 (stating that New Jersey "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation"); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370, 375 (1930) ("Viewing the statute [providing state-supported busing to parochial school students] as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose."); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 350 F. Supp. 655, 658, 661 (S.D.N.Y. 1972) (stating that "it is the primary responsibility of the state to ensure the health, welfare and safety of children attending both public and nonpublic schools"; aid to parochial schools for, inter alia, janitorial and maintenance services is "public welfare legislation").

doing is analogizing to other services the state provides parochial schools and to which few object, because the state so clearly has a "public welfare" interest in supplying them.³¹ In *Zobrest v. Catalina Foothills School District*, where the Court upheld state provision of an interpreter for a deaf student attending parochial school, it declared:

We have never said that "religious institutions are disabled - by the First Amendment from participating in publicly sponsored social welfare programs." For if the Establishment Clause did bar religious groups from receiving general government benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."³²

Likewise with state-supported busing for parochial school students: "[T]he transportation of children to school [is] general welfare legislation similar to providing police and fire protection"³³ Similarly, publicly provided textbooks for parochial schools are like "public provision of police and fire protection, sewage facilities, and streets and sidewalks."³⁴

In sum, when they try to claim that aid for parochial schools is going for a public and not a private purpose, aid defenders conceive it as "analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools."³⁵ Conversely, when aid defenders urge that the money in

31. See *Rhoades v. School Dist.*, 226 A.2d 53, 62 (Pa. 1967).

32. 509 U.S. 1, 8 (1993) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 609 (1998), and *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981)).

33. Margaret A. Nero, Case Comment, *The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause*, 58 OHIO ST. L.J. 1103, 1113 (1997).

34. *Allen*, 392 U.S. at 242.

35. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 781 (1973) (citing *Everson*, 330 U.S. at 17-18); see also *Widmar*, 454 U.S. at 274-75 ("If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments . . .'" (quoting *Roemer*, 426 U.S. at 747)); *Nyquist*, 413 U.S. at 820-21 (White, J., dissenting) ("States do, and they may, furnish churches and parochial schools with police and fire protection as well as water and sewage facilities."); *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970) ("[A]id to schools teaching a particular religious faith [is no] more a violation of the Establishment Clause than providing 'state-paid policemen, detailed to protect children [at the schools] from the very real hazards of traffic.'")

question really is no longer the public's but rests in private control, they liken it to social security checks or Pell grants, money that may originate in the state treasury but the expenditure of which we clearly think of as private.³⁶

And just as it does not matter if the aid actually never goes through private hands—it is private money as long as parents' private choices direct it³⁷—so, aid defenders claim, it does not matter if it goes directly to a private school, as long as it serves public purposes. The district court's decision in *Lemon*, for example, upheld state programs under which parochial schools were reimbursed for part of the salaries they paid to teachers of secular subjects such as math and reading, on the grounds that "nonpublic education, by providing instruction in secular subjects, contributes significantly to the achievement of [a] public purpose. The Legislature, therefore, concluded that it is a governmental duty to support the achievement of this public welfare purpose by supporting the purely secular objectives of nonpublic education."³⁸ Likewise, in discussing *Wolman*, one commentator concluded that "if the state could administer and grade state prepared exams for private school students, then the state could reimburse the private schools for performing the identical tasks."³⁹ True, in such cases, it is parochial schools that are providing the teaching and testing and not the state, as with busing and textbooks. Yet the schools are doing so, aid proponents claim, in a public role, in the way in which any private entity might when the state contracts with it to provide a public service. That does not mean that the money in question—whether you want to call it public or private—is flowing

(alterations in original).

There is no dispute that churches may benefit, like any member of the public, from many generally available government services. . . . Therefore, a city need not exclude a church from city fire or police protection. This is true even though a church's purely religious aims are more easily advanced when it need not divert effort from the saving of souls to the prevention of fires.

Matthew S. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy*, 75 MARQ. L. REV. 903, 918-19 (1992).

36. See *supra* notes 24-26 and accompanying text.

37. See *supra* note 14 and accompanying text.

38. *Lemon v. Kurtzman*, 310 F. Supp. 35, 39 (E.D. Pa. 1969).

39. Segal, *supra* note 3, at 274 (discussing *Wolman v. Walter*, 433 U.S. 229 (1977)).

to the support of private (religious) purposes,⁴⁰ or so aid defenders say.

What, then, do aid opponents say in response? How do they claim that the aid is in fact better understood as supporting private and not public purposes? There are two possibilities, and notwithstanding some considerable confusion on the matter, I claim it is the second which aid opponents are better understood to be arguing.

The first possibility is this: Aid opponents, in countering proponents' assertions that the aid in question goes to public purposes, argue, for example, that with state-provided counselling services, state-financed remedial instruction, state loans of equipment and materials such as projectors or maps, or state subsidies for field trips, it is in fact impossible to ensure the aid's restriction to public, as opposed to private or sectarian, purposes. In each such instance, aid opponents urge, teachers or other personnel have the discretion to use the publicly subsidized aid to convey a private sectarian message, even if unconsciously or unintentionally. A projector can be used to show religious films; a map might help illustrate Biblical claims; counselling can refer to theological sources of psychological support; and a field trip to the zoo can, *en passant*, be made the occasion for a creationist remark. In all such cases, schools are "bound to mix religious teachings with secular ones, not by conscious design, perhaps, but because the mixture [is] inevitable."⁴¹

40. See Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285, 1286 (1969) (stating that, in defending tax concessions, governments have "often asserted that the churches were carrying on activities that would otherwise have to be financed directly by the state").

To the extent that sectarian schools, in the discharge of their secular educational function, are spending dollars that would otherwise have to be spent by government in the public schools, the sectarian schools are performing, admittedly as volunteers, a public service. Accordingly, to that same extent, government should have the power, at its discretion, to compensate sectarian schools for the public service they have rendered

G. Sidney Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents*, 15 HOUS. L. REV. 783, 823 (1978).

41. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 749 (1976); see also *Wolman*, 433 U.S. 247 ("[T]he therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views."); *Meek v. Pittenger*, 421 U.S. 349, 357 (1975) (stating that instructional equipment, such as projectors and record players, "from its nature can be diverted to religious purposes" by a teacher); *Lemon v. Kurtzman*, 403 U.S. 602, 618-

The concern that certain types of aid, even if conceived with a "public welfare" rationale, can be diverted to private sectarian purposes, gains apparent credibility from the fact that where courts *have* upheld government aid, they have seemingly done so where the personnel administering the program act as mere conduits for public purposes with no discretion to allow sectarian purposes to seep into the secular activities being funded. "[U]nlike teaching and counseling," for example, "diagnostic testing does not involve the transmission of substantive views," and so "there [is] no danger of a religious message being conveyed."⁴² Courts have likewise upheld state-subsidized textbooks for parochial school students. Unlike a map, which requires teacher expatiation and risks being channelled to secular ends, the language in a textbook is immutable and can verifiably be confined to a secular approach: "[L]egislatures can require that texts deal only with subjects taught in public schools."⁴³ And unlike field trips, which are "components of teaching in . . . pervasively religious school[s]" and which will "inevitably and impermissibly" mix in religion, "busing on public routes to schools" does not admit of the same danger.⁴⁴ In all these cases, there is said to be no "admixture" of public and private,⁴⁵ no possibility that these sorts of aid could serve private ends.⁴⁶

19 (1971) (striking down Rhode Island's attempt to supplement the salaries of teachers of secular subjects in public schools because even "[w]ith the best of intentions such . . . teacher[s] would find it hard to make a total separation between secular teaching and religious doctrine").

42. Segall, *supra* note 3, at 272 (discussing *Wolman*, 433 U.S. at 241-43).

43. George Miller, Note, *Tax Deductions for Parents of Children Attending Public and Nonpublic Schools*: *Mueller v. Allen*, 71 KY. L.J. 685, 689 (1982-83).

44. *Mitchell v. Helms*, 120 S. Ct. 2530, 2583, 2587 (2000) (Souter, J., dissenting).

45. See *Everson v. Board of Educ.*, 330 U.S. 1, 47 (1947) (Rutledge, J., dissenting).

46.

[A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. . . . A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building . . . A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects.

The problem, however, is this: If what aid opponents are understood to be saying is that, however public its intended purpose, the contested aid is somehow vulnerable to a private-sectarian "admixture" or religious "diversion,"⁴⁷ then there is no debate to be joined, for all aid is, in fact, so vulnerable. Indeed, courts themselves risk incoherence if they are understood to be drawing the line between maps, field trips, and counselling on the one hand, and textbooks, busing, or testing on the other, on the basis of the former's relative permeability to religious admixture and its capacity to be diverted to private ends. As Justice Thomas put it in *Mitchell*:

A concern for divertibility . . . is misplaced not only because it fails to explain why the sort of aid that we have allowed is permissible, but also because it is boundless—enveloping all aid, no matter how trivial—and thus has only the most attenuated (if any) link to any realistic concern for preventing an "establishment of religion."⁴⁸

Consider that, just like maps and charts, it is the individual teacher who makes discussion of a textbook meaningful. Even secular textbooks can be put to religious uses: "[I]t is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message."⁴⁹ Similarly, just like field trips, bus transportation to school inevitably abets a religious purpose. As Justice Rutledge declared in his *Everson* dissent:

Nor is there pretense that [busing] relates only to the secular instruction given in religious schools . . . the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance . . . there is

Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (footnotes omitted).

47. See *Mitchell*, 120 S. Ct. at 2583.

48. *Id.* at 2549.

49. *Id.*; see also *Public Funds for Pub. Schs. v. Marburger*, 358 F. Supp. 29, 36 (D.N.J. 1973) (noting that state aid for textbooks, inter alia, must ensure that the "materials provided thereby [will] be used only for nonideological, secular purposes"); Segall, *supra* note 3, at 281 ("Whatever the establishment clause means, it cannot mean that a state can loan a book to a private school student but not a map or chart . . .").

undeniably an admixture of religious with secular teaching in all such institutions.⁵⁰

And in the same vein, "[p]upil attendance reporting" at parochial schools, which judges have allowed the state to subsidize, is just as "essential to the schools' sectarian educational function as it is to the secular aspect of the curriculum."⁵¹

True, there may be degrees to which any given bus, field trip, book, map, or remedial or testing service is capable of mixing private, sectarian with public, secular purposes. But as the Court noted in *Meek v. Pittenger*: "The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient."⁵²

If we are to explain the courts' distinction between books, buses, and counselling on the one hand, and maps, field trips, and testing on the other, we will have to jettison the faulty argument that the first set serve exclusively public secular purposes while private sectarian purposes inevitably creep into the second. More to the point, if we are looking for the grounds on which aid opponents and proponents engage each other, we will have to look elsewhere, because all aid is in fact permeable to private religious "admixture." Fortunately, there is a second possibility. What aid opponents and proponents are better conceived as arguing about is not whether a particular service (busing, textbook-provision, therapeutic services, counselling, etc.) allows for more or less sectarian seepage or

50. *Everson*, 330 U.S. at 46-47 (Rutledge, J., dissenting).

51. *Committee for Pub. Educ. v. Levitt*, 461 F. Supp. 1123, 1135 (S.D.N.Y. 1978) (Ward, J., dissenting).

52. 421 U.S. 349, 370-71 (1975). In his concurring opinion in *Wolman*, Justice Powell stated that "[o]ur decisions in this troubling area draw lines that often must seem arbitrary." *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring). And as Segall elaborated:

To illustrate Justice Powell's point, the *Wolman* Court held that textbooks could be lent to private school children but not maps or charts. Furthermore, the Court held that providing equipment and materials to children attending religious schools constituted an unlawful subsidy to those schools, but providing remedial classroom instruction to private school children did not have the same effect provided the instruction took place off the school grounds.

Segall, *supra* note 3, at 273 (footnotes omitted).

diversion, but whether it falls under a sectarian school's responsibility to provide.

Even aid that is relatively impermeable to sectarian admixture—even aid that comes as close as possible to the purely secular—can further a school's private purposes. For if it was the school's responsibility to supply the service in question, however secular it might be, then by relieving that responsibility, the aid allows the school to free up funds that it can devote to religious purposes.⁵³ As Justice Douglas put it in his *Lemon* concurrence:

It matters not that the teacher receiving taxpayers' money only teaches religion a fraction of the time. Nor does it matter that he or she teaches no religion. The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the school to use all of its own funds for religious training.⁵⁴

Or as G. Sidney Buchanan notes, "government dollars which support the secular activities of religious entities enable those organizations to support their religious activities with other funds."⁵⁵ In so doing, they "reliev[e] the sectarian school of costs it otherwise would have borne in educating its students."⁵⁶

53. For example, Justice Brennan's "position was that even if the secular educational components could easily be separated from the religious activities of church-related schools, they still could not constitutionally be aided." Morgan, *supra* note 3, at 68; see also Mitchell, 120 S. Ct. at 2549 ("It is perhaps conceivable that courts could take upon themselves the task of distinguishing among the myriad kinds of possible aid based on the ease of diverting each kind. But it escapes us how a court might coherently draw any such line.").

54. *Lemon v. Kurtzman*, 403 U.S. 602, 641 (1971) (Douglas, J., concurring).

55. G. Sidney Buchanan, *Governmental Aid to Religious Entities: The Total Subsidy Position Prevails*, 58 FORDHAM L. REV. 53, 84 (1989).

