2. Institutions of Higher Education

TILTON v. RICHARDSON

403 U.S. 672 (1971)

(*Tilton* is a companion case to *Lemon v. Kurtzman*)

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and an opinion in which MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

The Higher Education Facilities Act was passed in 1963 in response to a strong demand for the expansion of college and university facilities to meet the sharply rising number of young people demanding higher education. The Act authorizes federal grants and loans to "institutions of higher education" for the construction of a variety of "academic facilities." But § 751 (a)(2) expressly excludes "any facility used or to be used for sectarian instruction or as a place for religious worship, or any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity."

The Act is administered by the United States Commissioner of Education. He advises colleges and universities applying for funds that under the Act no part of the project may be used for sectarian instruction, religious worship, or the programs of a divinity school. The Commissioner requires applicants to provide assurances that these restrictions will be respected. The United States retains a 20-year interest in any facility constructed with Title I funds. If, during this period, the recipient violates the statutory conditions, the United States is entitled to recover an amount equal to the proportion of its present value that the federal grant bore to the original cost of the facility. During the 20-year period, the statutory restrictions are enforced by the Office of Education primarily by way of on-site inspections.

Appellants brought this suit for injunctive relief against the officials who administer the Act. Four church-related colleges and universities receiving federal construction grants under Title I were also named as defendants. Federal funds were used for five projects at these four institutions: (1) a library building at Sacred Heart University; (2) a music, drama, and arts building at Annhurst College; (3) a science building at Fairfield University; (4) a library building at Fairfield; and (5) a language laboratory at Albertus Magnus College.

We consider four questions: First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?

The stated legislative purpose appears in the preamble where Congress found and declared that "the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for higher education." This expresses a legitimate secular objective entirely appropriate for governmental action.

Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources to finance these services. Yet all of these forms of governmental assistance have been upheld. The crucial question is not whether some benefit accrues to a religious institution as a consequence of the program, but whether its principal or primary effect advances religion.

The Act was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship. These restrictions have been enforced in the Act's administration, and the record shows that some church-related institutions have been required to disgorge benefits for failure to obey them.

Appellants instead rely on the argument that government may not subsidize any activities of an institution of higher learning that in some of its programs teaches religious doctrines. This argument rests on *Everson* where the majority stated that the Establishment Clause barred any "tax levied to support any religious institutions." In *Allen*, however, it was recognized that the criteria was whether religion was being advanced by government action.

Under this concept appellants' position depends on the validity of the proposition that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are inseparable. The record provides no basis for any such assumption here. Two of the five federally financed buildings involved in this case are libraries. The District Court found that no classes had been conducted in these facilities and that no restrictions were imposed by the institutions on the books that they acquired. The third building was a language laboratory at Albertus Magnus College. The evidence showed that this facility was used solely to assist students with their pronunciation in modern foreign languages -- a use which would seem peculiarly unrelated and unadaptable to religious indoctrination. Federal grants were also used to build a science building at Fairfield University and a music, drama, and arts building at Annhurst College.

There is no evidence that religion seeps into the use of any of these facilities. Indeed, the parties stipulated in the District Court that courses at these institutions are taught according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.

Rather than focus on the four defendant colleges and universities involved in this case, however, appellants seek to shift our attention to a "composite profile" that they have constructed of the "typical sectarian" institution of higher education. We are told that such a "composite" institution imposes religious restrictions on admissions, requires attendance at religious activities, compels obedience to the doctrines and dogmas of the faith, requires instruction in theology and doctrine, and does everything it can to propagate a particular religion. Perhaps some church-related schools fit the pattern that appellants describe. Indeed, some colleges have been declared ineligible for aid by the authorities that administer the Act.

But appellants do not contend that these four institutions fall within this category. Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics. We cannot, however, strike down an Act of Congress on the basis of a hypothetical "profile."

Although we reject appellants' broad constitutional arguments we do perceive an aspect in which the statute's enforcement provisions are inadequate to ensure that the impact of the federal aid will not advance religion. If a recipient institution violates any of the statutory restrictions on the use of a federally financed facility, § 754 (b)(2) permits the Government to recover an amount equal to the proportion of the facility's present value that the federal grant bore to its original cost.

This remedy, however, is available to the Government only if the statutory conditions are violated "within twenty years after completion of construction." Under § 754 (b)(2), therefore, a recipient institution's obligation not to use the facility for sectarian instruction or religious worship would appear to expire at the end of 20 years. Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

To this extent the Act therefore trespasses on the Religion Clauses. This circumstance does not require us to invalidate the entire Act, however. In view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.

We next turn to the question of whether excessive entanglements characterize the relationship between government and church under the Act. Our decision today in *Lemon* v. *Kurtzman* has discussed and applied this independent measure of constitutionality under the Religion Clauses. There we concluded that excessive entanglements between government and religion were fostered by Pennsylvania and Rhode Island statutory programs. Here, however, three factors substantially diminish the extent and the potential danger of the entanglement.

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.

The record here would not support a conclusion that any of these four institutions departed from this general pattern. All four schools are governed by Catholic religious organizations, and the faculties and student bodies at each are predominantly Catholic. Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Finally, these four schools subscribe to a well-established set of principles of academic freedom. In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.

Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws.

The entanglement between church and state is also lessened here by the nonideological character of the aid that the Government provides. In *Lemon*, the state programs subsidized teachers. Since teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction. There we found the resulting entanglement excessive. Here, on the other hand, the Government provides facilities that are themselves religiously neutral. The risks of Government aid to religion and the corresponding need for surveillance are therefore reduced.

Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, the Government aid here is a one-time, single-purpose construction grant. Inspection as to use is a minimal contact.

