

Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments

*Douglas Laycock**

I. INTRODUCTION

Over the past two decades, the Supreme Court's approach to government funding of secular services provided by religious institutions has shifted from tight restrictions on aid to general approval of nondiscriminatory aid delivered through mechanisms of private choice. What may be less apparent is that these changes are rooted in tensions that go back to the very beginnings of modern Establishment Clause doctrine. The Court's general move to the right is only part of the explanation for the change, and in itself not a sufficient explanation. This brief Comment argues that the more fundamental causes of this change are a realignment of religious conflict, the end of desegregation and massive resistance, and the emergence of a broad political coalition supporting aid to religious schools, all of which reframed the legal issues and made it easier for Justices to see the other side of the original doctrinal tension.

Part II outlines the two conflicting principles underlying the Court's jurisprudence on aid to religious institutions: no-aid and nondiscrimination. Part III explains why the no-aid principle generally dominated during the *Lemon* era, from 1971 to 1985.¹ Part IV explains what changed and why the nondiscrimination principle has dominated since 1985. Part V offers a brief conclusion.

* Yale Kamisar Collegiate Professor of Law, University of Michigan. I am grateful to Scot Powe for helpful comments on an earlier draft, and to participants in the Seminar on Religion and Society at Harvard University for helpful reactions to an oral presentation of these ideas.

1. Much of Parts II and III of this Comment have previously appeared, with further elaboration, in Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997). It is necessary to reprint excerpts from that article here, with modest modifications, to set up the new question discussed in Part IV and to make that discussion comprehensible.

II. THE CONFLICTING PRINCIPLES

Ever since 1947, the Court has struggled to reconcile two competing intuitions, each announced in *Everson v. Board of Education*.² On one hand was the no-aid principle: “No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”³ On the other was the nondiscrimination principle, set forth in the very next paragraph: that the state “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.”⁴

The no-aid principle derived from eighteenth-century debates over earmarked taxes levied exclusively for the funding of churches.⁵ In an era with few public welfare benefits, these taxes funded purely religious programs and funded those programs preferentially. As applied to that dispute, the two principles did not conflict, and the no-aid principle served religious liberty.⁶ No-aid protected citizens from being forced to contribute to churches; it protected the churches from financial dependence on the government; it prevented discrimination in favor of religion; and it did not discriminate against religion.

The modern cases are very different. From *Everson* forward, the cases have involved equal government funding of religious and secular alternatives. And in all these modern cases, government money funded secular services in a religious environment, not purely religious programs. In that context, the Court had to choose between its two principles: either government money would flow to religious institutions, or students in religious schools and patients in religious hospitals would forfeit instruction or services that the state would have funded if the individuals had chosen a secular school or hospital instead.⁷

2. 330 U.S. 1 (1947).

3. *Id.* at 16.

4. *Id.*

5. See Laycock, *supra* note 1, at 48–53 (comparing the eighteenth-century proposals to disputes in the nineteenth century and later).

6. *Id.* at 49.

7. See Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13

The majority in *Everson* thought the two theories could be reconciled by applying each in its proper sphere.⁸ Some programs provided aid; others provided general welfare benefits. The Court appeared to cling to this belief for thirty years or more after *Everson*. But this was a doomed strategy because advocates could logically expand each theory from its point of origin until it covered the universe of cases. Tax-supported fire protection for private schools is a form of aid; education is a social welfare benefit. The effort to confine the two theories to separate spheres could only postpone the point at which the Court would be forced to choose between them.

Broad trends in the cases have mostly resulted from the Court's choice between these two ways of looking at the problem. A weak form of the nondiscrimination principle prevailed in *Everson*, which upheld government-funded bus rides to a Catholic high school,⁹ and again in *Board of Education v. Allen*¹⁰ in 1968, which allowed states to provide secular textbooks for use in religious schools.¹¹ These cases *permitted* equal funding; the Court has never yet *required* equal funding.¹²

In *Lemon v. Kurtzman*¹³ in 1971, the Court struck down a funding program for the first time, holding that states could not subsidize teachers' salaries in religious schools.¹⁴ With exceptions based on fine distinctions that are well-known and much ridiculed,¹⁵ the no-aid principle predominated from then until its high-water mark in *Aguilar v. Felton*¹⁶ in 1985. *Aguilar* invalidated the use of federal Title I funds¹⁷ to pay public school teachers to provide remedial instruction

NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 388–92 (1999) (further elaborating this comparison between contemporary and eighteenth-century proposals).

8. See *Everson*, 330 U.S. at 17–18 (characterizing bus rides to school as “a general program, . . . indisputably marked off from the religious function”).

9. See *id.* at 17–19.

10. 392 U.S. 236 (1968).

11. *Id.* at 243–49.

12. See *Locke v. Davey*, 540 U.S. 712 (2004) (upholding a program that offered scholarships to study any major at any accredited college or university, except that no student with such a scholarship could major in theology taught from a believing perspective).

13. 403 U.S. 602 (1971).

14. *Id.* at 615–25.

15. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 110–11 (1985) (Rehnquist, J., dissenting) (ridiculing a long list of such distinctions).