56. *Agostini v. Felton*, 521 U.S. 203, 228 (1997). As Professor Choper notes, some say that:

"since textbooks are used in the classrooms as an integral feature of the educational process, there is no certainty that they would not be manipulated for religious instruction in parochial schools." True. But even assuming that similar manipulation could not occur with respect to state-provided school lunches (by prayers in connection therewith, for example), or state-financed school medical examinations (by their illustrative use in classroom theological discussions), or state-laid sidewalks providing access to the denominational school, the point is not well taken. Even public aid that is itself immune from sectarian manipulation frees church funds either for uses subject to

Consequently, where courts have deemed state-supported aid to be part and parcel of the school's responsibility to defray, they have prohibited its being provided by the state, no matter how relatively secular the aid is. In *Meek* and *Ball*, where the aid at issue—salary support for teachers, and assistance for basic instructional equipment and material—"in effect subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects,"⁵⁷ the programs were stricken. In the district-level *Nyquist* decision, along similar lines, the court struck down state subsidies for janitorial and snow-removal services in parochial schools, notwithstanding the fact that such services are as close to purely secular as possible—that is, they are impervious to religious seepage.⁵⁸ "The argument is made," the court said, "that since janitorial functions and snow removal obviously are not the teaching of religion, their neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury."⁵⁹ The court found, however, that such an argument wrongly assumes "that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction."⁶⁰

manipulation, or for strictly religious uses. This being so, the attempted limitation only formalistically accomplishes the end sought.

Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 326 (1968) (footnote omitted).

57. *School Dist. v. Ball*, 473 U.S. 373, 397 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

58. *See Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 350 F. Supp. 655, 665 (S.D.N.Y. 1972).

59. *Id.*

60. *Id.*; *see also* *Gatton v. Goff*, Nos. 96CVH-01-193, 96CVH-01-721, 1996 WL 466499, at *10 (Ohio C.P. July 31, 1996), *quoted in* Suzanne H. Bauknight, *The Search for Constitutional School Choice*, 27 J. LAW & EDUC. 525, 546 (1998) ("The common deciding factor in these cases appears to have been that in each program, the state aid provided to the private schools made it possible for them to fulfill their secular functions, while making additional money available to fund their religious functions."); Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 423, 470, n.323 (1995) ("In other instances, however, nonsectarian aid may not benefit religious schools in such a way. If aid were earmarked toward a secular service that religious schools would not otherwise provide, then this aid would not furnish the schools with additional funding for religious purposes.").

On the other hand, just as state aid to essentially secular activities might assist the school's religious purposes by relieving the school of a financial responsibility it would otherwise bear, so aid to activities into which sectarianism can deeply permeate has been upheld as long as the court deems those activities not to have been a parochial school responsibility. In *Zobrest*, which dealt with a program under which the state paid for a sign language interpreter for a deaf student attending the parochial Salpointe School,⁶¹ surely the interpreter would not have been able to avoid the seepage of religious influence into her communications. As the Supreme Court later said of the *Zobrest* case, "we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction."⁶² Even so, the Court declared, the extension of state aid for interpretive services did not amount to "an impermissible direct subsidy' of Salpointe, for Salpointe is not relieved of an expense that it otherwise would have assumed in educating its students."⁶³ Likewise with the remedial instructional services at issue in *Agostini*, into which sectarian influences clearly could creep: "The Court . . . took pains to identify the limits of its holding, emphasizing that . . . the services . . . did not supplant the school's ordinary educational functions or relieve it of costs it would otherwise have borne in the student's education."⁶⁴

So, too, with state provision of certain kinds of instructional materials. The Circuit Court of Appeals in *Mueller v. Allen* allowed tax concessions for student purchases of tennis shoes and rulers, while striking them down for maps and globes.⁶⁵ It was not that rulers or even tennis shoes are incapable of being used for sectarian purposes—a ruler can be used to "measure mileage on a biblical map"⁶⁶—or that maps and globes are more readily bent to parochial

61. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3-4 (1993).

62. *Agostini*, 521 U.S. at 226; see also *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1192 (1992) ("Salpointe is a pervasively religious institution . . . Salpointe 'encourages its faculty to assist students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum.'").

63. *Zobrest*, 509 U.S. at 12 (quoting *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986)).

64. *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 142 (Me. 1999) (describing *Agostini*).

65. 676 F.2d 1195, 1201-02 (8th Cir. 1982).

66. *Id.* at 1202 n.14.

ends. Rather, it was that "[t]he needs of the institution from the standpoint of instructional materials and equipment are distinct from the needs of the student," and while state aid for instructional materials and equipment useful to schools, e.g., maps and globes, would relieve a school obligation and so free up funds for sectarian purposes, aid that is useful to students, e.g., rulers and tennis shoes, relieves—if anything—a parental obligation, and so frees up no school funds for sectarian purposes.⁶⁷

The question of whether aid flows to public or private purposes, then, comes down to the question of whether it defrays something that is better understood as a responsibility of the parochial school, regardless of how secular that thing might be, or whether it is better understood as something the parochial school is not obligated to supply, even though it may allow for considerable religious seepage. It is not, in other words, their permeability to sectarian influences versus their hermetically sealed secular nature that distinguishes prohibited maps, globes, and field trips from permissible busing, textbooks, and interpreters. It is, rather, their

67. *Id.* at 1202. In discussing the Supreme Court's decision in *Mueller*, Justice Thomas acknowledged in *Mitchell* the dissent's point that the "instructional materials which are subsidized by the Minnesota tax deduction plainly may be used to inculcate religious values and belief," yet upheld the aid anyway. *Mitchell v. Helms*, 120 S. Ct. 2530, 2547 (2000) (quoting *Mueller v. Allen*, 463 U.S. 388, 414 (1983) (Marshall, J., dissenting)). In *Cochran v. Louisiana State Board of Education*, the Court upheld a state program that purchased school books for children attending both public and private schools because the costs assumed by the state were generally borne by the parents rather than the school: "The schools . . . are not the beneficiaries of these appropriations . . . nor are they relieved of a single obligation, because of them." 281 U.S. 370, 375 (1930). The Court reasoned:

True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.

Id.; see also *Meek v. Pittenger*, 374 F. Supp. 639, 675 (E.D. Pa. 1974) (Higginbotham, J., dissenting) ("A cardinal distinction between approving the loaning of secular books and the banning of instructional materials would be that ostensibly books are given directly to the children and derivatively the benefits are extended to their parents . . ."); *Visser v. Nooksack Valley Sch. Dist.*, 207 P.2d 198, 202 (Wash. 1949) (upholding publicly paid "transportation of pupils to and from the Christian school" because it "is of no benefit to the school itself . . . the transportation of pupils to and from the school inures exclusively to the benefit of the pupils and their parents, in that it simply relieves them from the obligation incident to compulsory attendance statutes of providing transportation themselves").

relative tendency to fall within or outside of the school's sphere of responsibility. In the first set of cases—e.g., maps, globes, and field trips—courts have deemed that the aid saved the school money that it could then devote to private purposes. In the second set of cases—e.g., busing, textbooks, and interpreters—courts determined that by relieving no responsibility that the school would otherwise have been shouldering, the aid had no effect in creating any new quantum of religious influence and so remained devoted to broader public purposes.

C. Mitchell's *Confusion*

In *Mitchell*, the most recent Supreme Court parochial-school aid case, the Court upheld federal instructional-equipment aid for parochial schools.⁶⁸ Justice Thomas, writing for the plurality, convincingly dismissed the criterion of relative permeability to religious influence—or what he called “divertibility”—as a way of explaining what kind of aid the Court has upheld and what it has struck down.⁶⁹ In part, he did so because as long as the aid *money* can be deemed private—as long as it creates no “impermissible incentive” to choose private school—then it does not matter whether the *purposes* it serves are, because of divertibility, also private: “[A]ny use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.”⁷⁰

Justice Thomas, however, also introduced a wholly new criterion that is meant to trump “divertibility”: the criterion of “impermissible content,” according to which aid is impermissible only if it actually contains a religious message.⁷¹ So, for example, state funding for a textbook with a sectarian message would be impermissible, but state support for teachers of secular remedial classes at parochial schools—who presumably don't have sectarian messages stamped on their foreheads—would be permissible.⁷² The problem, however, is that while Justice Thomas purported to derive his impermissible content criterion—which has never before

68. See *Mitchell*, 120 S. Ct. at 2536-37.

69. See *id.* at 2547.

70. *Id.*

71. See *id.* at 2548.

72. See *id.* at 2548-49.

appeared in Court decisions—from “recent precedents,” and while he believed that it explains “the sort of aid that we have allowed,”⁷³ it in fact explains Supreme Court decisions even more poorly than does the divertibility/permeability criterion, let alone the “school responsibility” criterion.

Justice Thomas’ “content” criterion fails, for example, to explain why aid for field trips, maps, and globes—none of which on their own face need display religious content—have been struck down. This is presumably why Justice Thomas says that *Meek* and *Wolman*—which struck down state provision of maps, globes, and other instructional equipment—“created an inexplicable rift within [the Court’s] Establishment Clause jurisprudence.”⁷⁴ But in fact they are “inexplicable” only on Justice Thomas’ “content” criterion, which would strike down only that aid which carries an explicit sectarian content; *Meek* and *Wolman* are fully explicable on a criterion by which courts strike down aid that is deemed to fall within the school’s responsibility to provide. Or, put another way, while it is true, as Justice O’Connor says, that *Meek* and *Wolman* struck down aid for instructional materials such as maps and globes while the *Mitchell* Court upheld “similar” programs, there is no need to regard the cases as inconsistent.⁷⁵ The state-financed instructional material at issue in *Meek* and *Wolman* were not explicitly supplemental to private school responsibilities; hence, on some understandings they might well have supplanted some funds parochial schools would have devoted to the purchase of such materials, freeing up funds that the schools could then devote to sectarian purposes. In *Mitchell*, although the aid was substantively the same, the Court accepted that it was explicitly supplemental, falling as it did under Chapter Two of the Education Consolidation and Improvement Act,⁷⁶ thus relieving parochial schools of no financial responsibilities that they would otherwise be shouldering.

Notably, in a footnote to his plurality opinion, Justice Thomas concedes that the question of whether aid “supplants, rather than supplements, the core educational function of parochial schools”—in other words, whether it supports a service that falls within or

73. *Id.* at 2549.

74. *Id.* at 2563.

75. *See id.* at 2563-64 (O’Connor, J., concurring).

76. Pub. L. No. 97-35, 95 Stat. 357, 469 (1981); *Mitchell*, 120 S. Ct. at 2536-37.

outside the school's responsibility—"may be relevant to determining whether aid" serves religious purposes.⁷⁷ He does not pursue discussion of this criterion only because, "to the extent that the supplement/supplant line is separable from . . . [the divertibility criterion]," the court does not "need to resolve the distinction's constitutional status today, for, as we have already noted, [the Chapter Two program] itself requires that aid may only be supplemental."⁷⁸

Equally notably, in her *Mitchell* concurrence, in which she was joined by Justice Breyer, Justice O'Connor completely ignored Justice Thomas' "content" criterion, upholding the Chapter Two aid for two reasons. First, Justice O'Connor noted that the aid "is available to assist students regardless of whether they attend public or private non-profit religious schools"⁷⁹—in other words, the aid money is private and not public because it's controlled by parental choice and comes with no state-imposed incentives to go private. Second, she noted that the aid "only . . . supplement[s] the funds otherwise available to a religious school"—in other words, it serves exclusively public purposes because it relieves the school of no responsibility, and so affords it no new money which it can devote to private purposes.⁸⁰

But of course, the question of what constitutes a school's responsibility is by no means incontestable. Though courts have given answers to it in the specific cases discussed so far, dissents have been heated. Following my purposes here, which assume that in this area, today's dissent could be tomorrow's majority, I treat this very much as an open question.⁸¹ My aim is not to conclude

77. *Mitchell*, 120 S. Ct. at 2544 n.7.

78. *Id.*

79. *Id.* at 2562 (O'Connor, J., concurring).

80. *Id.* Or, as the *New York Times* put it, the opinion by "Justice Clarence Thomas . . . would have made 'the principle of . . . private choice' the only touchstone for channeling aid to religious schools"—in other words, it addressed only the question of whether the money was private or public. Greenhouse, *supra* note 11, at A27. "But Justice Thomas's opinion was qualified by Justice Sandra Day O'Connor's insistence in a concurring opinion that public aid may supplement, but must not supplant, money that a religious school could otherwise spend on its own programs." *Id.* In other words, the question of whether the aid ultimately abets private purposes through relieving school responsibility, or remains consigned to public purposes, is also crucial.

81. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 258 (1977) (Marshall, J., concurring in part and dissenting in part), *overruled by Mitchell v. Helms*, 120 S. Ct. 2530 (2000). Marshall

that the issue is settled, much less to settle it myself; rather, I look at how both sides—aid proponents and aid opponents—go about arguing the question of whether the particular service at issue is one for which parochial schools should be thought of as responsible. I will call this the question of fungibility, the question of whether the aid is “fungible . . . because the funds can be used for religious education.”⁸² In other words, because by providing money the school would otherwise have been responsible for spending in one area, it frees up the same amount to be spent in another.

D. The Existential Versus the Normative

Aid, if it is understood as *public* money serving the *private* purposes of parochial schools, risks violating the Establishment Clause. If, however, that money is understood as private, or those purposes as public, then it does not. But when does it become more reasonable to understand the money in question as private, not public? And when is it more plausible to construe the purposes in question as public, not private? At rock bottom, this is what debate over the Establishment Clause is about.

Part II looks at discourse over whether the money is private or public by examining how each side argues the question of whether incentives constrain the choice of parents so tightly that they cease to be genuine private agents and instead become mere conduits for what remains essentially public, state-controlled money. Part III looks at debate over whether the purposes to which that money goes are better understood as public or private, by examining how each side argues the question of whether the aid can be understood to relieve a school responsibility and is therefore fungible—capable of freeing up funds with which the school can pursue private

states:

It is, of course, unquestionable that textbooks are central to the educational process. Under the rationale of *Meek*, therefore, they should not be provided by the State to sectarian schools because “[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole.”