No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in *Lemon*. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.

We think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena. This conclusion is difficult to document, but neither have appellants pointed to any continuing religious aggravation on this

matter in the political processes. Possibly this can be explained by the character and diversity of the recipient colleges and universities. The potential for divisiveness inherent in the local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed.

Finally, we consider whether the Act inhibits the free exercise of religion. Appellants claim that the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants under the Act. Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs. Their share of the cost of the grants under the Act is not fundamentally distinguishable from the impact of the tax exemption sustained in *Walz* or the provision of textbooks upheld in *Allen*.

We conclude that the Act does not violate the Religion Clauses of the First Amendment except that part of § 754 (b)(2) providing a 20-year limitation on the religious use restrictions contained in § 751 (a)(2). We remand to the District Court with directions to enter a judgment consistent with this opinion.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MARSHALL concur, dissenting in part.

The reversion of the facility to the parochial school at the end of 20 years is an outright grant. A gift of taxpayers' funds in that amount would plainly be unconstitutional. The Court properly bars it even though disguised in the form of a reversionary interest.

But the invalidation of this one clause cannot cure the constitutional infirmities of the statute. What I have said in *Lemon* decided today is relevant here. The facilities financed by taxpayers' funds are not to be used for "sectarian" purposes. Religious teaching and secular teaching are so enmeshed in parochial schools that only the strictest supervision and surveillance would insure compliance with the condition. Surveillance creates an entanglement of government and religion which the First Amendment was designed to avoid. Yet after today's decision there will be a requirement of surveillance which will last for the useful life of the building.

As I said in *Lemon*, a parochial school is a unitary institution with subtle blending of sectarian and secular instruction. Thus the practices of religious schools are in no way affected by the minimal requirement that the government financed facility may not "be used for sectarian instruction or as a place for religious worship." Money saved from one item in the budget is free to be used elsewhere. By conducting religious services in another building, the school has -- rent free -- a building for nonsectarian use.

I dissent not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost. The million-dollar grants sustained today put Madison's "three pence" to shame. But he even thought, as I do, that even a small amount coming out of the pocket of taxpayers and going into the coffers of a church was not in keeping with our constitutional ideal.

ROEMER v. BOARD OF PUBLIC WORKS OF MARYLAND

426 U.S. 736 (1976)

MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and MR. JUSTICE POWELL joined.

We are asked once again to police the constitutional boundary between church and state. Maryland, this time, is the alleged trespasser. It has enacted a statute which, as amended, provides for annual noncategorical grants to private colleges, among them religiously affiliated institutions, subject only to the restrictions that the funds not be used for "sectarian purposes."

I

The challenged grant program provides funding for "any private institution of higher learning within the State of Maryland," provided the institution is accredited by the State Department of Education, was established in Maryland prior to July 1, 1970, maintains one or more "associate of arts or baccalaureate degree" programs, and refrains from awarding "only seminarian or theological degrees." The aid is in the form of an annual fiscal year subsidy to qualifying colleges and universities. The formula by which each institution's entitlement is computed provides for a qualifying institution to receive, for each full-time student (excluding students enrolled in seminarian or theological academic programs), an amount equal to 15% of the State's per-full-time-pupil appropriation for a student in the state college system. As first enacted, the grants were completely unrestricted. They remain noncategorical in nature, and a recipient institution may put them to whatever use it prefers, with but one exception. In 1972, following this Court's decisions in *Lemon v. Kurtzman* and *Tilton v. Richardson*, § 68A was added to the statute. It provides: "None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes."

The administration of the grant program is entrusted to the State's Board of Public Works "assisted by the Maryland Council for Higher Education." The Council performs what the District Court described as a "two-step screening process" to insure compliance with the statutory restrictions on the grants. First, it determines whether an institution applying for aid is eligible at all, or is one "awarding primarily theological or seminary degrees." Several applicants have been disqualified at this stage of the process. Second, the Council requires that those institutions that are eligible for funds not put them to any sectarian use. An application must be accompanied by an affidavit of the institution's chief executive officer stating that the funds will not be used for sectarian purposes, and by a description of the specific nonsectarian uses that are planned. By the end of the fiscal year the institution must file a "Utilization of Funds Report" describing and itemizing the use of the funds. The chief executive officer must certify the report and also file his own "Post-expenditure Affidavit," stating that the funds have not been put to sectarian uses. The recipient institution is further required to segregate state funds in a "special revenue account" and to identify aided nonsectarian expenditures separately in its budget. It must retain "sufficient documentation of the State funds expended to permit verification by the Council that funds were not spent for

sectarian purposes." Any question of sectarian use that may arise is to be resolved by the Council, if possible, on the basis of information submitted to it by the institution and without actual examination of its books. Failing that, a "verification or audit" may be undertaken. The District Court found the audit would be "quick and non-judgmental," taking one day or less.

In 1971, $1.7 million was disbursed to 17 private institutions in Maryland. Of the 17 institutions, five were church related, and these received $520,000 of the $1.7 million. A total of $1.8 million was to be awarded to 18 institutions in 1972, the second year of the grant program; of this amount, $603,000 was to go to church-related institutions. Before disbursement, however, this suit, challenging the grants as in violation of the Establishment Clause of the First Amendment, was filed. In addition to the responsible state officials, plaintiff-appellants joined as defendants the five institutions they claimed were constitutionally ineligible for this form of aid: Western Maryland College, College of Notre Dame, Mount Saint Mary's College, Saint Joseph College, and Loyola College. Of these, the last four are affiliated with the Roman Catholic Church; Western Maryland, was a Methodist affiliate. The District Court ruled with respect to all five. Western Maryland, however, has since been dismissed as a defendant-appellee. We are concerned, therefore, only with the four Roman Catholic affiliates.