16. 473 U.S. 402 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

17. See Elementary and Secondary Education Act of 1965, tit. I, Pub. L. No. 89-10, 79 Stat. 27, 27. This law has been so amended and expanded over the intervening years that its

in secular subjects to educationally deprived children in low-income neighborhoods, on the campuses of religious schools.¹⁸

Beginning in 1986, the Court progressively elevated the nondiscrimination principle while subordinating the no-aid principle. Since then, the Court has upheld six programs that permitted government funds to reach religious institutions;¹⁹ during that same period, it has invalidated none. Four decisions from the *Lemon* era have been overruled either in whole or in part.²⁰ The most important of the new decisions is *Zelman v. Simmons-Harris*,²¹ which upheld vouchers that can be used to pay tuition at any public or private school, including religious schools.²²

Both the no-aid and nondiscrimination principles provide plausible and internally coherent grounds for decision. The Court has never committed to either principle without exceptions, but the changes

original provisions are no longer identifiable, but provision for special programs for educationally disadvantaged children can still be found at 20 U.S.C. § 6315 (2000 & Supp. 2001), and a guarantee that students in private schools can participate in such programs can be found at 20 U.S.C. § 6320 (2000 & Supp. 2001). For descriptions of the statute and its evolution, see *Agostini*, 521 U.S. at 209–12; *Aguilar*, 473 U.S. at 404–07 nn.1–2, 4–6.

18. *Aguilar*, 473 U.S. at 404–07 (describing the program); *id.* at 408–14 (invalidating the program).

19. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school voucher program); *Mitchell v. Helms*, 530 U.S. 793 (2000) (federally funded equipment distributed to public and private schools on per-student basis); *Agostini*, 521 U.S. 203 (1997) (public school teachers providing remedial education to low-income students in public and private schools in low-income neighborhoods); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (interpreter for the deaf at Catholic high school); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (grants for counseling teenagers on sexual responsibility); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (state scholarship for vocational training for the blind, where blind student wished to attend seminary).

20. See *Aguilar*, 473 U.S. 402 (remedial instruction), *overruled by Agostini*, 521 U.S. 203; *Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (enrichment courses), *overruled in part by Agostini*, 521 U.S. 203; *Wolman v. Walter*, 433 U.S. 229, 248–51 (1977) (instructional materials and equipment), *overruled in part by Mitchell*, 530 U.S. 793; *Meek v. Pittenger*, 421 U.S. 349, 362–73 (1975) (instructional materials and equipment, remedial instruction, counseling, and speech and hearing services), *overruled in part by Mitchell*, 530 U.S. 793, and *in part, implicitly, by Agostini*, 521 U.S. 203.

21. 536 U.S. 639 (2002).

22. *Id.* at 652–53 (“*Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. . . . We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional.”).

since 1986 can generally be understood as a shift from a predominant commitment to the no-aid principle to a predominant commitment to the nondiscrimination principle. The question of why the Court changed its mind can therefore be restated this way: why did the no-aid principle seem the sensible way to view these issues from 1971 to 1985, and why has the nondiscrimination principle seemed the sensible way to view these issues since 1986?

More conservative Justices are obviously part of the explanation. But if the explanation were simply that conservative Justices were voting in ways more favorable to religion, then the rules on government-sponsored religious speech would have changed along with the rules on government funding. That may happen eventually, but it has not happened yet. To Justices Kennedy and O'Connor, these two sets of issues were very different. I have previously argued that in their view, money can be delivered in a way consistent with individual choice, but religious speech at government events cannot be.²³ Another way to say that is that the nondiscrimination principle can be applied to funding, but it cannot be applied to government speech. That distinction explains why the nondiscrimination principle was not extended to government speech, but it remains to explain why it came to dominate with respect to funding.

III. NO-AID IN THE *LEMON* ERA: 1971–85

Explaining this change in the Court's jurisprudence is a two-part question, a before-and-after inquiry. What were the conditions that enabled the no-aid principle to dominate before the change in doctrine? And how did those conditions change in ways that enabled the nondiscrimination principle to dominate after the change in doctrine?

A. Tradition

The no-aid principal was perhaps natural to the Justices because it had seemed politically settled, throughout their lifetimes, that the

23. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 157–58 (2004).

state could not finance religious schools.²⁴ *Everson*²⁵ and even *Allen*²⁶ had carved out only narrow exceptions, and over strong dissents. *Lemon* involved teacher pay,²⁷ an issue that could potentially involve a lot more money. So some of the Justices at the time of *Lemon* presumably viewed *Everson* and *Allen* as modest exceptions to a prevailing general rule of no-aid, and the more expensive program at issue in *Lemon* could not fit into the narrow exceptions.

B. Lingerin^g Anti-Catholicism

All of the Justices on the *Everson* and *Lemon* Courts had lived their formative years well before the dramatic reduction of Protestant-Catholic conflict in the 1960s. When *Everson* was decided, all nine Justices had been born in the nineteenth century and had completed their legal education by the 1920s.²⁸ At the time of *Lemon*, the youngest Justice was Justice White, who was born in 1917 and graduated from law school in 1946 (after playing in the National Football League and serving in World War II).²⁹ But the story runs deeper than mere chronology. Hugo Black had run for the Senate with the open support of the Ku Klux Klan, and as a Grand Dragon reportedly said, “Hugo could make the best anti-Catholic speech you ever heard.”³⁰

In the middle of the twentieth century, there was a wave of open and respectable anti-Catholicism among the American intellectual elite. Responding in part to Catholic support for Franco in the Spanish Civil War and the right-wing polemics of Father Coughlin, these intellectuals saw Catholicism as inimical to democracy and conducive to fascism or other forms of authoritarian government. The historian John McGreevy was able to document that this intellectual anti-

24. See, e.g., John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297–318 (2001) (reviewing the Protestant consensus against government aid to Catholic schools beginning in the nineteenth century, and the broader consensus against such aid through the mid-twentieth century after the collapse of the de facto Protestant establishment).