Id. (quoting *Meek v. Pittenger*, 421 U.S. 349, 366 (1975)) (citations omitted).

82. Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 49 (1993).

purposes—or whether it does not relieve any school responsibility, and therefore confines itself to its original public purposes.⁸³

More specifically, in Part II, I show that in arguing that the money is public, aid opponents at rock bottom adopt what I will call an “existential” perspective concerning baseline government responsibilities. By contrast, aid defenders, in deeming the money to be private, adopt what I will term a competing “normative” approach to the appropriate baseline government responsibilities. In Part III, however, I demonstrate that in arguing that the purposes the money serves are private, aid opponents switch to the normative viewpoint which they dismiss in labelling the money itself public. And, conversely, in deeming those purposes public, aid proponents adopt the existential point of view which they shun in arguing that the money itself is private.⁸⁴

II. MONEY: PUBLIC OR PRIVATE?

Money from the state is deemed private if private choice—unfettered parental discretion—controls its disposition. If, however, it comes with state-structured incentives, inducements or other kinds of constraints that channel its disposition in certain directions, then it remains public money. On this, both aid opponents and aid proponents agree. Where they disagree is how to apply this distinction. And, consequently, they part ways over whether a particular aid program in fact creates a financial incentive for students to undertake a sectarian education.

True, in a sense all aid for an educational purpose—whether for textbooks, school busing, remedial instruction or testing—is state-directed or constrained in that it is aid *for an educational purpose* and thus cannot be spent for noneducational ends. What we are looking for, consequently, is the presence or absence of some further kind of encumbrance on private discretion. Specifically, what we are asking is whether the aid is structured so as to provide parents

83. To “say that [aid is] for public purposes” is simply “to say that [it is] not for religious ones [or for] the private character of the function of religious education.” *Everson v. Board of Educ.*, 330 U.S. 1, 51 (1947).

84. The notion of “baseline” has gained some scholarly attention lately, notably as a result of the work of Cass Sunstein. I relate my own approach to that discussion, *infra* notes 181-94 and accompanying text.

with an incentive to send their children to *private* (and hence *parochial*) as opposed to public school, or whether it is better understood as providing no such skewing or thumb on the scale.

Here, at the very core of their argumentation, aid opponents adopt what might be called an "existential" approach. Taking the immediately preexisting budgetary and policy status quo as a baseline, they then ask whether the new aid package will induce any kind of departure from it in the direction of private school. Aid defenders, in countering, urge a "normative" approach to the baseline, arguing that one simply cannot look at whether the aid tends to alter the situation in favor of private schools by comparison with whatever the immediately preexisting status quo may have been. Rather, one must strip away what existed immediately prior, reaching farther back to some kind of theoretically grounded or historically significant baseline. Only then can one ask whether—when taken together with any support that exists for public schools beyond that baseline—the proposed aid to private education will skew parental choice in favor of the latter. It is remarkable how consistently and completely this existential-normative distinction explains the competing rhetoric uttered on the question of whether the aid provides any kind of skewing incentive in the direction of private schools—or, in other words, the question of whether the program's money is better understood as private or public, controlled more by parents or by the state.

A. Aid Opponents: An Existential Approach

To see this, begin with the one assumption universally at play and underpinning the argumentation of aid opponents. It is that any proposed new program that would direct some additional aid to private schools—even if comparable aid is already available to public schools through another program—provides an incentive for parents to patronize private schools, because it disturbs an immediately preexisting baseline. Compared to the status quo ante, at least some new parents have a greater incentive than they had before to send their children to private school.

This assumption of course takes its most readily understandable form when the program does in fact confine itself only to private school students. When eligibility for aid is "contingent upon

attendance at private schools," as one commentator puts it, that aid "by necessity, creates the impermissible 'financial incentive for students' to undertake sectarian education."⁸⁵ As the *Sloan* Court explained in a case involving tuition tax concessions to private school parents, in such situations, "[t]he State has singled out a class of its citizens for a special economic benefit," thus providing "an incentive to parents to send their children to sectarian schools"⁸⁶; "at bottom its intended consequence is to preserve and support religion-oriented institutions."⁸⁷

The idea here, it bears emphasizing, is that any such departure from the immediately preexisting status quo—whatever that status quo may have been—is sufficient to create a *de novo* incentive that skews individual parental choice away from public and toward private schools. As Chief Justice Burger put it in *Lemon*, "[w]e have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches"; what matters is that "the state programs before us today represent something of an innovation."⁸⁸ The words "today" and "innovation" are key. Or, as one commentator has put it, any voucher plan, directed as it would be exclusively at private school parents, "clearly increases the financial incentive to choose religious schools by lowering their price [and] significantly chang[ing] the price structure of the available options. Under [a] voucher plan, religious education would be significantly cheaper than it is at present."⁸⁹ Here, the words "change" and "at present" are key. What the plan

85. Green, *supra* note 82, at 67 (quoting *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986)).

86. *Sloan v. Lemon*, 413 U.S. 825, 832 (1973).

87. *Id.* at 832-33; *see also* *Americans United for Separation of Church & State v. School Dist.*, 718 F.2d 1389, 1399 (6th Cir. 1983) ("The Grand Rapids program . . . directly benefits nonpublic school students, and hence, nonpublic schools, while at the same time it excludes members of the public at large."), *aff'd*, *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wolman v. Essex*, 342 F. Supp. 399, 412 (S.D. Ohio 1972) (striking down a program of tuition reimbursement to parents of students attending private elementary and secondary schools because "[t]he reimbursement grant [is] directed only towards the parents of children who attend non-public schools").

88. *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971).

89. David Futterman, Note, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L.J. 711, 728 (1993).

does is to change the present, the immediately preexisting status quo, creating an incentive to go private.⁹⁰

Even if another near-identical program exists for public school students and their parents, that is insufficient to eliminate the incentive effect, according to the opponents. The proper baseline is not some normative plane of prior equality, such that if the state at one point provided a program for public school students—say busing—and then later on established a comparable private school program, no skewing incentive either way would be deemed to have been created. Rather, for aid opponents, the proper baseline is whatever immediately preceded the introduction of the private-oriented program, even if what existed previously included comparable, or for that matter, more significant aid to the public system. From this kind of existential baseline, obviously, anything that favors private school students creates an incentive that deviates from it.⁹¹

Consider some representative arguments. The Milwaukee Parental Choice Program (MPCP) was designed to provide state vouchers for private school parents in the same way as (or more exactly, to a smaller degree than) the state supports public schools.⁹² By merely countervailing state aid to public schools, aid defenders argued, MPCP's private school vouchers presented parents with an incentiveless "wash" between public and private venues.⁹³ On this reading, the program represented an option-expanding "attempt to enhance the opportunities of the poor to choose" in an unfettered way "between public and nonpublic education."⁹⁴ But for opponents, such an argument "proves too much" because it would "justify subsidizing religious schools

90. See *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316, 1321 (D. Minn. 1978) (noting that one of the reasons the Supreme Court struck down programs such as the tuition tax credits featured in *Nyquist* is because of their "recent vintage," whereas in *Walz*, the contested property tax exemptions for religious institutions were upheld because they had been in existence "for many years").

91. See, e.g., *Judd v. Board of Educ.*, 15 N.E.2d 576, 582 (N.Y. 1938) ("Free transportation of pupils induces attendance at the school.").

92. See *Jackson v. Benson*, 578 N.W.2d 602, 608-09 (Wis. 1998).

93. See *id.* at 617-18; Case Comment, *Establishment Clause—School Vouchers—Wisconsin Supreme Court Upholds Milwaukee Parental Choice Program—Jackson v. Benson*, 112 HARV. L. REV. 737, 740 (1999).

94. See Case Comment, *supra* note 93, at 740 (quoting Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 788 (1973)).

completely, as if such aid would be neutral taken together with state funding of the public schools—‘a result wholly at variance with the Establishment Clause.’⁹⁵ Instead, opponents argued, better to treat the voucher program as a departure from the immediately preexisting status quo—however much, by some normative measure, the status quo already favors public schools—and hence as an incentive to attend private school.

In exactly the same vein, the *Nyquist* Court had the following to say about New York’s challenged tuition tax credits for parents with children attending private school:

We do not agree with the suggestion in the dissent of The Chief Justice that tuition grants are . . . analogous [to] comparable benefits to . . . public . . . schools. The grants to parents of private school children are given in addition to the right that they have to send their children to public schools “totally at state expense.” And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause.⁹⁶

The proper baseline, in other words, is the immediately preexisting status quo to which the tuition aid represents a pivotal “addition”—a new incentive. It is not some prior point from which state-supported public education and the new tuition grants for private schools would counterbalance one another, such that for parents it would have become a wash with the state supplying no incentive influencing parental choice between public and private one way or the other.⁹⁷

95. *Id.* (quoting *Nyquist*, 413 U.S. at 782 n.38).

96. *Nyquist*, 413 U.S. at 782 n.38 (citation omitted).

97. See Evan M. Tager, Note, *The Supreme Court, Effect Inquiry, and Aid to Parochial Education*, 37 STAN. L. REV. 219, 228-29 (1984). The author states:

In three different cases the Court upheld programs the beneficiaries of which were *private school students*, rather than *all* students. It could be argued that the classifications in these cases were narrow only because public school students were already receiving the benefits in question and that therefore the true class of beneficiaries effectively included “all schoolchildren.” This argument proves too much, however. The same reasoning could be used to

Aid defenders claim that they are double taxed, paying for both public and private education (through taxes in the first case, fees in the second), and vouchers or tuition tax credits would simply even the playing field based on some historical or theoretical baseline of state neutrality.⁹⁸ Aid opponents turn an unsympathetic ear to this claim. Instead, the status quo is the baseline, and any departure from it creates new incentives to choose private schools. "Should we relieve individuals of contributing to the support of public parks if they never go to the park and, instead, give them financial incentives for growing a piece of personal greenery?"⁹⁹

B. Aid Proponents: A Normative Approach

Aid opponents, then, take an "existential" approach to the incentive question—looking at the immediately preexisting status quo and viewing any inducement to depart from it as a choice-influencing incentive. That incentive takes the aid's disposition out of the unfettered discretion of private parties (parents) and places it in the hands of the state; when a program "creates [a] financial incentive for parents to choose a sectarian school," what we really have is an instance of "state decisionmaking."¹⁰⁰

Aid proponents, by contrast, adopt a normative approach, on which the baseline is not the happenstance of whatever the immediately preexisting empirical state of the world might have been, but some theoretical or prior historical state. Against that kind of a baseline, aid defenders invariably claim, a program of aid, even if it focuses exclusively on private schools, comes with no incentives that might encumber private choice because it is

permit the aid to parents struck down in *Nyquist*. Specifically, it could be argued that because public school students are already entitled to a free education, a law that provides private school students with a free education does not involve a narrow classification.

Id. (footnote omitted).

98. Or, as Michael McConnell puts it, "[b]y taxing everyone, but subsidizing only those who use secular schools, the government creates a powerful disincentive for parents to exercise their constitutionally protected option to send their children to parochial schools." Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 132 (1992).

99. *Tuition Tax Credit Hearings*, *supra* note 30, at 396 (statement of the United Parents Association of New York City).

100. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993).

matched (and then some) by state aid to public schools. Hence the money, free of any publicly imposed skewing effect, becomes wholly privately controlled. For my purposes here, it does not matter what this theoretical or historical baseline is, or what the rationales for it (which are rarely if ever stated) might be. Although the anti-incentive arguments of aid proponents might branch out into numerous different theoretical or historical referents if one wanted to coax them all out, at root what they share is precisely this normative approach to the appropriate baseline from which to measure incentives. Or, put another way, what they all reject is the existential approach that aid opponents adopt.

Thus Jesse Choper describes his recommended doctrine, which would allow the state to fund any amount of secular education in parochial schools as long as it is coequal to what the state is providing to public schools, as "both a traditional and normative" one.¹⁰¹ Traditional and normative because the appropriate baseline—on which the state is providing no aid to either public or private schools—is certainly drawn not from the existential present, but rather is rooted in a particular historical starting point or is otherwise normatively conceived. Along similar lines, consider the following claim from a commentary on Justice Powell's decision in *Nyquist*, which struck down a package of tuition tax benefits for parents of private-school children.¹⁰² Justice Powell, the commentary complained, looked only at the newly provided benefits to the private schools—he looked at the effect of the program in isolation; from this perspective it naturally appeared as an "incentive" to religious education.

This approach narrowed the scope of the neutrality inquiry to the bounds of the single aid program in question; the overall effect of the government's school financing programs—with its disincentives as well as incentives to private education—was not evaluated. . . .

101. Choper, *supra* note 56, at 340.

102. Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 796-98 (1973).

The Court's narrow definition of neutrality led it to characterize the New York program as "advancing" religion and thus nonneutral.¹⁰³

In other words, a focus on the "newly provided benefits"—a focus on how the program caused a departure from what had previously been the existing situation—led Justice Powell to see an "incentive" in favor of public schools. For aid defenders, however, a more appropriate focus would have required a stepping back, a viewing of the new program from a theoretical or historical baseline from which overall government programs in aid of public and private education would be weighted against one another.¹⁰⁴ It would, as one legal scholar puts it, take into account that while "[s]ome of the statutes presented to the Court have involved aid to . . . private schools alone," they "often have been direct counterparts of provisions for public schools," and "it is immaterial whether the aid was made available to all schools through one statute or two."¹⁰⁵

Likewise, in 1991 Eric Segall surveyed the post-*Lemon* raft of Supreme Court school-aid cases dealing with new aid exclusively for private school students and argued that "[i]n none of the cases did the government . . . provide a benefit to a religious school that was not already provided to non-religious schools."¹⁰⁶ In so saying, Segall in effect urged that the proper baseline is not the existent status quo—from which any aid to private schools would induce departures in their favor—but something historically antecedent to or theoretically abstracted from that, such that the aid then granted to public schools and now to private schools countervail one another, creating no incentive one way or the other.