II

The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required. And religious institutions need not be quarantined from public benefits that are neutrally available to all. The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied. The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike. The Court also has taken the view that the State's efforts to perform a secular task, and at the same time avoid aiding in the performance of a religious one, may not lead it into such an intimate relationship with religious authority that it appears either to be sponsoring or to be excessively interfering with that authority.

III

The first part of Lemon's three-part test is not in issue; appellants do not challenge the finding that the purpose of Maryland's aid program is the secular one of supporting private higher education generally, as an economic alternative to a wholly public system. The focus is on the second and third parts, those concerning the primary effect of advancing religion, and excessive church-state entanglement. We consider them in the same order.

A

The primary-effect question is the substantive one of what private educational activities may be supported by state funds. *Hunt* [*v. McNair*, 413 U.S. 734 (1973),] requires (1) that no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded. [See Note after case.]

(1) The District Court's finding in this case was that the appellee colleges are not "pervasively sectarian." This conclusion it supported with a number of subsidiary findings concerning the role of religion on these campuses:

(a) Despite their formal affiliation with the Roman Catholic Church, the colleges are "characterized by a high degree of institutional autonomy." None of the four receives funds from, or makes reports to, the Catholic Church.

(b) The colleges employ Roman Catholic chaplains and hold Roman Catholic religious exercises on campus. Attendance at such is not required. It was the District Court's general finding that "religious indoctrination is not a substantial purpose or activity of any of these defendants."

(c) Mandatory religion or theology courses are taught at each of the colleges, primarily by Roman Catholic clerics, but these only supplement a curriculum covering "the spectrum of a liberal arts program." Nontheology courses are taught in an "atmosphere of intellectual freedom" and without "religious pressures."

(d) Some classes are begun with prayer. The percentage of classes varies with the college. There is no "actual college policy" of encouraging the practice. "It is treated as a facet of the instructor's academic freedom." Classroom prayers were therefore regarded by the District Court as "peripheral to the subject of religious permeation," as were the facts that some instructors wear clerical garb and some classrooms have religious symbols.

(e) The District Court found that, apart from the theology departments, faculty hiring decisions are not made on a religious basis. The District Court found that "academic quality" was the principal hiring criterion.

(f) The great majority of students at each of the colleges are Roman Catholic, but the District Court concluded that the student bodies "are chosen without regard to religion."

We cannot say that the foregoing findings as to the role of religion in particular aspects of the colleges are clearly erroneous. Appellants ask us to set those findings aside in certain respects. It is not our place, however, to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts. That is certainly not the case here, and it would make no difference even if we were to second-guess the District Court in certain particulars. To answer the question whether an institution is so "pervasively sectarian" that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements. The general picture that the District Court has painted of the appellee institutions is similar in almost all respects to that of the church-affiliated colleges considered in *Tilton*. We find no constitutionally significant distinction between them, at least

for purposes of the "pervasive sectarianism" test.

To be sure, in this case the District Court was unable to find, as was stipulated in *Tilton*, that mandatory theology or religion courses are taught without taint of religious indoctrination. This is not inconsistent, however, with the District Court's finding of a lack of pervasive sectarianism. The latter condition would exist only if, because of the institution's general character, courses other than religion or theology courses could not be funded without fear of religious indoctrination.

(2) Having found that the appellee institutions are not "so permeated by religion that the secular side cannot be separated from the sectarian," the District Court proceeded to the next question: whether aid in fact was extended only to "the secular side." This requirement the court regarded as satisfied by the statutory prohibition against sectarian use, and by the administrative enforcement of that prohibition. We agree. *Hunt* requires only that state funds not be used to support "specifically religious activity." It is clear that fund uses exist that meet this requirement. We have no occasion to elaborate further on what is and is not a "specifically religious activity." Funds are put to the use of the college's choice, provided it is not a sectarian use, of which the college must satisfy the Council. The statute in terms forbids the use of funds for "sectarian purposes," and this prohibition appears to be at least as broad as *Hunt' s* prohibition of the public funding of "specifically religious activity." We must assume that the colleges, and the Council, will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate. Should such questions arise, the courts will consider them. It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds.

B

If the foregoing answer to the "primary effect"question seems easy, it serves to make the "excessive entanglement" problem more difficult. The statute itself clearly denies the use of public funds for "sectarian purposes." It seeks to avert such use, however, through a process of annual interchange - proposal and approval, expenditure and review - between the colleges and the Council. In answering the question whether this will be an "excessively entangling" relationship, we must consider the several relevant factors identified in prior decisions:

(1) First is the character of the aided institutions. This has been fully described above. As the District Court found, the colleges perform "essentially secular educational functions" that are distinct and separable from religious activity. This finding, which is a prerequisite under the "pervasive sectarianism" test to any state aid at all, is also important for purposes of the entanglement test because it means that secular activities, for the most part, can be taken at face value. There is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity - the study of biology, the learning of a foreign language, an athletic event - will actually be infused with religious content or significance. The need for close surveillance of purportedly secular activities is correspondingly reduced. Thus the District Court found that in this case "there is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education." We cannot say

the District Court erred in this judgment or gave it undue significance.

(2) As for the form of aid, we have already noted that no particular use of state funds is before us in this case. The process by which aid is disbursed, and a use for it chosen, is before us. We address this as a matter of the "resulting relationship" of secular and religious authority.