25. *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1 (1947).

26. *Bd. of Ed. v. Allen*, 392 U.S. 236 (1968).

27. *Lemon v. Kurtzman*, 403 U.S. 602, 606–09 (1971).

28. KENNETH JOST, *THE SUPREME COURT A TO Z* 48–49, 61–62, 168–69, 197–98, 246–47, 302, 385–86, 414, 528–29 (4th ed. 2007) (giving details about the birth and education of the Justices in *Everson*).

29. *Id.* at 540–41.

30. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 427 (2002).

Catholic movement attracted the favorable attention of Justices Black, Frankfurter, Rutledge, and Burton, and with the intellectual attitude so pervasive, many of the other Justices and the elite lawyers who would later become Justices were likely exposed to it, either directly or indirectly.³¹

Respectable anti-Catholicism faded in the 1950s and all but collapsed in the 1960s in the wake of the Kennedy presidency and the Second Vatican Council.³² But even at the time of *Lemon*, some Justices were influenced by residual anti-Catholicism and a deep suspicion of Catholic schools.³³ This appears most clearly in Justice Douglas's quotation of an anti-Catholic hate book in his concurring opinion in *Lemon*³⁴ and in Justice Black's dissenting opinion in *Allen*.³⁵ The majority's opinion in *Lemon* is more subtle and open to more charitable interpretations, but it relied on what it considered to be inherent risks in religious schools despite the absence of a record in *Lemon* itself³⁶ and despite contrary fact-finding by the district court in the companion case.³⁷

C. Framing the Issue as Aid to Catholics

Funding for religious schools was still a Catholic issue in 1971, and the Court's assumptions about religious schools were assump-

31. This paragraph is principally based on John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination 1928-1960*, 84 J. AM. HIST. 97 (1997). For further elaboration, see JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 166-88 (2003); for more on the Supreme Court, see *id.* at 183-87. For a similar account of mid-century anti-Catholicism, with a number of additional insights, see Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 123-51 (2001). Professor Berg and I give very similar accounts of the entire period discussed in this Comment, and the influence between us has run in both directions.

32. See Berg, *supra* note 31, at 151-55.

33. *Id.* at 155-56.

34. *Lemon v. Kurtzman*, 403 U.S. 602, 635 n.20 (1971) (quoting Loraine Boettner, *Roman Catholicism* (1962)). Illustrative quotations from Boettner are in Douglas Laycock, *Civil Rights and Civil Liberties*, 54 CHI.-KENT L. REV. 390, 418-21 (1977). Justice Black also joined in this dissent.

35. *Bd. of Ed. v. Allen*, 392 U.S. 236, 251 (1968) (Black, J., dissenting) ("The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion.")

36. 403 U.S. at 620.

37. *Id.* at 618.

tions about Catholic parochial schools. The funding programs were commonly called “Parochiaid,”³⁸ in reference to Catholic parochial schools. This conflation of religious schools and Catholic schools was supported by the numbers. Catholic schools accounted for nearly ninety-five percent of private school enrollment in 1961;³⁹ and although that number had declined to eighty percent by 1970,⁴⁰ eighty percent is still a huge supermajority, and changes in perception generally trail changes in reality.

Nearly twenty years elapsed between *Everson* and *Allen*, but then the cases came in bunches all through the 1970s.⁴¹ The principal reason for this surge of cases was a financial crisis in Catholic schools caused by the collapse of inner cities, the movement of white Catholic ethnics to the suburbs, and a dramatic decline in the supply of nuns available to teach for low pay.⁴² Enrollment in Catholic schools peaked around 1965 at more than 5.6 million,⁴³ but by 1970 this number had declined to about 3.8 million.⁴⁴ These cases came from northeastern and midwestern states with large Catholic populations and older cities much affected by these changes. When the records were compiled in *Lemon* and its companion case, Catholic schools educated more than twenty percent of the student population in Pennsylvania and Rhode Island, the two states whose programs were

38. See, e.g., DALE E. TWOMLEY, *PAROCHIAID AND THE COURTS* (1979); articles cited *infra* notes 49, 63.

39. MARTIN A. LARSON, *WHEN PAROCHIAL SCHOOLS CLOSE* 285 (1972) (compiling data from multiple sources).

40. *Id.*

41. See *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *New York v. Cathedral Acad.*, 434 U.S. 125 (1977); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 433 U.S. 902 (1977); *Wolman v. Walter*, 433 U.S. 229 (1977); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976); *Wolman v. Essex*, 421 U.S. 982 (1975); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974); *Marburger v. Pub. Funds for Pub. Sch.*, 417 U.S. 961 (1974); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Grit v. Wolman*, 413 U.S. 901 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Essex v. Wolman*, 409 U.S. 808 (1972); *Neb. State Bd. of Educ. v. Sch. Dist. of Harrington*, 409 U.S. 921 (1972); *Kervick v. Clayton*, 403 U.S. 945 (1971); *Ams. United, Inc. v. Indep. Sch. Dist. No. 622*, 403 U.S. 945 (1971); *Sanders v. Johnson*, 403 U.S. 955 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