In the 1997 Cleveland voucher case, the pro-voucher side complained that its opponents were urging the court to "examine the scholarship program in isolation, as if it were enacted out of whole cloth for the benefit of religious institutions."¹⁰⁷ Instead, the brief maintained, "the constitutional inquiry must encompass 'the

103. *Government Neutrality*, *supra* note 19, at 707 (footnote omitted).

104. *See id.*

105. Hugh F. Smart, Case Comment, *Tax Deductions As Permissible State Aid to Parochial Schools: Mueller v. Allen*, 60 CHI.-KENT L. REV. 657, 677 (1984).

106. Segall, *supra* note 3, at 298-99.

107. Opening Brief of Appellants/Cross-Appellees Hope for Cleveland's Children, et al. at 30, *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1997) (No. 97-1117).

nature and consequences of the program viewed as a whole”—that is, not narrowly against a baseline of the immediate status quo ante, but as part of a broader movement away from a baseline that existed historically or is devised theoretically.¹⁰⁸

Then-Professor Antonin Scalia gave the normative approach its most explicit formulation when he told a 1981 Senate hearing on tuition tax credits:

“The broadness” or “narrowness” of benefit coverage . . . should be determined by the total scope of a logically and conceptually unitary program, and not by the scope of one or another individual amendment to it. For the “broadness” or “narrowness” factor speaks to the presence or absence of preferential purpose and effect, and it can hardly be called preferential to add to an existing program a group that could logically have been included there in the first place. That is to say, far from being “preferential” to a class that is heavily weighted toward church-related schools, the [tuition tax credit] proposal would merely eliminate a pre-existing discrimination against that class.¹⁰⁹

108. *Id.* (quoting *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 492 (1986) (Powell, J., concurring)); see also *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 375-76 (1985) (“Although Shared Time itself is a program offered only in the nonpublic schools, there was testimony that the courses included in that program are offered, albeit perhaps in a somewhat different form, in the public schools as well.”). In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, Chief Justice Burger argued:

The only discernible difference between the programs in *Everson* and *Allen* and [the present *Nyquist* tuition tax credit case] is in the method of the distribution of benefits: here the particular benefits of the . . . statutes are given only to parents of private school children, while in *Everson* and *Allen* the statutory benefits were made available to parents of both public and private school children. But to regard that difference as constitutionally meaningful is to exalt form over substance.

413 U.S. 756, 803 (1973) (Burger, C.J., concurring in part and dissenting in part). Similarly, then-Justice Rehnquist reasoned:

[P]arents [of private school students] are nonetheless compelled to support public school services unused by them and to pay for their own children’s education. Rather than offering “an incentive to parents to send their children to sectarian schools,” as the majority suggests, New York is effectuating the secular purpose of the equalization of the cost of educating New York children that are borne by parents who send their children to nonpublic schools.

Id. at 812 (Rehnquist, J., dissenting in part) (citations omitted).

109. Antonin Scalia, *On Making it Look Easy by Doing it Wrong: A Critical View of the Justice Department*, in *PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES*, 173, 179 (Edward McGlynn Gaffney, Jr. ed., 1981), reprinted in *Tuition Tax*

Scalia's use of the words "logically and conceptually unitary program" to describe his approach to the breadth or narrowness of a particular program, and his rejection of the notion that any mere addition "to an existing program" renders the aid narrowly focused on whatever beneficiaries have been newly added, are about as overt a revelation of the normative, anti-existentialist approach as there is on the question of incentive. Or, as Justice Thomas put it in his concurring opinion in *Rosenberger*, "[t]he constitutional demands of the Establishment Clause may be judged against either a baseline of 'neutrality' or a baseline of 'no aid to religion,' but the appropriate baseline surely cannot depend on the fortuitous circumstances"—the existential state of the world—"surrounding the *form* of aid."¹¹⁰

The "normative" approach that aid proponents take also provides them an answer to the "proves too much" argument mounted by aid opponents—namely, that a theoretical or historical baseline of no public school aid at all would justify complete state funding of private schools. After all, such funding would simply "counterbalance" the massive aid the state already gives to public schools, thus creating no "overall" incentive for parents to choose private schools. In other words, the normative baseline approach:

Credits Hearings, *supra* note 30, at 570.

110. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 826 (1995) (Thomas, J., concurring). In *Meek v. Pittenger*, the Court struck down programs that provided equipment and instructional material to private schools that the state had long furnished to public schools. 421 U.S. 349 (1975). Then-Justice Rehnquist, in dissent, said the following:

If the number of sectarian schools [benefitted by the program] were measured as a percentage of all schools, public and private, then no doubt the majority would conclude that the primary effect of the instructional materials and equipment program is not to advance religion. One looks in vain, however, for an explanation of the majority's selection of the number of private schools as the denominator in its instructional materials and equipment calculations. The only apparent explanation might be that [the aid program] applies only to private schools while different legislation provides equipment and materials to public schools. But surely this is not a satisfactory explanation, for the plurality tells us, in connection with its discussion of the textbook loan program [which it approved] that "it is of no constitutional significance whether the general program is codified in one statute or two." We are left with no explanation for the arbitrary course chosen.

Id. at 389-90 (Rehnquist, J., dissenting).

proves too much, for it would . . . provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause.¹¹¹

In response, aid advocates might deny that they have no stopping point—that they *must* therefore advocate complete subsidization of private schools. It depends entirely on the norm they use. Perhaps the norm holds that private school parents should get some subsidy for relieving a burden on the public treasury, a principle that would be defeated were they to get *complete* subsidization.¹¹² Or perhaps aid advocates might simply temper the logic of their normative approach with a concern about the erosion of church-state separation that full public funding of private schools would imply.¹¹³

Finally, it is also possible that some aid proponents might simply embrace, unflinchingly, full public funding of private schools' secular teaching requirements. Recall that Choper describes his approach, which would allow the state to fund any amount of secular education in religious schools as long as it was co-equal to what the state was providing in public schools, as "both a traditional and a normative" one.¹¹⁴ Choper, in essence, simply rejects the premise of the "proves too much" attack, denying that

111. *Nyquist*, 413 U.S. at 782 n.38.

112. See *id.* at 812 (Rehnquist, J., dissenting in part) ("New York has recognized that parents who are sending their children to nonpublic schools are rendering the State a service by decreasing the costs of public education and by physically relieving an already overburdened public school system.").

113.

A compromise is indeed possible For any program of aid to religion, a court can balance the degree of burden that is being alleviated against the additional separation problems that are created and decide to what extent each principle should be compromised. A court could approve a certain plan that only partially alleviated burdens on the choice of religious schooling on the ground that the program only slightly infringed the separation [of church and state]. . . .

....

[C]omplete government subsidization of all schools, religious as well as secular, would provide neutrality by making all schools equally attractive economically, but the problem of church-state involvement would be overwhelming.

Government Neutrality, *supra* note 19, at 708, 713.

114. Choper, *supra* note 56, at 340.

full state funding of the secular teaching mission of parochial schools violates the Establishment Clause because the aid, understood against the appropriate historical or theoretical baseline, creates no incentives to choose private over public. After all, on this argument the money is privately, not publicly controlled.

C. *Even-Handed Programs*

Thus far, I have looked only at programs—textbook provision, tuition tax credits, vouchers—that provide some new form of aid only to private schools (even if comparable aid was already being furnished to public schools). And I have shown how aid opponents, using an existential criterion, invariably find a pro-private incentive while aid defenders, using a normative standard, inevitably do not. But some new programs—such as Title I aid for needy students, Title II aid for instructional material, or IDEA support for interpretive services—were conceived *de novo* as assistance for both public and private school students.¹¹⁵

Here, one might almost expect aid *proponents* to take an existential approach. There is, after all, a sense in which new aid to both public and private-school students furnishes no new relative incentive for parents to choose private school—even by comparison with the immediately preexisting status quo—because whatever new inducements the aid creates to “go private” are offset by equally available new incentives to “go public”; hence it in no way intrudes state manipulation into parental choice. But interestingly, even here aid opponents continue their existential approach, while aid proponents persist with their normative arguments.

To see this, consider *Witters v. Washington Department of Services for the Blind*, a case much cited in discourse over state aid to parochial schools.¹¹⁶ In *Witters*, the Court upheld a Washington state program, available to both public and private college students, under which Witters, suffering from a progressive eye condition, received assistance to study at a parochial college to become a

115. See Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1491n (1994); Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. §§ 6301-8962 (1994)).

116. 474 U.S. 481 (1986).

pastor.¹¹⁷ Justice Powell, in concurring, gave a revealing critique of the Supreme Court of Washington, which had struck down the program as violative of the Establishment Clause. "The Washington Supreme Court," Powell wrote, "found that the program had the practical effect of aiding religion. In effect, the court analyzed the case as if the Washington Legislature had passed a private bill that awarded petitioner free tuition to pursue religious studies."¹¹⁸

Justice Powell's remarks are telling. Instead of viewing the program as one that evenhandedly favored both public and private school students, aid opponents simply treated it as if it benefitted only private-school students. In other words, what the Supreme Court of Washington did—and what aid opponents invariably do in such situations—is willfully view the aid, even though available to both public and private students, as if it were like all the other aid packages discussed above: available only to private-school students and hence, on existential terms, creating a new incentive to go private. Justice Souter, reasoning along the same lines as the Supreme Court of Washington in his *Rosenberger* dissent, wrote that programs that aid both public and private school students "cannot be lifted to a higher plane of generalization"—a plane that recognizes their normative evenhandedness—"without admitting that new economic benefits are being extended directly to religion."¹¹⁹ "[E]venhanded availability," Justice Souter declared, "is not by itself enough to satisfy constitutional requirements for any aid scheme that results in a benefit to religion."¹²⁰

If aid opponents continue to find a new existential incentive to go private—even in neutral public-private aid packages—then it should not be surprising that aid proponents, in denying the presence of incentive in such even-handed packages, are driven to continue their normative, antiexistentialist stance. Nowhere is this more apparent than in Justice Thomas' *Mitchell* opinion, in which he discussed Chapter Two aid for computers and other materials for both public and private schools.¹²¹ Justice Thomas declared:

117. *See id.* at 482.

118. *Id.* at 492 (Powell, J., concurring) (citations omitted).

119. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 889 (1995) (Souter, J., dissenting).

120. *Id.* at 864.

121. *See Mitchell v. Helms*, 120 S. Ct. 2530, 2543-44, 2552-53 (2000).

[W]hat should be obvious [is] that simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program . . . creates . . . an "incentive" for parents to choose such an education for their children. For *any* aid will have some such effect. . . . Private decisionmaking controls because of the . . . program's neutrality.¹²²

Justice Thomas is prepared to concede to aid opponents that by their existential criterion—going by what parents "previously receive[d]"—Chapter Two creates an incentive to go private. But what counts is the program's own normative evenhandedness or neutrality between public and private, judged, necessarily, against a theoretical or historical baseline of deeper neutrality from which public schools, by virtue of the significant state support they get elsewhere, have already departed.¹²³

In sum, although each side conceivably has a choice of weapons when it comes to programs that aid both public and private schools evenhandedly, aid opponents still choose the existential approach, focusing on the benefits, and hence incentives, such new programs provide for private school students, while aid proponents, conceding the existential criterion to opponents, wrap themselves more in normative rhetoric.¹²⁴

122. *Id.* at 2543-44.

123. Likewise, the court in *Simmons-Harris v. Zelman*—along Justice Souter's lines in *Rosenberger* and the Supreme Court of Washington's in *Witters*, see *supra* notes 116-20 and accompanying text—struck down a Cleveland voucher program even though it was part of a broader package of aid to community schools:

Should we consider the Community Schools program in our analysis of the constitutionality of the school voucher program, we would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program: we would be considering and comparing every available option for Cleveland children. . . . we must limit ourselves to [the voucher] issue, regardless of the temptations Defendants' arguments present.

Nos. 00-3055/3060/3063, 2000 U.S. App. LEXIS 31367, at **38 (6th Cir. Dec. 11, 2000). Notably, the dissent responded by quoting the very passage from Justice Thomas cited above. See *Simmons-Harris*, 2000 U.S. App. LEXIS 31367, at **83 (Ryan, J., concurring in part and dissenting in part).

124. In *Everson v. Board of Educ.*, "New Jersey [spent] tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." 330 U.S. 1, 17 (1947). Justice Rutledge in his

D. *The Debate Over Incentive: A Summary*

The debate over incentive—over whether a particular aid package creates an inducement to choose private over public schools—thus comes down to this: On the one hand are aid opponents, who take the immediately preexisting status quo as the baseline. For them, “[j]udgements about the state of the world must be brought to bear.”¹²⁵ At least the “state of the world” is a real and definable baseline, they urge, whereas a “background norm”—such as the “principle of neutrality”¹²⁶—“by itself is insufficient to define the baseline” because it gives “free rein to our political preferences and our prejudices”; it can be located in any one of a number of places depending on the beliefs of the person advancing it.¹²⁷ And since any aid package, whether exclusively directed to private school students or more broadly to both public and private pupils, creates some new reason—by comparison with that immediately preexisting baseline—for parents to go private, it falls afoul of the incentive test. The parents aren’t deciding for themselves, but rather are influenced by the aid itself to skew in a private direction. The money remains public, not private.