(3) As noted, the funding process is an annual one. The subsidies are paid out each year, and they can be put to annually varying uses. The colleges propose particular uses for the Council's approval, and, following expenditure, they report to the Council on the use to which the funds have been put.

The District Court's view was that in light of the character of the aided institutions, the annual nature of the subsidy was not fatal. We agree with the District Court that "excessive entanglement" does not necessarily result from the fact that the subsidy is an annual one. It is true that the Court favored the "one-time, single-purpose" construction grants in *Tilton* because they entailed "no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures." The present aid program cannot claim these aspects. But if the question is whether this case is more like *Lemon* or more like *Tilton* - and surely that is the fundamental question before us - the answer must be that it is more like *Tilton*.

Tilton is distinguishable only by the form of aid. We cannot discount the distinction entirely, but neither can we regard it as decisive. As the District Court pointed out, ongoing, annual supervision of college facilities was explicitly foreseen in *Tilton*. Occasional audits are possible here, but we must accept the District Court's finding that they would be "quick and non-judgmental." They and the other contacts between the Council and the colleges are not likely to be any more entangling than the inspections and audits incident to the normal process of the colleges' accreditations by the State.

While the form-of-aid distinctions of *Tilton* are thus of questionable importance, the character-of-institution distinctions of *Lemon* are most impressive. To reiterate a few of the relevant points: The elementary and secondary schooling in *Lemon* came at an impressionable age; the aided schools were "under the general supervision" of the Roman Catholic diocese; the principals of the schools were usually appointed by church authorities; religion "pervade[d] the school system"; teachers were specifically instructed by the "Handbook of School Regulations" that "'[r] eligious formation is not confined to formal courses; nor is it restricted to a single subject area.'" These things made impossible what is crucial to a nonentangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes. The District Court gave primary importance to this consideration, and we cannot say it erred.

(4) As for political divisiveness, the District Court found that the program "does not create a substantial danger of political entanglement." Several reasons were given. As was stated in *Tilton*, the danger of political divisiveness is "substantially less" when the aided institution is a college, "whose student constituency is not local but diverse and widely dispersed." Furthermore, political divisiveness is diminished by the fact that the aid is extended to private

colleges generally, more than two-thirds of which have no religious affiliation. Finally, the substantial autonomy of the colleges was thought to mitigate political divisiveness, in that controversies surrounding the aid program are not likely to involve the Catholic Church itself, or even the religious character of the schools, but only their "fiscal responsibility and educational requirements."

The District Court's reasoning seems to us entirely sound. Once again, appellants urge that this case is controlled by previous cases in which the form of aid was similar (*Lemon*, *Nyquist*, *Levitt*), rather than those in which the character of the aided institution was the same (*Tilton*). We disagree. Our holdings are better reconciled in terms of the character of the aided institutions, found to be so dissimilar as between those considered in *Tilton*, on the one hand, and those considered in *Lemon*, *Nyquist*, and *Levitt*, on the other.

There is no exact science in gauging the entanglement of church and state. In reaching the conclusion that it did, the District Court gave dominant importance to the character of the aided institutions and to its finding that they are capable of separating secular and religious functions. For the reasons stated above, we cannot say that the emphasis was misplaced or the finding erroneous. The judgment of the District Court is affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

While I join in the judgment of the Court, I am unable to concur in the plurality opinion substantially for the reasons set forth in my opinions in *Lemon* and *Nyquist*. I am no more reconciled now to *Lemon* than I was when it was decided. *Lemon* imposes unnecessary, and superfluous tests for establishing "when the State's involvement with religion passes the peril point" for First Amendment purposes.

"It is enough for me that the [State is] financing a separable secular function of overriding importance in order to sustain the legislation here challenged." As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason to take the constitutional inquiry further. However, since 1970, the Court has added a third element: whether there is "an excessive government entanglement with religion." I have never understood the constitutional foundation for this added element; it is at once both insolubly paradoxical, and - as the Court has conceded from the outset - a "blurred, indistinct, and variable barrier." Today's plurality opinion leaves the impression that the criterion really may not be "separate" at all. In affirming the District Court's conclusion that the legislation here does not create an "excessive entanglement," the plurality emphasizes that "the District Court gave dominant importance to the character of the aided institutions and to its finding that they are capable of separating secular and religious functions." Yet these are the same factors upon which the plurality focuses in concluding that the Maryland legislation satisfies the second part of the *Lemon* test. The "excessive entanglement" test appears no less "curious and mystifying" than when it was first announced.

I see no reason to indulge in the redundant exercise of evaluating the same facts and findings under a different label. No one in this case challenges the District Court's finding that the purpose of the legislation here is secular. And I do not disagree with the plurality that the

primary effect of the aid program is not advancement of religion. That is enough in my view to sustain the aid programs against constitutional challenge, and I would say no more.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Maryland Act "does in truth offend the Constitution by its provisions of funds, in that it exposes State money for use in advancing religion, no matter the vigilance to avoid it." Each of the institutions is a church-affiliated or church-related body. In that circumstance, "of telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose." "I do not believe that [direct] grants to such a sectarian institution are permissible. The reason is not that religion 'permeates' the secular education that is provided. Rather, it is that the secular education is provided within the environment of religion; the institution is dedicated to two goals, secular education and religious instruction. When aid flows directly to the institution, both functions benefit."

The discrete interests of government and religion are mutually best served when each avoids too close a proximity to the other. The Maryland Act requires "too close a proximity" of government to the subsidized sectarian institutions and in my view creates real dangers of the "secularization of a creed."

MR. JUSTICE STEWART, dissenting.