42. For illustrative data, see Berg, *supra* note 31, at 157–58.

43. LARSON, *supra* note 39, at 285.

44. *Id.*

immediately at issue.⁴⁵ Fearing a financial crisis in the public schools if Catholic schools closed their doors and dumped all those students on the public system,⁴⁶ legislators began searching for ways to rescue the Catholic schools. The financial aid issue during this period was in fact, and not just in perception, about financial support for Catholic schools.

Most Protestants still opposed funding for religious schools; this included evangelical Protestants, who had not yet sought funding for their own schools.⁴⁷ While *Lemon* was pending in the Supreme Court, eleven state conventions of Southern Baptists passed resolutions opposing financial aid to private schools.⁴⁸ *Christianity Today*, a leading voice of conservative evangelicalism, editorialized against aid to religious schools while the case was pending and again after the decision.⁴⁹ As late as the 1980s, Jerry Falwell urged “that no church or private religious school be underwritten by the government.”⁵⁰ At the time of *Lemon*, the evangelical claim that public schools were secular and hostile to religion was little developed beyond criticism of the school prayer decisions, and there was substantial dissent even from that: the Southern Baptist Convention adhered to its separationist tradition and opposed the school prayer amendment.⁵¹ The evangelical movement is bitterly unhappy with *Lemon* today, but at the time, it was on the other side.

Two important denominations dissented from the dominant Protestant position: the Missouri Synod Lutherans and the Christian Reformed Church, each with well-developed systems of religious schools.⁵² These denominations supported financial aid in the 1960s

45. See *Lemon*, 403 U.S. at 608 (stating, based on finding of fact below, that twenty-five percent of Rhode Island students attended nonpublic schools and that ninety-five percent of those attended Catholic schools); *id.* at 610 (stating, based on state-compiled data cited below, that more than twenty percent of Pennsylvania students attended nonpublic schools, that more than ninety-six percent of those attended religious schools, and adding without citation that “most” of those attended Catholic schools).

46. See, e.g., Berg, *supra* note 31, at 157 & n.199.

47. *Id.* at 160–61.

48. *Baptists Support Separation*, 24 CHURCH AND STATE 38 (1971).

49. *Holding the Line on Parochialism*, 15 CHRISTIANITY TODAY 284, 284–85 (1970); *Plight of Parochialism*, 15 CHRISTIANITY TODAY 971 (1971).

50. Jerry Falwell, *Ninety-five Theses for the 1980s*, in SALT AND LIGHT: EVANGELICAL POLITICAL THOUGHT IN MODERN AMERICA 160, 164 (1989).

51. *Baptist Leaders Hit Amendment*, 24 CHURCH AND STATE 203 (1971).

52. William Willoughby, *Parochial School Crisis Fuels State Aid Debate*, 13 CHRISTIANITY TODAY 605 (1969).

and led in developing the argument against secularized public schools.⁵³ Protestant, Jewish, and independent schools were active defendants in *Lemon*,⁵⁴ and Protestant and Orthodox Jewish organizations filed or joined in briefs supporting financial aid to private schools,⁵⁵ but these efforts did little to change the impression that the case was essentially about aid to Catholic schools. The *Lemon* plaintiffs claimed that ninety-seven percent of the money under the Pennsylvania program went to Catholic schools,⁵⁶ and they argued that the program was therefore unconstitutional, in part because it preferred one religion over others.⁵⁷ The program's supporters conceded that most of the money went to Catholic schools: "This [fact] is admitted but irrelevant."⁵⁸ At oral argument both sides reportedly emphasized that the legislation was needed to rescue the financially troubled Catholic schools in Pennsylvania.⁵⁹ In the companion case, the Court focused on the characteristics of Catholic schools in Rhode Island,⁶⁰ which taught ninety-five percent of the private school students in the state.⁶¹

An anti-aid amicus felt obliged to deny that its position was an attack on any particular denomination,⁶² but it also said that if there were to be an aid program, "Every one of the 258 different denominations must get its 'fair share' of the tax money now going almost

53. See *id.* (reporting the position of these two denominations); Gordon Oosterman, *Tax Funds for Religious Education? Yes*, 13 CHRISTIANITY TODAY 575 (1969) (pro-aid article by official of Christian Reformed Church's school association). Cf. C. Stanley Lowell, *Tax Funds for Religious Education? No*, 13 CHRISTIANITY TODAY 574 (1969) (anti-aid article by official of Americans United for Separation of Church and State).

54. See Brief for Appellee Schools, *Lemon v. Kurtzman*, 403 U.S. 602 (1970) (No. 70-89).

55. See Brief of the National Catholic Education Association et al., Amici Curiae, *Lemon* (joined by associations of Episcopal schools, Christian schools, Yeshiva principals, and Lutheran educators); Motion for Leave to File Brief and Brief of the National Jewish Commission on Law and Public Affairs as Amicus Curiae, *Lemon*; Brief of National Association of Independent Schools, Inc., Amicus Curiae, *Lemon*; Brief of the Long Island Conference of Religious Elementary and Secondary School Administrators (Licressa), Amicus Curiae in Support of Defendants-Appellees and Intervener Defendant-Appellee, *Lemon*.