On the other hand are aid defenders, who urge a more normative baseline, one that theoretically abstracts from or is historically antecedent to the existential state of the world, whatever that happens to be. Recall Justice Thomas’s *Rosenberger* concurrence: “The constitutional demands of the Establishment Clause may be judged against either a baseline of ‘neutrality’ or a baseline of ‘no aid to religion,’ but the appropriate baseline surely cannot depend on the fortuitous circumstances”—the existential state of the world—“surrounding the *form* of aid.”¹²⁸ On the kind of theoretical

dissent concluded that the program “does in fact give aid and encouragement to religious instruction.” *Id.* at 45 (Rutledge, J., dissenting). Rejecting the majority’s conclusion that “this aid is not ‘support’ [for religion] in law”—i.e., as a normative proposition—Rutledge concluded that it was “support in fact.” *Id.* For compared to what existed yesterday, he argued the program “helps the children to get to [parochial] school and the parents to send them.” *Id.*

125. Laycock, *supra* note 7, at 1006.

126. *E.g.*, Mitchell, 120 S. Ct. at 2541.

127. Laycock, *supra* note 7, at 1006.

128. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 862 (1995) (Thomas, J., concurring).

or historical baseline that Justice Thomas prefers—one that prescind from or exists prior to state support for public schools—any assistance for private schools is simply counterbalancing. Far from establishing an incentive to go private, the aid creates at best a wash, throwing all decisions back to unfettered parental discretion. The money becomes private, no longer public.

On an existential approach, then, any new aid creates a “financial incentive” for parents to go private, and hence is controlled by “state decisionmaking.”¹²⁹ It remains public money, and public money risks constitutional violation if it serves private, parochial purposes. Through a normative lens, however, the aid in no way influences private decision making; any skewing incentive dissolves and the money remains wholly subject to “private choice.” And private money, of course, can constitutionally serve private, parochial purposes.

The remaining question, however, is whether those purposes really are private or are instead public. Here, as we shall see, it is *opponents* of aid, in claiming that its purposes are ultimately private, who adopt a resolutely normative baseline in assessing the issues. *Proponents* of aid, in arguing that its purposes are really public, use a relentlessly existential baseline, just the opposite of the positions they occupy in the debate over whether the money itself is public or private.

III. PURPOSES: PUBLIC OR PRIVATE?

As I explained in Part I, the question as to whether aid serves a public or a private purpose resolves itself into a prior question: Does the aid program at issue defray expenses that parochial schools would otherwise have had to meet, thus (money being fungible) freeing up funds to be spent on the private purposes of religion? Or does the aid assist expenditures that schools would not otherwise have been responsible for meeting, meaning that it frees up no funds for private purposes? If the latter is the case, then the aid furthers purposes that fall entirely outside the private school's rubric and are thus purely public, confined to the stipulated “public

129. See *Zobrest v. Catalina Hills Sch. Dist.*, 509 U.S. 1, 10 (1993).

welfare” purposes, and hence not violative of the Establishment Clause.

Here, the poles reverse themselves. Advocates of aid take the existing situation, the “state of the world,” as the baseline. They argue, in any given case, that the proposed aid supports a service that private schools themselves had not, at that particular moment, in fact been providing. Hence, aid advocates say, the aid saves the schools no money. Aid opponents, by contrast, eschew whatever “fortuitous circumstances” happen to surround the aid as a thin reed on which to base definitions of school responsibility, and advance their own normative view. They make the case that regardless of what the immediately preexisting situation might have been, the aid supports a service that—on some set of theoretical grounds—would be considered part of a parochial school’s mission, or that historically might have fallen under the parochial school’s responsibility. Thus, to publicly subsidize that service is indeed to assist the school. It is to free up funds that the school otherwise would have been obligated to spend were it operating not as it is, but as it would under a certain theoretical or historical norm.

A. Aid Proponents: An Existential Approach

Consider the rhetoric of aid proponents first. In the *Zobrest* case, the Ninth Circuit struck down public provision of an interpreter for James Zobrest, a deaf student attending Salpointe parochial school (a decision the Supreme Court later reversed).¹³⁰ The dissent, in arguing for the constitutionality of the state’s aid to Zobrest, explained its opinion thusly: “The provision of an interpreter . . . would not relieve Salpointe of any *preexisting* financial or educational obligation. Nothing in the record or argument suggests that, without state aid, Salpointe itself will undertake the burden of employing an interpreter for James.”¹³¹ The key word “preexisting” literally reveals an existential criterion, a concern on the part of aid proponents with the immediate state of

130. See *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d, 1190, 1196 (9th Cir. 1992), *rev’d*, 509 U.S. 1 (1993).

131. *Id.* at 1200 (emphasis added).

the world, and the existential reality that the school had not, in fact, been providing the service in question. Hence, the court held that the aid freed up no school funds that otherwise would have been spent on an interpreter but which could be used for religious purposes.

Similarly, in *Americans United for Separation of Church and State v. School District*, the dissent would have upheld Grand Rapids' Shared Time program, under which the state provided secular courses for students at religious schools, on the following rationale:

The majority . . . predicates a finding of advancement of religion upon a premise that the challenged programs conferred a financial benefit upon the non-public schools by relieving their fiscal responsibilities The non-public schools, however, were never charged with a responsibility for offering the challenged courses. As the majority concedes . . . [a]ll Shared Time programs . . . are supplemental to the statutorily required core curriculum which must be offered by the non-public schools as a condition of state accreditation. Similarly, all Community Education courses are supplemental. It follows logically that the non-public schools have not been relieved of a fiscal responsibility since they were never . . . offer[ing] the supplemental courses at issue.¹³²

Again, the question for the court in upholding the aid was an existential one: Were these courses, as a matter of fact, already being provided by the school? The answer being no, their provision by the state could not have freed up any school funds to be spent on religious purposes; the aid could not have been used fungibly for sectarian ends.¹³³

132. 718 F.2d 1389, 1410-11 (6th Cir. 1983) (Krupansky, J., dissenting).

133. Indeed, the *Americans United* majority, in opposing the aid package, conceded that as an *existential* matter the programs being funded were not school responsibilities; ergo it must have deemed them to be school responsibilities on *normative* grounds. See *id.* at 1392-93. The court stated:

[T]he educational opportunities offered through the program are, in the main, supplementary to the core curriculum of the nonpublic schools. . . . The specific courses available through the elementary level Shared Time programs would not otherwise be available in any of the nonpublic schools

....

In *Everson* and *Allen*, where the aid consisted of busing and textbooks, defenders likewise observed that neither form of assistance relieved the school of an immediately preexisting obligation, meaning that no private funds that might otherwise have been spent were freed up. As the Court in *DiCenso v. Robinson* noted, "in both *Everson* and *Allen*, . . . the aid was sustained [because] the cost of bus fares in *Everson* and textbooks in *Allen* was originally borne by the parents rather than the schools . . . prior to enactment parents bore the costs."¹³⁴ The phrase "prior to" is key; it is an existential term, directing our attention to what, in fact, schools had (or more to the point, had not) been doing.¹³⁵

But even in *Ball*, where the Court invalidated a "shared time" program that placed public school teachers in religious schools to teach certain secular classes,¹³⁶ and *Meek*, where the Court struck down parts of two Pennsylvania laws that allowed for state provision of counselling/therapeutic services and instructional equipment directly to parochial schools,¹³⁷ aid defenders were able to take an existential approach. They argued that as a matter of fact—regardless of what one might think ought to have been the case—the schools were not providing such services, hence their provision by the state would free up no private funds. So, for example, defenders of the Shared Time program in *Ball* "argue[d] that [the] 'subsidy' effect is not significant . . . because the . . .

Of the nonpublic schools presently participating in the Community Education program, none have ever provided an identical course to their students. In that respect, Community Education courses do not represent substitutes for courses formerly offered at nonpublic schools.

Id.

134. 316 F. Supp. 112, 118 (D.R.I. 1970). In *Allen*, "in which the challenged government practice was lending textbooks . . . there was no evidence that [private schools] had previously supplied books . . . and some evidence that they had not." *Mitchell v. Helms*, 120 S. Ct. 2530, 2576 (2000) (Souter, J., dissenting).

135. Likewise, in the textbook case of *Cochran v. Louisiana State Bd. of Educ.*, the Court noted:

True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and . . . books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them.

281 U.S. 370, 375 (1930).

136. *School Dist. v. Ball*, 473 U.S. 373, 397 (1985).

137. *Meek v. Pittenger*, 421 U.S. 349, 367-73 (1975).

program[] supplemented the curriculum with courses *not previously* offered."¹³⁸

Likewise in *Meek*, aid proponents urged: "[E]ach of these services is rendered not as a part of the nonpublic school's general instructional program, but on an individualized basis to specific children determined to be in need of educational services beyond that available in a general instructional program."¹³⁹ They are not "part of the ordinary regular school curriculum";¹⁴⁰ they represent "an opening up of certain opportunities [that parochial-school students] really have not had before."¹⁴¹ In both cases, in other words, aid defenders pointed out that even if you believe—on normative grounds—that the courses or services or equipment in question should be the school's responsibility to provide (as the *Ball* and *Meek* Courts ultimately did), they were as a matter of fact not ones the school had been furnishing. Hence their provision by the state freed up no existing school funds that could then be devoted to private sectarian purposes.

Likewise in the battery of cases having to do with Title I aid to parochial schools, which addresses the needs of educationally deprived children of low-income families,¹⁴² aid proponents, whether they won or lost, argued on existential criteria. In *Agostini*, the Court concluded:

In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign language interpreters [in *Zobrest*]. Title I services are by law supplemental to the regular curricula. These services do not, therefore, "relieve sectarian schools of costs they otherwise would have borne in educating their students."¹⁴³

Here, the court was reversing its position in *Aguilar*, instead agreeing with Justice O'Connor's dissent in that case:

138. *Ball*, 473 U.S. at 396 (emphasis added).

139. *Meek v. Pittenger*, 374 F. Supp. 639, 654 (E.D. Pa. 1974).

140. *Id.* at 655.

141. *Id.* at 656.

142. See Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. §§ 6301-8962 (1994)).

143. *Agostini v. Felton*, 521 U.S. 203, 228 (1997) (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993)).

The only type of impermissible effect that arguably could [arise in] this litigation . . . is the effect of subsidizing "the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." That effect is tenuous, however, in light of the statutory directive that Title I funds may be used only to provide services that otherwise would not be available to the participating students. The Secretary of Education has vigorously enforced the requirement that Title I funds supplement rather than supplant the services of local education agencies.¹⁴⁴

And so, too, with the Title II aid that defenders successfully upheld in *Mitchell*, which provided monetary grants for the acquisition of computers and other instructional equipment: it "may only supplement and, to the extent practical, increase the level of funds that would be made available" to schools; it may not "supplant [parochial-school] funds."¹⁴⁵

A complementary way for aid proponents to make their point that the service being supported was not previously being underwritten by the schools is to show that in fact parents were formerly paying for it. Consider the textbook cases: "[S]ince the textbooks in *Allen* had been previously provided by the parents, and not the schools, no aid to the institution was involved."¹⁴⁶ As with *Allen*, so with *Meek*, in which the Court, while striking down a Pennsylvania law that provided parochial schools with state-supported counselling and therapeutic services and instructional equipment, upheld that portion dealing with textbooks: "The Supreme Court in *Meek* did note that, prior to the commencement of the . . . textbook programs . . . the parents of nonpublic

144. *Aguilar v. Felton*, 473 U.S. 402, 425 (1984) (O'Connor, J., dissenting), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997); *see also* *Felton v. United States Dep't of Educ.*, 739 F.2d 48, 50 (2d Cir. 1984) ("Federal financing is available only for programs that will supplement, rather than supplant, non-federally funded programs that would have been available in the absence of Title I funds."); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 145 (Me. 1999) ("[T]he *Agostini* Court found it significant that the services provided at the religious school supplemented rather than supplanted the costs that would otherwise be born by that school.").

145. *Mitchell v. Helms*, 120 S. Ct. 2530, 2537 (2000).

146. *Lemon v. Kurtzman*, 403 U.S. 602, 656 (1971) (Brennan, J., concurring) (citations omitted).

schoolchildren purchased their own textbooks."¹⁴⁷ Again, the situation existent "prior to" the initiation of the program is controlling, and if parochial schools are not in fact the ones providing the service at that stage, then a state program that now offers it frees up no private-school funds to be used for religious purposes.¹⁴⁸ As with both *Allen* and *Meek*, so also with the busing case *Visser v. Nooksack Valley School District*:

[T]he transportation of pupils to and from the Christian school is of no benefit to the school itself. [Instead,] the transportation of pupils to and from the school inures . . . to the benefit of the pupils and their parents, in that it simply relieves them from the obligation incident to compulsory attendance statutes of providing transportation themselves.¹⁴⁹

If busing aid relieves parents of an obligation, it necessarily does not relieve the school; hence it cannot fungibly be used to abet the school's private purposes.

In sum, when it comes to whether the aid in question serves public or private purposes, the issue for its *defenders* is an existential one. What matters is that the services that the aid in question would support are *not* already being provided by the schools, regardless of whether by some normative baseline they might have been. This, of course, is precisely the approach that aid *opponents* take when it comes to determining whether the money itself is better understood as public or private. There, what matters is that assistance for the services at issue *is* already being provided to public schools by the government, regardless of whether by some normative baseline it might not have been. As long as the assistance is already being furnished by the government to public schools, it is included in the baseline from which any aid to private schools represents an incentive-creating departure—instead of itself representing a departure from some normatively conceived baseline that the challenged private-school aid only countervails.

147. *Wolman v. Essex*, 417 F. Supp. 1113, 1118 n.2 (S.D. Ohio 1976) (citations omitted), *vacated*, 421 U.S. 982 (1975).