In my view, the decisive differences between this case and *Tilton v. Richardson* lie in the nature of the theology courses that are a compulsory part of the curriculum at each of the appellee institutions and the type of governmental assistance provided to these church-affiliated colleges. In *Tilton* the Court emphasized that the theology courses were taught as academic subjects. Here, by contrast, the District Court was unable to find that the compulsory religion courses were taught as an academic discipline:

> "Each defendant maintains a vigorous religion or theology department. The primary concern of these departments is Christianity. As already noted, the departments are staffed almost entirely with clergy of the affiliated church. At each of the defendants, certain of these courses are required.

In light of these findings, I cannot agree with the plurality's assertion that there is "no constitutionally significant distinction" between the colleges in *Tilton* and those in the present case. The findings in *Tilton* clearly established that the federal building-construction grants benefited academic institutions that made no attempt to inculcate the religious beliefs of the affiliated church. In the present case, by contrast, the compulsory theology courses may be "devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline." In view of this salient characteristic of the appellee institutions and the noncategorical grants provided to them by the State of Maryland, the challenged Act "does offend the Constitution by its provisions of funds, in that it exposes State money for use in advancing religion, no matter the vigilance to avoid it."

For the reasons stated, and those expressed by MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS, I dissent from the judgment of the Court and the plurality's opinion.

MR. JUSTICE STEVENS, dissenting.

My views are substantially those expressed by MR. JUSTICE BRENNAN. However, I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith.

NOTE: After *Tilton* and before *Roemer*, the Court in *Hunt v. McNair*, 413 U.S. 734 (1973), upheld a South Carolina program that helped to finance the construction of secular college facilities "by revenue bonds issued through the medium of a state authority." The Court in *Roemer* relied on *Hunt's* "refinement" of the "primary effect" prong. *Roemer* described that refinement as follows: "In applying the second of *Lemon's* three-part test, that concerning 'primary effect,' the following refinement was added: Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."

WITTERS v. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

474 U.S. 481 (1986)

JUSTICE MARSHALL delivered the opinion of the Court.

The Washington Supreme Court ruled that the First Amendment precludes the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director. Finding no such federal constitutional barrier on the record presented to us, we reverse and remand.

I

Petitioner Larry Witters applied in 1979 to the Washington Commission for the Blind for vocational rehabilitation services pursuant to Wash. Rev. Code § 74.16.181 (1981). That statute authorized the Commission to "[provide] for special education and/or training in the professions, business or trades" so as to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." Petitioner, suffering from a progressive eye condition, was eligible for vocational rehabilitation assistance under the terms of the statute. He was at the time attending Inland Empire School of the Bible, a private Christian college in Spokane, Washington, and studying the Bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director.

The Commission denied petitioner aid. It relied on an earlier determination embodied in a

Commission policy statement that "[the] Washington State constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas," and on its conclusion that petitioner's training was "religious instruction" subject to that ban. That ruling was affirmed by a state hearings examiner, who held that the Commission was precluded from funding petitioner's training "in light of the State Constitution's prohibition against the state directly or indirectly supporting a religion." The hearings examiner cited Wash. Const., Art. I, § 11, providing in part that "no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment," and Wash. Const., Art. IX, § 4, providing that "[all] schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." That ruling was upheld on administrative appeal.

Petitioner then instituted an action in State Superior Court for review of the administrative decision; the court affirmed on the same state-law grounds. The State Supreme Court affirmed as well. The Supreme Court, however, declined to ground its ruling on the Washington Constitution. Instead, it explicitly reserved judgment on the state constitutional issue and chose to base its ruling on the Establishment Clause of the Federal Constitution.

II

The Establishment Clause has consistently presented this Court with difficult questions of interpretation and application. We acknowledged in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." Nonetheless, the Court's opinions in this area have at least clarified "the broad contours of our inquiry," and are sufficient to dispose of this case.

We are guided by the three-part test set out in *Lemon*. Our analysis relating to the first prong of that test is simple: all parties concede the secular purpose of the Washington program. That program was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services, and no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education.

The answer to the question posed by the second prong of the *Lemon* test is more difficult. We conclude, however, that extension of aid to petitioner is not barred on that ground either. 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 barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State. Aid may have that effect even though it takes the form of aid to students or parents. The question presented is whether, on the facts in the record before us, extension of aid to petitioner and the use of that aid to support his religious education is a permissible transfer similar to the hypothetical salary donation described above, or is an impermissible "direct subsidy."

Certain aspects of Washington's program are central to our inquiry. As far as the record shows, vocational assistance provided under the Washington program is paid directly to the

student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. Washington's program is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted," and is in no way skewed towards religion. It creates no financial incentive for students to undertake sectarian education. It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.

Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program will end up flowing to religious education. The function of the Washington program is hardly "to provide desired financial support for nonpublic, sectarian institutions." The program, providing vocational assistance to the visually handicapped, does not seem well suited to serve as the vehicle for such a subsidy. No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State's program. The combination of these factors, we think, makes the link between the State and the school petitioner wishes to attend a highly attenuated one.

On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. Thus, while *amici* supporting respondent are correct in pointing out that aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is "clearly prohibited under the Establishment Clause" because it may subsidize the religious functions of that institution, that observation is not apposite to this case. On the facts present here, we think the Washington program works no state support of religion prohibited by the Establishment Clause.[1]

III

We therefore reject the claim that, on the record presented, extension of aid under Washington's program to finance petitioner’s training at a Christian college to become a pastor, missionary, or youth director would advance religion in a manner inconsistent with the Establishment Clause. On remand, the state court is free to consider the applicability of the "far stricter" dictates of the Washington State Constitution. It may also choose to reopen the

[1] We decline to address the "entanglement" issue at this time. As a prudential matter, it would be inappropriate for us to address that question without the benefit of a decision on the issue below. Further, we have no reason to doubt the conclusion of the Washington Supreme Court that that analysis could be more fruitfully conducted on a more complete record.

record in order to consider [other] arguments. We decline petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to petitioner regardless of what the State Constitution commands or further factual development reveals, and we express no opinion on that matter.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JUSTICE WHITE, concurring.