56. Brief for Appellants 13, *Lemon*.

57. *Id.* at 36-38.

58. Brief for Appellee Schools at 44, *Lemon*.

59. See *The Nation Waits*, 24 CHURCH AND STATE 75, 84 (1971).

60. *Lemon*, 403 U.S. at 615-20.

61. *Id.* at 608.

62. Brief of Protestants and Other Americans United for Separation of Church and State as Amicus Curiae 2, *Lemon*.

wholly to the Roman Catholic Church.”⁶³ My Texas colleague Scot Powe, who clerked for Justice Douglas that year, remembers the briefing as a bitter fight between Catholics and their enemies, and he doubts that anyone in Justice Douglas’s chambers read far enough in the unusually large stack of amicus briefs to discover that there were Protestant denominations on both sides.⁶⁴

With the case focused on Catholicism, it was easier for the Court to see funding as a subsidy for one church than as a means of achieving neutrality across a wide range of views. Viewing the program in such a way made it harder to adopt the view of later conservatives that opposition to funding reflected hostility to religion in general.⁶⁵

D. Desegregation

Lemon was decided in 1971, when the Court was at the height of its battle “to achieve the greatest possible degree of actual desegregation” in public schools.⁶⁶ After fifteen years of “all deliberate speed”⁶⁷ and very little progress, the Court was demanding a remedy that “promises realistically to work, and promises realistically to work now.”⁶⁸ During the same Term as *Lemon*, in a unanimous vote, the Court affirmed its first busing order.⁶⁹ The prospect of subsidized private schools threatened to aggravate the difficulties of desegregation by expanding the avenues for white flight. The Court had already invalidated deliberate state schemes to thwart desegregation by subsidizing private education,⁷⁰ and it had already encountered the risk that with or without a subsidy, “white students will flee the school system altogether.”⁷¹ The Justices may or may not have known that desegregation in Mississippi had produced a nine-fold increase in the number of non-Catholic private schools, but they

63. *Id.* at 12 (quoting Gaston D. Cogdell, WHAT PRICE PAROCHIAID 75 (1970)).

64. Interview with Lucas A. Powe (known to all as Scot), Professor of Law, University of Texas (May 6, 1997).

65. *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 717 (1994) (O’Connor, J., concurring) (“The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools.”).

66. Davis v. Bd. of Sch. Comm’rs, 402 U.S. 33, 37 (1971).

67. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

68. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

69. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29–31 (1971).

70. Griffin v. Sch. Bd., 377 U.S. 218 (1964).

71. Monroe v. Bd. of Comm’rs, 391 U.S. 450, 459 (1968).

would soon find out.⁷² Those who organized the *Lemon* litigation argued these dangers; they named an African-American man, Alton Lemon, as the lead plaintiff and devoted ten pages of their brief to a segregation claim.⁷³ No Justice ruled on that claim, but every Justice took note of the issue,⁷⁴ and it is hard to believe that no Justice was influenced by it.

E. Summary

All of these factors combined to obscure the possibility of viewing financial aid to private schools as a nondiscriminatory means of aiding all Americans to pursue their various educational preferences. Nearly all the money was going to a single denomination. That denomination dominated the argument for enacting the programs and for their constitutionality. Moreover, and to different degrees and with different levels of consciousness, most of the Justices disliked that denomination. These programs could readily be used to undermine the Court's fundamental commitment to desegregating public schools, a commitment that had encountered massive resistance and had reached a critical stage in responding to that resistance. And the nondiscrimination view of the issue required a paradigm shift from how the Justices had thought about it for most of their lives.

72. See *Norwood v. Harrison*, 413 U.S. 455, 463–70 (1973) (holding that the state could not aid these schools even with free textbooks, a form of aid that would have been permissible under the Establishment Clause).

73. Brief for Appellants, *supra* note 56, at 47–57. As to the organizers of the litigation, Leo Pfeffer, the great separationist litigator who long represented the American Jewish Congress, represented Lemon in the trial court. *Lemon v. Kurtzman*, 310 F. Supp. 35, 38 (E.D. Pa. 1969), *rev'd*, 403 U.S. 602 (1971). Other plaintiffs included the Pennsylvania NAACP, the Pennsylvania Council of Churches (made up mostly of Protestant and Eastern Orthodox denominations), the Pennsylvania Jewish Community Relations Conference, the Pennsylvania ACLU, and Americans United for Separation of Church and State. *Id.* at 35. Americans United participated both as an appellant and an amicus, using one version of its name on the Jurisdictional Statement and Brief, and a different version on its amicus brief. Brief of Protestants, *supra* note 62.

74. See *Lemon v. Kurtzman*, 403 U.S. 602, 611 n.5 (stating that it was unnecessary to reach the equal protection claim); *id.* at 632 & n.17 (Douglas, J., concurring) (reviewing the cases on tuition subsidies to avoid desegregation); *id.* at 642 (Marshall, J., recusing himself, presumably because the Pennsylvania NAACP was an appellant); *id.* at 644 n.1 (Brennan, J., concurring) (stating his view that Lemon had standing to assert the segregation claim); *id.* at 671 n.2 (White, J., dissenting) (stating his view that the state could not constitutionally aid schools that discriminated on basis of race or religion).