148. *See Meek v. Pittenger*, 374 F. Supp. 639, 675 (E.D. Pa. 1974) (Higginbotham, J., concurring in part and dissenting in part).

149. 207 P.2d 198, 202 (Wash. 1949).

B. Aid Opponents: A Normative Approach

Given that aid proponents argue as an existential matter of fact that the contested programs would provide services that parochial schools are not otherwise offering, those who would oppose them must necessarily argue as a matter of norm. Specifically, they must and do argue that when considered against some theoretical or historical standard, these are indeed services that fall within a school's baseline responsibility. Thus, to aid those services is to aid the school, because any such support fungibly frees up funds the school would otherwise have had a normatively construed obligation to spend on whatever services the aid happens to support, whether it was *actually* fulfilling that responsibility at the moment. On this interpretation, the purposes the aid furthers can very easily become private, instead of assuredly remaining public.

This argument, of course, is reminiscent of the approach aid *proponents* take in showing that the aid money is private, no longer public. In that debate, proponents disregard the existential baseline, which includes aid that the government is already providing to public schools, insisting that, when considered against some theoretical or historical criterion, the aid government gives to public schools falls outside the baseline such that any comparable aid to private schools simply creates an incentiveless wash.

So, for example, in *Everson*, which upheld aid for school buses—something that schools themselves had not previously been providing—Justice Rutledge, in dissent, took a normative approach, arguing that:

[T]ransportation, where it is needed, is as essential to education as any other element. . . . No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. . . . For me . . . [p]ayment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. . . . No rational line can be drawn between

payment for such larger, but not more necessary, items and payment for transportation.¹⁵⁰

Justice Rutledge's repeated use of the word "essential" is key here. It echoes a venerable terminological opposition in modern philosophy between the "essential" and the "existential," the one that defines the nature of a thing by its essence—by a normative notion of what it should do—and the other by its existential qualities—by the happenstance of what it actually is or does do.¹⁵¹ And Rutledge's deployment of the qualifier "for me" also signifies a subjective, normative as opposed to an objective, existential perspective, one growing out of his own beliefs instead of emanating from an observation of the state of the world.¹⁵²

Both the concept of the "essential" and the first-person assertion of commitment also appear in this passage from *Judd v. Board of Education*, a textbook-aid case:

School books [which as an existential matter parents, not parochial schools, were providing] are as essential to the means of imparting instruction to the children as are other educational

150. *Everson v. Board of Educ.*, 330 U.S. 1, 47-48 (1947).

151. See, e.g., GORDON HARLAND, *THE THOUGHT OF REINHOLD NIEBUHR* (1960) (distinguishing between Niebuhr's conception of "essential" and "existential man"); Patrick L. Bourgeois, *The Integration of Merleau-Ponty's Philosophy*, 5 SW. PHIL. REV. 37 (1989) (contrasting "essential phenomenological themes" with "existential phenomenology"); Joseph A. Bracken, *Essential and Existential Truth*, 28 PHIL. TODAY 66 (1984) (contrasting "essential truth" and "existential truth"); Charles E. Caton, *Essentially Arising Questions and the Ontology of a Natural Language*, 5 NOÛS 27 (1971) (distinguishing between the essential and the existential in the philosophy of language); Albert William Levi, *The Two Imaginations*, 25 PHIL. & PHENOMENOLOGICAL RES. 188 (1964) (distinguishing the "existential" from the "essential" imagination); Armand Maurer, *Descartes and Aquinas on the Unity of a Human Being: Revisited*, 67 AM. CATH. PHIL. Q. 497 (1993) (arguing that in Descartes and Aquinas, the existential factor, as distinct from the essential, plays the key role); John M. McDermott, *Maritain on Two Infinities: God and Matter*, 28 INT'L PHIL. Q. 257 (1988) (contrasting "existential and essential orders"); James B. Steeves, *Authenticity and Falling in Martin Heidegger's "Being and Time"*, 46 IYYUN 237 (1997) (contrasting "essential" and "existential" notions in Heidegger's philosophy); Norman J. Wells, *Suarez, Historian and Critic of the Modal Distinction Between Essential Being and Existential Being*, 36 NEW SCHOLAST. 419 (1962) (distinguishing between existential and essential in the thought of Suarez).

152. See also *Judd v. Board of Educ.*, where the court declared flatly, advancing a contestable norm for which it made no argument: "It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid." 15 N.E.2d 576, 582 (N.Y. 1938).

appliances, schoolhouses and schoolteachers. . . . I do not believe that any one will contend for a moment that, in the face of the prohibitory clauses of the Constitution, money can be taken from the public treasury for the purpose of furnishing the children in private and sectarian schools with these necessary educational facilities.¹⁵³

In these and other cases, aid opponents argue that “where the state has supplied [parochial] school children with transportation and books, sectarian educational enterprises are indirectly aided by being relieved of a financial burden which they might otherwise feel obligated to bear.”¹⁵⁴ Not burdens that they actually happen to bear, but that they “might otherwise feel obligated to bear”: a normatively, not existentially rooted criterion.

What of cases like *Ball* and *Meek*, involving programs of state support for instructional materials and teachers of secular subjects at parochial schools?¹⁵⁵ Recall that aid defenders “argue that [these programs] supplement[] the curriculum with courses not previously offered in the religious schools.”¹⁵⁶ But aid opponents remain unmoved by what might “previously” have been the existential case:

153. *Id.* at 583.

154. *Lemon v. Kurtzman*, 310 F. Supp. 35, 50 (E.D. Pa. 1969). In *Wolman v. Walter*, Justice Marshall stated:

It is, of course, unquestionable that textbooks are central to the educational process. Under the rationale of *Meek*, therefore, they should not be provided by the State to sectarian schools because “[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole.”

433 U.S. 229, 258 (1977) (Marshall, J., concurring in part and dissenting in part) (quoting *Meek v. Pittenger*, 421 U.S. 349, 366 (1975)) (alteration in original), *overruled by Mitchell v. Helms*, 120 S. Ct. 2530 (2000). The phrase “it is . . . unquestionable that textbooks are central to the educational process” is premised on a normative, not an existential, perspective, for indeed, as an existential matter, the schools were not paying for textbooks prior to the case. Hence, as a matter of fact, if not norm, they were not “part of the educational function of [parochial] schools.” See also *Board of Educ. v. Allen*, 228 N.E.2d 791, 796 (N.Y. 1976) (stating that “[i]t seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school”—even though schools, as a matter of existential fact, had not been paying for them).

155. See *supra* notes 136-37 and accompanying text.

156. *School Dist. v. Ball*, 473 U.S. 373, 396 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

[W]e do not find that this feature of the program is controlling. . . . The distinction between courses that "supplement" and those that "supplant" the regular curriculum is therefore not nearly as clear as petitioners allege. [And] although the precise courses offered in these programs may have been new to the participating religious schools, their general subject matter—reading, mathematics, etc.—was surely a part of the curriculum in the past, and the concerns of the Establishment Clause may thus be triggered despite the "supplemental" nature of the courses.¹⁵⁷

Here, we see both a theoretically based claim—"the distinction between courses that 'supplement' and those that 'supplant' . . . is not clear"—and an historical one—"surely these supplementary programs were a part of the curriculum in the past"—up against the admitted fact that, by comparison with the immediately preceding existent state, the courses supported here were in fact "new."

What aid opponents look to, then, in determining whether schools are responsible for providing the challenged services, and hence whether state aid risks fungibly abetting private ends, is not whether schools actually provide those services but whether, on some theoretical or historical baseline, they would. This is just the opposite of the approach aid opponents take in determining whether aid money is private or public. What matters for them is what government actually provides, not what it would provide on some theoretical or historical baseline.

Perhaps Justice Souter's dissent in *Agostini* illustrates the normative approach, and contrasts it with its existential competitor, most clearly. In *Agostini*, the state provided "remedial" instructional services through Title I which were—as Justice Souter conceded—existentially "supplemental" to the courses private schools were already providing.¹⁵⁸ Indeed, Title I expressly requires that anything supported through its provisions not supplant activities that the school is already undertaking, because it would then simply be substituting public for private money, freeing up the

157. *Id.*

158. See *Agostini*, 521 U.S. at 244 (Souter, J., dissenting).

latter.¹⁵⁹ But nevertheless, on a particular normative view—one on which the supplemental remedial teaching services fall within the school's normative "obligation," whether or not the school is actually providing them—Title I does relieve "the responsibility of the schools themselves," freeing up funds they should otherwise be spending on remedial services.¹⁶⁰ Justice Souter argued:

What was so remarkable was that the schemes in issue assumed a teaching responsibility indistinguishable from the responsibility of the schools themselves. The obligation of primary and secondary schools to teach reading necessarily extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not distinguish their subjects from the schools' basic subjects, however inadequately the schools may have been addressing them. . . . While it would be an obvious sham, say, to channel cash to religious schools to be credited only against the expense of "secular" instruction, the line between "supplemental" and general education is likewise impossible to draw.¹⁶¹

Hence, Justice Souter concluded: "Instead of providing a service the school would not otherwise furnish, the Title I services necessarily relieve[] a religious school of 'an expense that it otherwise would have assumed.'"¹⁶² But since the school was not *in fact* assuming responsibility for those services, Souter's argument that by underwriting them the state would have been disburdening private schools must assume that, as a normative matter, it is the schools' "obligation" to supply such services.

What of the only case where the teaching services that the state sought to support were *in fact*, and not just on a particular norm, part of the parochial school's mandate? What, in other words, of the only case where, as an existential matter, the school was actually already providing the service in question? That case was *Lemon* itself, where the state sought to assist parochial schools to pay the

159. See Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 77 (1965) (codified as amended at 20 U.S.C. §§ 6301-8962 (1994)); *Agostini*, 521 U.S. at 241.

160. *Agostini*, 521 U.S. at 245.

161. *Id.* at 245-46.

162. *Id.* at 252 (citation omitted) (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993)).

salaries of instructors teaching core secular subjects.¹⁶³ But even there, although aid opponents *could have* appropriated the existential argument—claiming that as a matter of fact the service was indeed previously being funded by the school, so that the aid in fact freed up funds for possible sectarian purposes—they chose instead to argue on normative grounds. That is, they opted to claim that the services being assisted were, as a normative matter, part and parcel of a school's responsibility. Or, to use the old distinction, they argued on essentialist not existentialist criteria, looking at the essence of what a school should be doing rather than the existent fact of what it actually does. "Quality teaching in secular subjects is an integral part of this religious enterprise," Justice Brennan declared in his *Lemon* opinion, and "[g]ood secular teaching is as essential to the religious mission of the parochial schools as a roof for the school or desks for the classrooms."¹⁶⁴

In a related vein, aid opponents sometimes reframe their normative argument in the following way. If the existential criterion urged by aid proponents is adopted, they say, then over time parochial schools could deliberately shed services—even basic teaching services—safe in the knowledge that were the state to then take them over, the public treasury would not be underwriting services that parochial schools were (at that moment) otherwise offering. After all, on existential criteria, as long as parochial schools were not immediately previously providing a service—even basic math instruction—the state could underwrite it without relieving the school of a burden and freeing up funds. But surely, on any reasonable norm, whether theoretical or historical, we think of such a service as being integral to the responsibilities of a private school, indeed any school. Therefore, the preexisting status quo, whatever it promiscuously happens to be at any given time, could not possibly be the appropriate baseline of school responsibility, because it really is no standard at all.

Justice Souter's argument hints at this concern, but others have been more explicit. "[P]etitioner's argument," the *Ball* court complained,

163. See *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971).

164. *Id.* at 657 (Brennan, J., concurring and dissenting).

would permit the public schools gradually to take over the entire secular curriculum of the religious school, for the latter could surely discontinue *existing* courses so that they might be replaced a year or two later by a Community Education or Shared Time course with the same content. The average religious school student, for instance, now spends 10% of the schoolday in Shared Time classes. But there is no principled basis [i.e., if we go by existential criteria, then there are no norms or principles available] on which this Court can impose a limit on the percentage of the religious schoolday that can be subsidized by the public school. To let the genie out of the bottle in this case would be to permit ever larger segments of the religious school curriculum to be turned over to the public school system, thus violating the cardinal principle that the State may not in effect become the prime supporter of the religious school system.¹⁶⁵

Likewise, the *Felton* court declared that, on the existential criteria recommended by aid proponents,

[c]onsiderable segments of the curriculum of the religious schools could be turned over to public school teachers It will not do to say that such an outcome cannot occur "while this Court sits," unless there is a principled basis [i.e., a norm] on which the Court can impose a limit. The Court has thus wisely decided, as we read its cases, that whatever the situation may be with respect to other forms of government aid, no part of the teaching or counseling function in parochial schools can be performed by public school employees, whether under a good plan, a bad plan, or no plan at all.¹⁶⁶

Assume, in other words, that religious schools were to withdraw from all their secular teaching responsibilities so that, as an existential proposition, state aid for their entire teaching function

165. *School Dist. v. Ball*, 473 U.S. 373, 396-97 (1985) (emphasis added), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

166. *Felton v. United States Dep't of Educ.*, 739 F.2d 48, 67 (2d Cir. 1984); *see also* *Americans United for Separation of Church & State v. School Dist.*, 718 F.2d 1389, 1405-06 (6th Cir. 1983) ("The Public School District is gradually, but surely, taking over an integral function of these religious schools; namely, providing an education to parochial students. . . . The only costs not covered may in time be those specifically allocated to religious services or classes in religious instruction.").

would not relieve a burden they were currently assuming and free up funds. Even so, on the basis of the "societal norms" and "historical precedent" that should be "significant in determining a baseline from which to measure whether religion has been advanced"—that is, on the basis that parochial schools should be in principle or were in the more distant past providing the service in question—the state would clearly be defraying a school obligation.¹⁶⁷

C. A Final Battle Over Fungibility

There is a particular kind of case in which combat between aid proponents and aid opponents gains heightened intensity: where the aid helps private schools comply with a new mandate or regulation that the state has at the same time promulgated. Consider, for example, a new state law that requires parochial schools to administer exams while providing the funds to assist them in doing so. For aid proponents, the fact that, existentially speaking, the mandated or regulatory responsibilities are new ones, ones that schools did not previously have to observe, means that the accompanying aid does not defray a purpose the school would otherwise have had to fulfill out of its own coffers. But for

167. Stick, *supra* note 60, at 471.

The crux of the case for me is whether you can by sophisticated accounting methods fund only secular programs in nonpublic schools, recognizing that a substantial monetary benefit is realized by the sectarian organization, without primarily aiding or advancing religion. For me the answer is unequivocally, emphatically and resoundingly NO. . . . [A] law which converts a school's entire task of providing secular instruction from a purely private to a predominately state responsibility, while permitting religious instruction to continue unaltered, would constitute sponsorship of the school—the physical and administrative facility through which religion is taught—even if all public funds were formally designated to be spent for functions other than teaching religion.