I remain convinced that the Court's decisions finding constitutional violations where a State provides aid to private schools or their students misconstrue the Establishment Clause. Even under the cases in which I was in dissent, however, I agree with the Court that the Washington Supreme Court erred in this case. Hence, I join the Court's opinion and judgment. At the same time, I agree with most of JUSTICE POWELL's concurring opinion with respect to the relevance of *Mueller* v. *Allen* to this case.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring.

The Court's omission of *Mueller* v. *Allen*, 463 U.S. 388 (1983), from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one.[1] I write separately to emphasize that *Mueller* strongly supports the result we reach today.

As the Court states, the central question in this case is whether Washington's provision of aid to handicapped students has the "principal or primary effect" of advancing religion. *Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* test, because any aid to religion results from the private choices of individual beneficiaries. Thus, in *Mueller*, we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools. We noted the State's traditionally broad taxing authority, but the decision rested principally on two other factors. First, the deduction was equally available to parents of public school children and parents of children attending private schools. Second, any benefit to religion resulted from the "numerous private choices of individual parents of school-age children."

The state program at issue here provides aid to handicapped students when their studies are likely to lead to employment. Aid does not depend on whether the student wishes to attend a public university or a private college, nor does it turn on whether the student seeks training for a religious or a secular career. It follows that under *Mueller* the State's program

[1] The Court offers no explanation for omitting *Mueller* from its substantive discussion. Indeed, save for a single citation on a phrase with no substantive import whatever, *Mueller* is not even mentioned.

does not have the "principal or primary effect" of advancing religion.[2]

The Washington Supreme Court reached a different conclusion because it found that the program had the practical effect of aiding religion *in this particular case.* 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.

Such an analysis conflicts with both common sense and established precedent. Nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole.* The same is true of our evaluation of the tuition reimbursement programs at issue in *Nyquist* and *Sloan* v. *Lemon*. This is the appropriate perspective for this case as well. Viewed in the proper light, the program easily satisfies the second prong of the *Lemon* test.

I agree, for the reasons stated by the Court, that the State's program has a secular purpose, and that no entanglement challenge is properly raised on this record. I therefore join the Court's judgment. On the understanding that nothing we do today lessens the authority of our decision in *Mueller*, I join the Court's opinion as well.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion, and concur in the judgment. I also agree with the Court that both the purpose and effect of Washington's program of aid to handicapped students are secular. As JUSTICE POWELL's separate opinion persuasively argues, the Court's opinion in *Mueller* v. *Allen*, 463 U.S. 388 (1983), makes clear that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries." The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.

ON REMAND: In *Witters v. Commission for the Blind*, 771 P.2d 1119 (Wash. 1989), the Washington Supreme Court ruled that awarding vocation rehabilitation funds to Witters would violate the Constitution of the State of Washington:

> Article 1, section 11 of the Constitution of the State of Washington provides in pertinent part: No public money or property shall be appropriated for *or applied to* any religious worship, *exercise or instruction*, or the support of any religious establishment.
>
> Here, the applicant is asking the State to pay for a religious course of study at a

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[2] Contrary to the Court's suggestion, this conclusion does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training. Over 90% of the tax benefits in *Mueller* ultimately flowed to religious institutions. Nevertheless, the aid was thus channeled by individual parents and not by the State, making the tax deduction permissible under the "primary effect" test of *Lemon*.

religious school, with a religious career as his goal. This falls precisely within the clear language of the state constitutional prohibition against applying public moneys to any religious instruction. Indeed, as counsel for the applicant summarized at oral argument before this court: “We would concede that Larry Witters is getting a religious education.” Our state constitution prohibits the use of public moneys to pay for such religious instruction.

In this case, the applicant's course of study is designed to prepare him for a career promoting Christianity. His Bible study and church courses necessarily provide indoctrination in the specific beliefs of Christianity. Thus, for the Commission to provide vocational assistance funds to the applicant would violate article 1, section 11 of the Constitution of the State of Washington because public money would be applied to religious instruction.

The applicant urges that we examine the vocational rehabilitation program as a whole and not focus on his individual participation in the program. His argument ignores the "sweeping and comprehensive" language of Const. art. 1, § 11, which prohibits not only the appropriation of public money for religious instruction, but also the application of public funds to religious instruction. Herein lies a major difference between our state constitution and the First Amendment to the United States Constitution. It follows that to apply federal Establishment Clause analysis to article 1, section 11 would be inappropriate.

FINAL CHAPTER: After the Washington Supreme Court ruled against him, Witters sought further review by the U.S. Supreme Court on the ground that the state court decision violated his rights under the Free Exercise Clause of the First Amendment. On October 2, 1989, the U.S. Supreme Court refused to review the decision of the Supreme Court of Washington.

3. Religious Grant Recipients

BOWEN v. KENDRICK

487 U.S. 589 (1988)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This litigation involves a challenge to a federal grant program that provides funding for services relating to adolescent sexuality and pregnancy. Considering the statute both "on its face" and "as applied," the District Court ruled that the statute violated the Establishment Clause insofar as it provided for the involvement of religious organizations in the federally funded programs. We conclude, however, that the statute is not unconstitutional on its face, and that a determination of whether any of the grants made pursuant to the statute violate the Establishment Clause requires further proceedings in the District Court.