Given all these factors and pressures, the surprise is not that the Court adopted the no-aid theory in *Lemon*; the surprise is that it adopted the nondiscrimination theory in *Everson* and *Allen*, that it did not overrule those precedents, and that other exceptions to no-aid continued to emerge throughout the *Lemon* era. The no-aid principle never entirely prevailed, but there are many reasons why it predominated in the 1970s.

IV. NONDISCRIMINATION SINCE 1986

The shift to permitting funding of religious schools began in the 1980s, gathered momentum in the 1990s, and came to fruition at the turn of the millennium.⁷⁵ In part, the Court simply moved to the right; in the past forty years there have been two Democratic appointments and twelve Republican appointments. Part of the conservative judicial agenda was a shift from substantive interpretations to nondiscrimination interpretations across a broad range of individual rights issues,⁷⁶ including Religion Clause issues.⁷⁷ But independently of this change in personnel and judicial philosophy, there were changes in nearly all the factors that had pressed toward the no-aid interpretation in 1971.

A. Tradition

Of course the long political tradition of no-aid remained; but as other changes inclined the Court to reconsider that tradition, it became possible to view that tradition in a different light. One could see a continuous and principled tradition of no aid to religion, from the founding era to the present. Or one could quibble with that tra-

75. See *supra* notes 19–22 and accompanying text.

76. See, e.g., Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 369–88 (1991) (reviewing such changes in law of search and seizure, freedom of speech, and free exercise of religion); Nadine Strossen, *Religion and the Constitution: A Libertarian Perspective*, 2005-2006 CATO SUP. CT. REV. 7, 16–24 (updating this analysis and extending it to Establishment Clause cases).

77. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding vouchers that could be used at either secular or religious schools); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that neutral and generally applicable laws that burden religion require no justification); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990) (upholding generally applicable sales tax as applied to sales of religious literature); *Jones v. Wolf*, 443 U.S. 595 (1979) (permitting state courts to apply neutral principles of law to resolve church property disputes).

dition, and claim that non-preferential funding had always been permitted—a highly dubious argument, but one that has persisted and has attracted some Justices.⁷⁸ Or one could concede the tradition of no aid to religious functions as such, but see that the tradition of no aid to private schools dated only to the nineteenth century and recognize that it flowed from an unprincipled exercise of raw political power by a Protestant majority oppressing a Catholic minority—a much more plausible argument that has also attracted some Justices.⁷⁹ Aid to religious functions as such is not a contemporary issue anyway, so distinguishing education and social services from the religious organizations that provide them makes all the difference.⁸⁰

B. The Decline of Anti-Catholicism

As already mentioned, respectable anti-Catholicism declined in the 1950s and collapsed in the 1960s.⁸¹ Older Justices were replaced by younger Justices who were educated in a different era. By the time of *Zelman*, all the Justices had attended law school after World War II, and only Rehnquist and Stevens had graduated before 1960.⁸² There were three conservative Catholics on the Court, rather than one liberal Catholic as in the time of *Everson* (Frank Murphy) and of *Lemon* (William Brennan).⁸³

78. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring) (finding “much to commend” in “the view that the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others”); *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (“[T]he Establishment Clause . . . forbade establishment of a national religion, and forbade preference among religious sects or denominations. . . . [But it did not] prohibit the Federal Government from providing nondiscriminatory aid to religion.”). The claim that approval of nonpreferential aid was the original understanding is historically inaccurate. See Douglas Laycock, “*Nonpreferential Aid to Religion: A False Claim About Original Intent*,” 27 WM. & MARY L. REV. 875 (1986).

79. See *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion) (“[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.”).

80. See Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 71, 82–83 (2007) (arguing that it is neutral to fund education in secular subjects without regard to who provides that education, and that the equation of schools and churches is a conceptual mistake rooted in nineteenth-century anti-Catholicism).

81. See *supra* note 32 and accompanying text; Berg, *supra* note 31, at 152–55; Lupu, *supra* note 7, at 385–87.

82. JOST, *supra* note 28, at 55–56, 205–06, 268–69, 313–14, 386–87, 416–17, 458–59, 477–78, 500–01.

83. Religious Affiliation of the U.S. Supreme Court, <http://www.adherents.com/>

C. The Emergence of a Pro-Aid Coalition

By far the most important point is that aid to private schools was no longer just a Catholic issue. It had the support of a broad and diverse coalition, and this broad support fundamentally changed the framing of the constitutional issue.

1. The evangelicals switch sides

In the 1980s, evangelicals switched sides on this issue, moving from intense opposition⁸⁴ to intense support. The number of evangelical Protestant private schools grew enormously, first as havens from desegregation in the South, but later and throughout the country as havens from perceived secularism and hostility to faith and morals in the public schools. Conservative Christian schools were the fastest growing part of private school enrollment in the last three decades of the century.⁸⁵ By the mid-1990s, they accounted for fourteen percent of private school enrollment,⁸⁶ while Catholic schools had declined to about half of private school enrollment.⁸⁷

Through the 1970s, these evangelical schools were more concerned about government regulation than government funding.⁸⁸ But as the regulation issues were resolved, attention turned to funding. By the 1980s, evangelical parents found themselves in the same position as Catholic parents a century before: paying taxes for public schools they could not use in good conscience, and also paying tuition to fund religiously acceptable private schools. Evangelicals began demanding government funding for their private religious schools.⁸⁹

adh_sc.html (last visited Mar. 26, 2008) (indicating that Justices Kennedy, Scalia, and Thomas are Catholic). Justices Roberts and Alito make five, *id.*, but they were not on the Court when *Zelman* was decided.