Meek v. Pittenger, 374 F. Supp. 639, 675-76 (E.D. Pa. 1974) (Higginbotham, J., concurring in part and dissenting in part).

For their part, aid defenders argue that this kind of normatively based concern, which rejects existential fact in favor of personal norms ("for me . . ."), is counterfactual. As a matter of fact, private schools simply will never withdraw from the provision of secular teaching services, expecting the state to then pick up the tab. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 785 (1973). Justice Powell declared that Justice Black's "fears regarding [state support for] religious buildings and religious teachers have not come to pass and insofar as [the state's] 'pick[ing] up . . . the bills for the religious schools' [is concerned], neither has [this] fear materialized." *Id.*

opponents, the fact that the responsibility is now required of schools by mandated or regulatory norms—the fact that, normatively speaking, it is a school responsibility to administer exams—means that the aid does defray a purpose that the school would otherwise have had to fulfill out of its own coffers.

So on the one hand, aid defenders produce rhetoric such as the following from *Committee for Public Education & Religious Liberty v. Levitt*, which dealt, in part, with state assistance for attendance-taking at state-required exams.¹⁶⁸

Of course it might be argued that since sectarian schools would otherwise be required to expend funds for the taking and recording of attendance, they benefit to the extent that reimbursement facilitates an activity that is essential to the conduct of the sectarian enterprise as a whole or at least “frees up” funds for religious purposes. [But a]lthough record-keeping may be part of the operation of a sectarian school . . . [i]n our view it is closer to the operation of buses for the transportation of children to sectarian schools, the cost of which may [therefore] be reimbursed by the State without violation of the Establishment Clause.¹⁶⁹

As for aid opponents, they place their emphasis on the fact that the law now normatively requires the private school to perform the service regardless of whether, existentially, it had not been supplying it immediately previously. Since, as a normative proposition, the school is responsible for the service, for the state to help underwrite it is in effect to free up funds that the school would otherwise have had to spend administering the test, allowing those monies to be channeled instead towards religious purposes. In his dissent in *Committee for Public Education & Religious Liberty v. Regan*, another exam-aid case, Justice Blackmun opined:

The aid provided by Chapter 507 goes primarily to reimburse such schools for personnel costs incurred in complying with state reporting and testing requirements, costs that must be incurred if the school is to be accredited to provide a combined sectarian-secular education to school-age pupils. To continue to

168. 461 F. Supp. 1123, 1125 (S.D.N.Y. 1978).

169. *Id.* at 1130.

function as religious schools, sectarian schools thus are required to incur the costs outlined . . . or else lose accreditation by the State of New York. These reporting and testing requirements would be met by the schools whether reimbursement were available or not. As such, the attendance, informational, and testing expenses compensated by Chapter 507 are *essential* to the overall educational functioning of sectarian schools in New York in the same way instruction in secular subjects is essential.¹⁷⁰

"Therefore," the *Regan* Court concluded, "just as direct aid for ostensibly secular purposes by provision of instructional materials . . . is forbidden by the Establishment Clause, so [is] direct aid for the performance of recordkeeping and testing activities."¹⁷¹ Such aid defrays costs that, as a normative matter, form part of the parochial school's responsibilities, thus freeing up funds the school would otherwise have had to spend, enabling them to be devoted to sectarian purposes.

D. The Debate Over Fungibility: A Summary

In sum, the debate over whether the money—public or private depending on the questions discussed in Part II—itself goes to public or private purposes comes down to this: in almost all school aid cases, the service in question is, as a matter of existential fact, not one that the private school had been supplying previously. Aid defenders seize on this fact, arguing that it means the aid in no way relieves the school of a burden it would otherwise have borne, and thus frees up none of its resources for private religious purposes.

170. 444 U.S. 646, 668 (1980) (Blackmun, J., dissenting) (emphasis added).

In the present case, it is conceded that the attendance taking and test administration are performed during regular school hours by school personnel and would be so performed whether or not reimbursement is available. . . . In order to continue to qualify as institutions providing an educational alternative to public schools, the private school beneficiaries must continue to comply with the state's reporting and testing requirements. Compliance with state laws regulating education is as much a part of the educational function of private schools as classroom instruction in secular subjects.

Committee for Pub. Educ. & Religious Liberty v. Levitt, 414 F. Supp. 1174, 1179 (S.D.N.Y. 1976), *vacated*, 433 U.S. 902 (1977).

171. *Regan*, 444 U.S. at 668 (Blackmun, J., dissenting).

Hence, they conclude, the purposes which the aid underwrites remain purely public. For their part, aid opponents conclude that regardless of the existential fact of the matter, on some plausible (if usually unarticulated) norm, such services *are* school responsibilities. And so the aid *does* relieve the school of a responsibility that it would otherwise properly bear, thus freeing up some of its funds for private purposes.

IV. A LOOSE END

Reconstructed to display its most central characteristics, the constitutional argument over state aid to parochial schools comes down to this: On the one side are opponents of aid who see the program in question as a means of flowing public money toward private purposes. Taking an existential view of baseline government responsibility, they claim that the aid creates a publicly structured incentive to choose private school—hence it remains public money—while, according to their normative view of baseline school responsibility, it underwrites services that really are better understood as baseline school obligations, thus fungibly freeing up funds for private purposes. On the other side, of course, are proponents of aid who conceive the money as private and/or its purposes as public. Taking a normative view of government responsibility, they argue that no publicly structured incentives interfere with private discretion over how the money is spent—hence the money remains private—while at the same time, taking an existential view of school responsibility, they urge that the aid underwrites no responsibilities that parochial schools are actually assuming, thereby freeing up no funds for private ends and serving only public purposes.

In Part V, I will draw on previous discussion to show what I have already at points suggested: that the (existential) arguments aid opponents advance in urging that the money is public are, at a fundamental level, inconsistent with the (normative) arguments they mount in claiming that the purposes it serves are private. Likewise, I will show that the (normative) assumptions made by aid proponents in deeming the money private contradict the (existential) approach they adopt in claiming its purposes to be public.

Here, though, I will tie up a loose end. Notice that while those opposed to aid must depict it as public money flowing to private purposes, defenders of aid need only insist that the money is private or that its purposes are public. In other words, their approach can be disjunctive, which explains a couple of remaining rhetorical strands.

On the one hand, while aid defenders sometimes concede that the money might well be understood as public—since it flows through an incentive structure created by the government—they nevertheless claim that the purposes to which it flows are also public, in that no school funds are ultimately being freed for private purposes. Hence there is ultimately no constitutional violation; after all, public funds can flow to public purposes. So, for example, one commentator argues that a statute should be upheld even if it “attract[s] a significant number of additional students to . . . parochial schools”—that is, even if it provides a state-structured incentive for them to attend parochial schools—as long as it does not fungibly “furnish the schools with additional funding for religious purposes” by “taking over a substantial portion of their responsibility for teaching secular subjects.”¹⁷²

On the other hand, defenders of a particular aid program sometimes concede that it may well actually help advance the private purposes of the school, but claim that because the money is better understood as private as well—here they point to the absence of any incentives directing its disposition—no constitutional violation takes place. If “there [is] no incentive to use the aid at a religious institution,” if “the student . . . ‘transmits it to the educational institution of his or her choice’”—meaning that the money is essentially private—then such aid may be “upheld . . . even though the religious institution could use the assistance provided through the student for any purpose,” including a private

172. Stick, *supra* note 60, at 470 n.323; see also *McGowan v. Maryland*, 366 U.S. 420, 467 (1961) (Frankfurter, J., concurring) (stating that “even though [the] expenditure may cause some children to go to parochial schools who would not otherwise have gone,” as long as it serves a public purpose, the aid passes constitutional muster); *Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947) (arguing that “[t]here is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children’s bus fares out of their own pockets”—meaning the aid creates an incentive for them to go there and hence the money remains public—but if nevertheless such state-provided busing to parochial schools serves a “public purpose,” it must be upheld).

parochial one.¹⁷³ Justice Thomas, in *Mitchell*, likewise made such a claim, arguing that as long as the aid money can be deemed genuinely private—because it comes with no “impermissible incentive” to choose private school—then it does not matter whether the purposes it serves are also private, for “any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.”¹⁷⁴

173. *Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352, 358 (Vt. 1994); see also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10-11 (1989) (arguing that aid does not have the effect of advancing religion even if it fungibly relieves religious groups of costs they would otherwise incur, as long as it comes in the form of a general program of assistance that does not favor religious institutions over others, thus providing no incentive for their utilization); *Hunt v. McNair*, 413 U.S. 734, 741, 743 (1973) (stating that “the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends”; aid can flow to private ends as long as the particular program’s “benefits . . . are available to all institutions of higher education . . . whether or not [they have] a religious affiliation”—in other words, as long as the aid money remains private, bereft of a state-imposed incentive for it to be spent one way or the other).

174. *Mitchell v. Helms*, 120 S. Ct. 2530, 2547 (2000). A related point bears mention. To understand its import, imagine first an aid program that opponents describe as creating an “existential” incentive to patronize parochial school. That is, compared with the immediately preceding status quo, even if not against some normative or theoretical baseline of state neutrality, the aid provides some new financial reason to go private. For example, the state may provide free busing or textbooks. Assume equally, however, that on existential grounds the aid flows to a service that does not relieve the parochial school of an obligation, thus freeing up no funds for private purposes. In other words, suppose that the service was not one that parochial schools were providing in the immediately preexisting status quo, even if on some normative or theoretical grounds it is their responsibility to do so.

Now with that in mind, consider the following claim. Even if we accept the existential criterion—noting that the busing or book services in question are not ones that the school was underwriting anyway, such that in paying for them the state frees up no new funds that the school can devote to private purposes—we still face a potential problem. Knowing that parents are now getting free busing services or textbooks, the school can simply raise its tuition commensurately so as to capture their gains. As Choper puts it, “[s]ince tuition charges are flexible,” they “could readily be adjusted upward to take advantage of the parents’ subsidies . . . thus providing [the school] with funds available for strictly religious use.” Choper, *supra* note 56, at 315 n.382, 319. Or, as Senator Bob Packwood told private-school officials at the 1981 subcommittee hearing on tuition tax credits:

What I want to ask each of you is to lay to rest, if you can, [the concern] that if we pass this [tuition-tax credit bill], you are all going to immediately raise your tuition, and this is just going to become a Federal subsidy for the school, and the parents will be no better off than if we never pass a bill.

Tuition Tax Credits Hearings, *supra* note 30, at 220.

In raising its tuition in this way, the school *would* be getting new money, money that is new on existential grounds—new, that is, compared with the immediately preexisting status quo. As a result, the aid relieves the school of some expenditures it actually undertakes as an existential matter—let alone whatever it may be responsible for on normative criteria.

V. THE CONTRADICTION AT THE CORE OF ESTABLISHMENT CLAUSE DISCOURSE

Time and again, in cases involving state aid for parochial schools, the disagreement over whether to conceptualize the aid money as public or private boils down to the question of "incentive." In the same way, discourse over whether to conceive of the aid's purpose as public or private resolves itself into the issue of "fungibility."

I looked at the "incentive" debate first. The money in question is more appropriately thought of as retaining its public character if it in some way constrains, controls, or skews the ends to which parents direct it—if, to use the term most often employed by judges and commentators, the program comes with a state-created "incentive" for the money to be spent one way or another. State-originated money is more plausibly deemed private, however, if no such incentives bias the discretion of the private party to direct the money as he or she likes. I analyzed the rhetorical moves made by aid opponents and proponents on this question.

At rock bottom, I suggested, aid opponents take an "existential" view of the proper baseline from which to gauge the possible emergence of an incentive. Whatever the immediately preexisting status quo happens to be—whatever the government had been doing prior to the advent of the program—if the aid creates any deviation from it, then a choice-fettering incentive exists, and the money is more properly thought of as publicly, not privately, controlled.

Aid proponents, by contrast, take a more "normative" approach to the "incentive" baseline. They scrape away the existent status quo to reach some prior historical or preeminent theoretical

Even though the money's initial purposes were public—supporting busing and books that the private school was not previously underwriting—with a tuition price hike, the aid can be converted to private purposes by relieving the school of obligations it *would* have had to underwrite anyway. But note that to the extent that tuition goes up, any incentive that the aid provides to parents to send their children to private school would diminish. After all, if the free busing and books are countervailed by a price hike from the institution, then even on existential grounds, there is no new incentive to send one's child to parochial school. In other words, with a tuition price hike, the purposes to which aid is devoted may become private (even on existential grounds), but then so does the money (even on existential grounds), for with a tuition hike, the aid creates no new incentives to go private over public leaving its disposition instead entirely up to parental choice.

baseline from which to measure incentive—usually a baseline from which substantial government support for public schools has already created departures that the private aid now in question at best counterbalances—thus, in fact, generating no overall incentive for parents to choose private schools. Once we thus back away from the here and now, in other words, and adopt a more “traditional and normative” baseline as the appropriate measure of government’s initial responsibility, we will see that the aid does not create an incentive to choose private school even if, taken from that precise existential moment, it might have.¹⁷⁵ On this approach, the money is private because it is privately controlled.