I

The Adolescent Family Life Act (AFLA or Act), was passed by Congress in 1981 in response to the "severe adverse health, social, and economic consequences" that often follow pregnancy and childbirth among unmarried adolescents. The AFLA is essentially a scheme for providing grants to public or nonprofit private organizations or agencies "for services and research in the area of premarital adolescent sexual relations and pregnancy." These grants are intended to serve several purposes, including the promotion of "self discipline and other prudent approaches to the problem of adolescent premarital sexual relations," the promotion of adoption as an alternative for adolescent parents, the establishment of new approaches to the delivery of care services for pregnant adolescents, and the support of research and demonstration projects "concerning the societal causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing."

In pertinent part, grant recipients are to provide two types of services: "care services," for the provision of care to pregnant adolescents and adolescent parents, and "prevention services," for the prevention of adolescent sexual relations. While the AFLA leaves it up to the Secretary of Health and Human Services (the Secretary) to define exactly what types of services a grantee must provide, the statute contains a listing of "necessary services" that may be funded. These services include pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, nutritional information, counseling, child care, mental health services, and perhaps most importantly for present purposes, "educational services relating to family life and problems associated with adolescent premarital sexual relations."

In determining what services to provide under the Act, Congress was well aware that "the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex." Indeed, Congress expressly recognized that legislative or governmental action alone would be insufficient. Accordingly, the AFLA expressly requires grant applicants to describe how they will, "as appropriate in the provision of services[,] involve families of

adolescents [, and] involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." This broad-based involvement of groups outside of the government was intended by Congress to "establish better coordination, integration, and linkages" among existing programs in the community, to aid in the development of "strong family values and close family ties," and to "help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations."

In line with its purposes, the AFLA also imposes limitations on the use of funds by grantees. First, the AFLA expressly states that no funds provided for demonstration projects under the statute may be used for family planning services (other than counseling and referral services) unless appropriate family planning services are not otherwise available in the community. Second, the AFLA restricts the awarding of grants to "programs or projects which do not provide abortions or abortion counseling or referral," except that the program may provide referral for abortion counseling if the adolescent and her parents request such referral. Finally, the AFLA states that "grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

Since 1981, when the AFLA was adopted, the Secretary has received 1,088 grant applications and awarded 141 grants. Funding has gone to a wide variety of recipients, including state and local health agencies, private hospitals, community health associations, privately operated health care centers, and community and charitable organizations. It is undisputed that a number of grantees were organizations with ties to religious denominations.

II

The District Court in this lawsuit held the AFLA unconstitutional both on its face and as applied. Few of our cases in the Establishment Clause area have explicitly distinguished between facial challenges to a statute and attacks on the statute as applied. Several cases have clearly involved challenges to a statute "on its face." In other cases we have, in the course of determining the constitutionality of a statute, referred not only to the language of the statute but also to the manner in which it had been administered. In several cases we have expressly recognized that an otherwise valid statute authorizing grants might be challenged on the grounds that the award of a grant in a particular case would be impermissible.

There is, then, precedent in this area of constitutional law for distinguishing between the validity of the statute on its face and its validity in particular applications. Although the Court's opinions have not even adverted to the consequences of this distinction, we think they do justify the District Court's approach in separating the two issues as it did here.

This said, we turn to consider whether the District Court was correct in concluding that the AFLA was unconstitutional on its face. As in previous cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon* v. *Kurtzman*.

It is clear that the AFLA was motivated primarily, if not entirely, by a legitimate secular purpose -- the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood. As usual in Establishment Clause cases, the more difficult question is whether the primary effect of the challenged statute is impermissible.

Before we address this question, however, it is useful to review again just what the AFLA sets out to do. Simply stated, it authorizes grants to institutions that are capable of providing certain care and prevention services to adolescents. The services are not religious in character. Certainly it is true that a substantial part of the services under the Act involve some sort of education or counseling, but there is nothing inherently religious about these activities. Finally, it is clear that the AFLA takes a particular approach toward dealing with adolescent sexuality and pregnancy -- for example, two of its stated purposes are to "promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations," and to "promote adoption as an alternative," but again, that approach is not inherently religious, although it may coincide with the approach taken by certain religions.

Given this statutory framework, there are two ways in which the statute, considered "on its face," might be said to have the impermissible primary effect of advancing religion. First, it can be argued that the AFLA advances religion by expressly recognizing that "religious organizations have a role to play" in addressing the problems associated with teenage sexuality. In this view, even if no religious institution receives aid or funding pursuant to the AFLA, the statute is invalid under the Establishment Clause because it expressly enlists the involvement of religiously affiliated organizations in the federally subsidized programs, it endorses religious solutions to the problems addressed by the Act, or it creates symbolic ties between church and state. Secondly, it can be argued that the AFLA is invalid on its face because it allows religiously affiliated organizations to participate as grantees in AFLA programs. From this standpoint, the Act is invalid because it authorizes direct federal funding of religious organizations which, given the AFLA's educational function and the fact that the AFLA's "viewpoint" may coincide with the grantee's "viewpoint" on sexual matters, will result in the "inculcation" of religious beliefs in the context of a federally funded program.

We consider the former objection first. The AFLA expressly mentions the role of religious organizations in four places. It states (1) that the problems of teenage sexuality are "best approached through a variety of integrated and essential services provided to adolescents and their families by [, among others,] religious organizations," (2) that federally subsidized services "should emphasize the provision of support by [, among others,] religious and charitable organizations, (3) that AFLA programs "shall use such methods as will strengthen the capacity of families to make use of support systems such as religious organizations," and (4) that grant applicants shall describe how they will involve religious organizations, among other groups, in the provision of services under the Act.