84. See *supra* notes 47–51 and accompanying text.

85. See Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 13, 25 (Stephen D. Sugarman & Frank R. Kemerer, eds. 1999); see also Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 *IND. J. GLOBAL LEGAL STUD.* 503, 511–12 (2006) (describing this movement qualitatively).

86. Henig & Sugarman, *supra* note 85, at 25.

87. *Id.*

88. See Laycock, *supra* note 85, at 511.

89. *Id.* at 511–12; Berg, *supra* note 31, at 164–65.

This was a change of historic proportions. It helped turn historic religious enemies into political allies. It quickly moved the spokespeople for a quarter of the population from one side of the funding issue to the other, and it made it impossible ever again to perceive government funds for private schools as just a Catholic issue.⁹⁰

2. *The emergence of the free marketeers*

Free marketeers making economic arguments for school choice became much more numerous and got more attention in a political environment more interested in market solutions. Milton Friedman had suggested privatizing education long ago,⁹¹ but he wanted to privatize nearly everything. He had little traction at first. The idea finally took off about the same time the Court was changing its mind. Terry Moe, who has written influentially about these issues from the Brookings Institution and now the Hoover Institution, cites the initial implementation of the Milwaukee voucher plan in 1990 as the point at which the free-market, educational-reform portion of the debate over aid to private education shifted from a merely academic discussion to a real political debate with high stakes.⁹² Here is one crude indicator: In the online catalog of the main libraries of the University of Michigan,⁹³ there were 199 entries in a search for “school choice” as a phrase in the subject matter index on February 9, 2008. The earliest entry was published in 1976. Four were published in the 1970s, 14 in the 1980s, 90 in the 1990s, and 91 between 2000 and 2007.

3. *Black parents switch sides*

In the 1960s and 1970s, religious schools had been actual or potential refuges from desegregation, but by the 1990s, the Court had lost interest in desegregation and had begun to dismantle busing

90. See also Lupu, *supra* note 7, at 387–88, 391–92 (emphasizing the growing pluralism of American private schools).

91. See MILTON FRIEDMAN & ROSE D. FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 150–88 (1980) (arguing against public education and in favor of the privatization of education through vouchers); MILTON FRIEDMAN & ROSE D. FRIEDMAN, *CAPITALISM AND FREEDOM* 89–98 (1962) (same).

92. TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* 199 (2001).

93. <http://mirlyn.lib.umich.edu> (last visited April 3, 2008).

programs.⁹⁴ The risk of subsidizing white flight, which had loomed so large in *Lemon*, was no longer relevant.

Equally important, frustrated black parents in inner cities were also demanding school choice.⁹⁵ The civil rights leadership did not switch sides, and not all black parents switched sides, but many did—a majority in many polls.⁹⁶ And so far, the only way to enact a voucher program has been to focus the program on failing schools, mostly (in Florida) or exclusively (in Milwaukee and Cleveland) in inner cities. In *Zelman*, vouchers were presented to the Court as perhaps the last best hope for educating poor black children in Cleveland.⁹⁷

94. See *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

95. See, e.g., THOMAS C. PEDRONI, MARKET MOVEMENTS: AFRICAN AMERICAN INVOLVEMENT IN SCHOOL VOUCHER REFORM (2007) (reviewing black support for voucher program in Milwaukee); Berg, *supra* note 31, at 166–67.

96. These polls are sensitive to the wording of the question and of preceding questions and thus present variable results. For a sophisticated analysis of these difficulties in interpreting polls, see MOE, *supra* note 92, at 193–207. For data indicating black support for vouchers and similar programs, see *id.* at 214 (reporting poll in which seventy-five percent of black parents with children in public schools, and sixty-four percent of other blacks, supported vouchers); *id.* at 217–19 (showing that blacks are more likely than the average American, at statistically significant levels, to support vouchers after controlling for many other variables, and both before and after receiving explanation of voucher programs); William G. Howell et al., *What Americans Think About Their Schools*, EDUC. NEXT, Fall 2007, at 12, 17, available at http://media.hoover.org/documents/ednext_20074_12.pdf (reporting a poll in which sixty-eight percent of African-Americans completely or somewhat favored the use of “government funds to pay the tuition of low-income students who choose to attend private schools”); David L. Leal, *Latinos and School Vouchers: Testing the “Minority Support” Hypothesis*, 85 SOC. SCI. Q. 1227, 1234–35 (2004) (finding that African-American support for vouchers is stronger than that of whites, at statistically significant levels, after controlling for a number of other variables); Frank Margonis & Laurence Parker, *Choice: The Route to Community Control?*, in 38 THEORY INTO PRACTICE 203, 204 (1999) (reporting poll in which fifty-six percent of African-Americans supported school vouchers); Lowell C. Rose & Alec M. Gallup, *The 31st Annual Phi Delta Kappan/Gallup Poll of the Public’s Attitudes Toward the Public Schools*, 81 PHI DELTA KAPPAN 41, 53 (1999) (reporting poll in which fifty-seven percent of “blacks” supported full tuition vouchers and sixty-eight percent of “nonwhites” supported partial tuition vouchers). *Phi Delta Kappan*, an education journal, repeats this poll every year, but rarely reports racial or other subcategories of responses.

97. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (reciting data on disastrous educational failures of Cleveland public schools and then stating that voucher plan was enacted “against this backdrop”).

4. *Why this coalition matters*

It is not just that the Supreme Court follows the election returns, although there is some truth to that. Rather, the mere existence of this broad coalition reframed the issue. As this coalition joined Catholics in demanding money for private schools, and as Protestant hostility to Catholics faded further into the past, aid to private schools looked less like a special interest demand for Catholics and more like a way to accommodate the needs and preferences of a wide variety of Americans. It became much more apparent that this was not just about aiding Catholics, and not just about aiding religion; it became much easier to see the issue in terms of neutrality and private choice. The nondiscrimination frame had been available since *Everson*; now it became much more salient.

This obviously didn't matter to the dissenters in *Zelman*, and it probably didn't matter to Rehnquist, Scalia, or Thomas. But it mattered to Kennedy and O'Connor, and their gradual reframing of the issue was essential to the Court's change of position. Of course the Justices said little about such non-doctrinal matters in their opinions, but we know these changes happened in the larger society, and the Justices knew about these changes, at least through changes in the flow of amicus briefs and probably from simply reading the newspaper. We know that Kennedy and O'Connor distinguished government funding of religious institutions from government speech in support of religion, applying the nondiscrimination model to government funding but not to government speech.⁹⁸ It is easy to see that the nondiscrimination model doesn't work with respect to government speech, but we still have to explain why Kennedy and O'Connor adopted that model with respect to government funding. Of course we do not have access to their subjective thought processes, but we can identify the important forces that were in position to influence those thought processes.

What we can say with confidence is that the Court had both the no-aid and nondiscrimination models available to it at least since 1947, that each was attractive enough to find a place in the Court's opinions, and that the majority shifted from nondiscrimination to

98. See Laycock, *supra* note 23, at 162–67, 218–22 (collecting and analyzing the two sets of cases and noting the critical role of Kennedy and O'Connor in the religious speech cases).

no-aid in 1971 and back to nondiscrimination beginning in 1986. We know that as of 1971, a powerful array of social facts and social forces had come together to support the no-aid view of the matter, that this array was changing by 1986, and that by the 1990s, all those social facts had changed and all those social forces had realigned in important ways, all coming together to support the nondiscrimination view of the matter. Perhaps the swing votes would have swung to the nondiscrimination view anyway, but surely these broad changes in the framing of the issue at least pushed them in that direction and made the change easier. And while there is no way to know for sure, it is quite possible that but for these changes, Rehnquist, Scalia, and Thomas would not have gotten the fifth vote, or even the fourth vote, from Kennedy and O'Connor.

To consider that admittedly speculative possibility, try to imagine the environment of 1971 persisting into the twenty-first century. If funding private schools were still only a Catholic issue, if nearly all other religious groups were opposed, if the Court were still battling massive resistance to desegregation, if it were still trying to prevent white flight from the public schools, if all the civil rights groups were opposed and if they still had the nearly unanimous support of the black community, if there were no secular movement of free marketers and educational reformers arguing for vouchers—if, in short, there were no broad coalition in support of aid to religious schools, and if the coalition opposed to such aid were much broader than it is today, I find it hard to imagine Kennedy and O'Connor voting to uphold vouchers. Of course, if all those things were true, we would be living in a different political world; we would probably have different Justices; and the Court probably would not have swung so far to the right on a whole range of issues.

The Court does not act without support in some substantial body of elite public opinion.⁹⁹ Even the Warren Court, supposedly the quintessentially countermajoritarian Court, always had substantial elite support in the Kennedy-Johnson liberal coalition. The evo-

99. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 485–501 (2000) (concluding, after lengthy analysis of its decisions, that the Warren Court was a working part of this coalition and a consequence of the same social forces that led to other important changes in the 1960s). Professor Powe will make the case for the importance of such political influences throughout the Court's history in *The Politics of Judicial Review: The Supreme Court in American History* (forthcoming 2009).

lution from *Lemon* to *Zelman* readily fits that model of how the Court operates.

V. CONCLUSION

The law of government aid to religious schools has shifted from a rule of no aid, with a fair number of exceptions, to a rule of unlimited nondiscriminatory aid, subject to certain rules of process and perhaps to exceptions still in the course of being defined. This shift stems partly from an influx of more conservative justices, but more fundamentally, from a realignment of religious conflict and political factions that reframed the issue and took the Court back to an alternative that had been available since the very origins of modern Establishment Clause jurisprudence. A decline in anti-Catholic sentiment and the emergence of a pro-aid coalition that includes evangelicals, black parents, and free-marketeers have helped key Justices to see the issue differently, to recharacterize the relevant legal tradition, and ultimately, to fundamentally change the Court's approach to religious funding cases.