I then looked at the “fungibility” debate—the debate over how to conceive the kind of purposes to which the money (whether public or private) ultimately flows. Are those purposes themselves public or private? Here, the question is whether the object of the aid is a school responsibility such that, in assuming it, the state fungibly frees up funds that the school can then use for private purposes. Or, on the contrary, are the services in question not part and parcel of the school’s responsibility such that, in aiding them, the program serves only its stipulated “public welfare” purpose and frees up no funds for private ends?

The deep structure of judicial and scholarly debate over this question of fungibility reveals that it is aid proponents who take an “existential” approach. Specifically, aid proponents urge that the appropriate baseline from which to decide whether any new program relieves a school of responsibility is whatever the school had been doing immediately prior to the advent of the program. If the school had not been engaged in that activity, then obviously funding it would not free up money that the school would, as a matter of fact, otherwise be spending on it. The aid, consequently, does not find itself fungibly assisting private ends. Rather, it remains confined to its stipulated public purposes.

It is aid opponents, by contrast, who take a more normative approach by insisting that we back away from the existential here and now and adopt a theoretically or historically fashioned baseline as the appropriate measure of a school’s responsibility, using “historical precedent and societal norms” to “determin[e] a

175. Choper, *supra* note 56, at 340.

baseline.”¹⁷⁶ Once we do that, aid opponents believe, we will see that the aid does indeed relieve the school of a burden that it would otherwise have had to bear, even if it was not shouldering that burden at that precise instant, and so is assisting the private purposes of the school.

A. The Contradiction for Aid Opponents

I have thus tried to find a path to the very heart of the assumptions separating pro-aid and anti-aid forces. What has been revealed is a kind of mirror-image reversal on each side. Anti-aid judges and commentators adopt an existential perspective on the question of how to draw the appropriate baseline—how to determine the point of departure from which any inducements should be measured—when the issue is incentive. The state of the world—whatever government happens to be providing at that moment—is the appropriate point of departure. But in addressing the question of how to draw the appropriate baseline when the issue is fungibility—how to determine the point of departure from which school responsibility should be measured—whatever “the state of the world is,” or whatever schools happen to provide or not provide at that moment, is simply too promiscuous and ungrounded a starting-off point. Instead, aid opponents summon up a normative—a theoretically or historically grounded—view as to where to draw the line.

When the question is incentive, then, the key baseline for aid opponents is whatever the “state of the world” throws up; it is the one that currently—existentially—circumscribes what government actually does. Aid opponents feel no need to search for a normatively grounded line—a line that describes what government would do on some theoretical or historical norm. But when the question is fungibility, whatever the “state of the world” throws up is manifestly *not* sufficient; the key baseline is not simply the one that currently—existentially—circumscribes what the parochial school actually does. Instead, the appropriate baseline must be one that describes what the parochial school would do on some theoretically- or historically-crafted norm.

176. Stick, *supra* note 60, at 471.

On the one hand, then, according to aid opponents, courts should reject the kind of normative baseline against which the aid would simply be seen to perform the same function as assistance the state already provides to public schools, thus merely countervailing that assistance and creating an incentiveless wash. Rather, for aid opponents, the appropriate baseline is the immediate existential moment, against which the aid represents something “additional” that benefits private schools alone and hence creates an incentive that does influence parental decision making. On this understanding, the money remains publicly skewed and not wholly within the control of private discretion.

On the other hand, when it comes to determining the *purposes* the aid serves, the appropriate baseline for opponents is very much a normative one—one on which the aid performs the same function as spending the private school should already have been undertaking, supplanting that spending and fungibly freeing up funds the school can devote to private purposes. Here, the appropriate baseline is emphatically *not* an existential one. It differs deeply, in other words, from one that would look at what schools at the immediate moment were in fact providing and on which the aid would then represent something “additional” or supplemental, not a substitute that frees up funds the school would otherwise be spending. For aid opponents, their normative approach to this baseline allows them to conclude that the purposes served have left the realm of the public and become private.

But if the “preexisting” situation (as then-Professor Scalia called it)¹⁷⁷ suffices as the baseline for determining the presence of incentive—and hence the question of whether the money is public or private—then why should not the “preexisting” situation, as the *Zobrest* appellate court identically called it,¹⁷⁸ suffice for determining the presence of fungibility—and hence the question of whether the aid frees up funds the school can devote to private purposes? Put it another way: If, when the question is incentive, it is unacceptable to back away from the existential here and now and adopt what Choper calls a “traditional and normative”¹⁷⁹ baseline

177. See *supra* text accompanying note 109.

178. See *supra* text accompanying note 131.

179. Choper, *supra* note 56, at 340.

of government responsibility, then why is it quite acceptable, when the question is fungibility, to back away from the existential here and now, and adopt what Michael Stick calls "historical precedent" and "societal norms" to "determin[e] a baseline"¹⁸⁰ of school responsibility?

B. The Contradiction for Aid Proponents

What of the argumentation mounted by aid proponents? When the question is incentive—when the question is whether the aid money is ultimately public or private—they adopt a normative approach. Aid proponents urge us to hang back from the existential present—from whatever the state of the world happens to be and from wherever government is currently drawing its baseline—in determining whether the aid creates a new inducement to attend private school. Instead, they invoke a theoretically or historically grounded view of the baseline from which any ultimate incentive effect must be measured—one from which subsequent departures in favor of public schools countervail any incentive effect created by the aid program in favor of private schools. This normative baseline renders the money more privately than publicly controlled. But when the issue is fungibility, aid proponents reject the idea of hanging back from the existential present—of invoking a theoretically or historically grounded baseline—to determine whether any public aid supplants what private schools would otherwise be providing. Instead, whatever the state of the world happens to be—wherever schools are currently drawing their baseline—suffices as the point of departure aid proponents take in determining the school's responsibility. On this criterion the aid does not supplant services the school is in fact otherwise underwriting and thus serves only public, not private purposes.

Yet if the state of the world is good enough for determining fungibility—for determining whether the aid ultimately restricts itself to public purposes or flows to private ends—then why is it not good enough for measuring incentive—for determining whether the money is public or private? Alternatively, if we should look to what government would provide—on some theoretical or historical

180. Stick, *supra* note 60, at 471.

baseline—when we have to determine the presence of incentive, then why not look to what parochial schools would provide—on some theoretical or historical baseline—when it comes to determining the existence of fungibility?

CONCLUSION

Each side, then, seems splayed on a kind of tension. But how serious is it?

Quite serious, I would argue. Conceivably, there could be a story that explains why it is appropriate, as aid opponents would have it, to use the existent status quo of what government *is* providing as a baseline when the issue is incentive, but to insist on some normative baseline of what schools *might be* providing when the issue is fungibility. Likewise, there may be an account available to aid supporters that explains why they fly toward a normative conception of government responsibility when the issue is incentive, but remain firmly on the ground of current existence when the question is school responsibility. In any case, neither side has advanced one. Indeed, my claim is that to analyze constitutional discourse over state aid to parochial schools is to see that these mirror-image and internally conflicting existential-normative assumptions about baselines occupy rock bottom in the argumentation of either side. There is nothing further beneath or sustaining them. They form a central instance of what Joseph William Singer calls “contradiction all the way down.”¹⁸¹

Nowhere is the primordial incompatibility between existential and normative approaches to baseline illustrated more trenchantly, as a general proposition, than in Cass R. Sunstein’s *The Partial Constitution*.¹⁸² For Sunstein, the conflict between those who take “existing arrangements,” “existing practices,” and “the status quo as the baseline” for analyzing the constitutional effect of law and policy,¹⁸³ and those who “abandon[] the status quo as a baseline and

181. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 537 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

182. SUNSTEIN, *supra* note 12.

183. *Id.* at 3-4.

instead rel[y] on . . . principle"¹⁸⁴ or "historical context,"¹⁸⁵ is the fundamental faultline in American constitutional jurisprudence.

True, there are some important differences between Sunstein's discussion and the one I am offering here. Sunstein, for example, devotes scant attention to Establishment Clause issues themselves,¹⁸⁶ and his short discussion—which concludes that "[g]overnment is constitutionally authorized to be neutral as between [public and private schools], but it is under no obligation of neutrality"¹⁸⁷—simply describes the parameters or the arena in which constitutional combat takes place. It does not report on the contest itself. In concluding that government does not *have* to fund parochial schools, Sunstein simply brings the discussion up to the point where my Article begins, namely whether government assistance to religious schools in a variety of different cases violates the Constitution. In any case, Sunstein's concern is to show how one side in any given constitutional struggle—such as the debates over pornography, abortion, or campaign finance—assumes an existential baseline, while the other side adopts a normative approach. His concern is not to show, as I do here, how the existential-normative dichotomy splits sides themselves and places each partisan in an internal contradiction. Additionally, Sunstein, of course, wants to argue against an existentialist and in favor of a normative approach to baselines,¹⁸⁸ whereas that is not my objective here. But what Sunstein does very clearly show, for my purposes, is that the conflict between existential and normative baselines is an animating one lying rock bottom in constitutional law. And if the two cannot be reconciled, then particular positions that rely on both must fall into a kind of inveterate inner conflict.

There is, however, also a confusion in Sunstein's analysis that helps underscore what is so uniquely vexing about the kind of contradiction that plagues opponents and proponents alike in the school-aid cases. At times, Sunstein seems to conceive the

184. *Id.* at 81.

185. *Id.* at 76.

186. *See id.* at 307-08.

187. *Id.* at 308.

188. *See id.* at 4-7; *see also* Emily Sherwin, *A Comment on Cass Sunstein's Equality*, 9 CONST. COMMENTARY 189, 192 (1992) (describing Sunstein's approach as both "normative" and based in "history").

"existential status quo" as I do here, namely, as the present situation whatever it happens to be at the moment of controversy. But on other occasions, he seems to take the existential status quo as of 1937 by speaking of "[s]tatus quo neutrality, pre-New Deal style," and at other times, he goes back even further by identifying the Common Law itself as the status quo baseline.¹⁸⁹ Indeed, this is precisely why he is able to chide jurists who fail to find normative arguments to justify whatever particular existential "status quo" baseline they choose; as he says: "A decision to use the status quo as the baseline would be entirely acceptable if the status quo could be independently justified. . . . [Problems arise] when the status quo is used without adequate justification or merely by reflex."¹⁹⁰

For my purposes, the problem with Sunstein's argument here is that while one can imagine a normative argument being made for any specific baseline, such as the threshold of the New Deal or the emergence of the Common Law, one cannot imagine a normative argument being made for whatever the status quo of the present moment happens to be. Such a notion of the status quo is "content-independent."¹⁹¹ It simply embraces too promiscuous a set of possibilities for any particular "norm" or "principle" to capture, swinging wildly as it would from baselines that include or exclude all manner of government aid, or baselines that include or exclude a wide array of school responsibilities, depending on the time and place, and the program and jurisdiction involved. Hence, while Sunstein holds out hope that some of the existential status quo baselines he posits—pre-New Deal, post-Common Law—can be justified on some set of normative arguments, the reason they can is that they are set in stone and are thus fundamentally distinct from the existential baseline as I use that term: whatever the present state of the world happens to be.¹⁹²

What I take from Sunstein, then, is that the conflict between existential and normative baselines is a fundamental one in

189. SUNSTEIN, *supra* note 12, at 82.

190. *Id.* at 6, 348.

191. See Frederick Schauer, *Acts, Omissions, and Constitutionalism*, 105 ETHICS 916, 921 (1995).

192. That is why on my scheme, Sunstein's "existential" baselines of pre-New Deal and post-Common Law would be treated as straightforwardly normative, implying or promising as they do some sort of theoretical or historical justification.

constitutional law.¹⁹³ What I add to it is the suggestion that in this case—the case of parochial-school aid—it is also an implacable one since here, the existential can never become normative, and each side in the parochial-school aid cases finds its loyalty divided between the two. My story thus does not have a happy, nicely wrapped-up ending, for we are left to ask: Why is it appropriate, as aid opponents claim, to take the existential status quo—whatever government happens to be providing at the moment—as the baseline to determine whether incentive exists, and hence whether the money is more public or private, and yet renounce the existential status quo—whatever schools happen to be providing at the moment—as the baseline for determining whether fungibility exists, and hence whether the aid serves a public or a private purpose? And why is it fine to adopt a distinctive normative or theoretical approach to baseline government responsibility in the debate over incentive, as aid defenders do, while rejecting any such notion in favor of a relentlessly existential approach to baseline school responsibility in the debate over fungibility?

If government's baseline responsibilities are to be determined by looking simply at the existing status quo, why not so determine the school's? On the other hand, if the government's baseline responsibilities are to be ascertained by adopting some normative or historical perspective, why not so ascertain the school's? At present, neither side has an answer to these questions.

193. See also Anna T. Majewicz, Note, *Baseline Analysis: Broadening the Judicial Perspective*, 65 ST. JOHN'S L. REV. 495, 496 (1991) ("[O]ne's perspective, embodied in 'baselines,' profoundly affects one's analysis of a problem and ultimately may determine its resolution. Because the choice of baseline critically directs the judicial decision-making process, a court should explicitly acknowledge and identify its choice in its legal analysis.") (citations omitted).