Putting aside for the moment the possible role of religious organizations as grantees, these provisions of the statute reflect at most Congress' considered judgment that religious organizations can help solve the problems to which the AFLA is addressed. Nothing in our previous cases prevents Congress from making such a judgment. Particularly when, as Congress found, "prevention of adolescent sexual activity and pregnancy depends primarily upon developing strong family values and close family ties," it seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life. To the extent that this congressional recognition has any effect of advancing religion, the effect is at most "incidental and remote." In addition, although the AFLA does require potential grantees to describe how they will involve religious

organizations in the provision of services, it also requires grantees to describe the involvement of "charitable organizations, voluntary associations, and other groups in the private sector." In our view, this reflects the statute's successful maintenance of "a course of neutrality among religions, and between religion and nonreligion,"

This brings us to the second ground for objecting to the AFLA: it allows religious institutions to participate as recipients of funds. A fairly wide spectrum of organizations is eligible to receive funding under the Act, and nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution. In this regard, the AFLA is similar to other statutes that this Court has upheld in the past. In *Roemer*, for example, we upheld a statute that provided annual subsidies directly to qualifying colleges and universities, including religiously affiliated institutions. Similarly, in *Tilton*, we approved the Higher Educational Facilities Act, which was intended by Congress to provide construction grants to "all colleges and universities regardless of any affiliation with a religious body." In other cases involving indirect grants of aid to religious institutions, we have found it important that the aid is available regardless of whether it will ultimately flow to a secular or sectarian institution. See Witters; *Mueller*; *Everson*; *Walz*.

Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are "pervasively sectarian." We stated in *Hunt* that "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."

The reason for this is that there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's "religious mission." Accordingly, a relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions.

In this lawsuit, nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to "pervasively sectarian" institutions. Indeed, the contention that there is a substantial risk of such institutions receiving direct aid is undercut by the AFLA's facially neutral grant requirements, the wide spectrum of public and private organizations which are capable of meeting the AFLA's requirements, and the fact that, of the eligible religious institutions, many will not deserve the label of "pervasively sectarian."[1] This is not a case like *Grand Rapids*, where the challenged aid flowed almost entirely to

[1] The validity of this observation is borne out by the statistics for the AFLA program in fiscal year 1986. According to the record, some $ 10.7 million in funding was awarded under the AFLA to a total of 86 organizations. Of this, about $ 3.3 million went to 23 religiously affiliated grantees, with only $ 1.3 million of this figure going to the 13 projects that were cited by the District Court for constitutional violations.

parochial schools. Instead, this litigation more closely resembles *Tilton* and *Roemer*, where it was foreseeable that some proportion of the recipients of government aid would be religiously affiliated, but that only a small portion of these, if any, could be considered "pervasively sectarian." In those cases we upheld the challenged statutes on their face and as applied to the institutions named in the complaints, but left open the consequences which would ensue if they allowed federal aid to go to institutions that were in fact pervasively sectarian. As in *Tilton* and *Roemer*, we do not think the possibility that AFLA grants may go to religious institutions that can be considered "pervasively sectarian" is sufficient to conclude that no grants whatsoever can be given under the statute to religious organizations. We think that the District Court was wrong in concluding otherwise.

Nor do we agree with the District Court that the AFLA necessarily has the effect of advancing religion because the religiously affiliated AFLA grantees will be providing educational and counseling services to adolescents. Of course, we have said that the Establishment Clause does "prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith," and we have accordingly struck down programs that entail an unacceptable risk that government funding would be used to "advance the religious mission" of the religious institution receiving aid. But nothing in our prior cases warrants the presumption adopted by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner. Only in the context of aid to "pervasively sectarian" institutions have we invalidated an aid program on the grounds that there was a "substantial" risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination. In contrast, when the aid is to flow to religiously affiliated institutions that were not pervasively sectarian, as in *Roemer*, we refused to presume that it would be used in a way that would have the primary effect of advancing religion. We think that the type of presumption that the District Court applied is simply unwarranted.

We also disagree with the District Court's conclusion that the AFLA is invalid because it authorizes "teaching" by religious grant recipients on "matters [that] are fundamental elements of religious doctrine," such as the harm of premarital sex and the reasons for choosing adoption over abortion. On an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions. But the possibility or even the likelihood that some of the religious institutions who receive funding will agree with the message that Congress intended to deliver to adolescents through the AFLA is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion. The facially neutral projects authorized by the AFLA -- including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, etc. -- are not themselves "specifically religious activities," and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.

As yet another reason for invalidating parts of the AFLA, the District Court found that the involvement of religious organizations has the impermissible effect of creating a "crucial symbolic link" between government and religion. If we were to adopt the District Court's reasoning, it could be argued that any time a government aid program provides funding to

religious organizations in an area in which the organization also has an interest, an impermissible "symbolic link" could be created, no matter whether the aid was to be used solely for secular purposes. This would jeopardize government aid to religiously affiliated hospitals, for example, on the ground that patients would perceive a "symbolic link" between the hospital -- part of whose "religious mission" might be to save lives -- and whatever government entity is subsidizing the purely secular medical services provided to the patient. We decline to adopt the District Court's reasoning and conclude that, in this litigation, whatever "symbolic link" might in fact be created by disbursement of funds to religious institutions is not sufficient to justify striking down the statute on its face.

A final argument that has been advanced for striking down the AFLA on "effects" grounds is the fact that the statute lacks an express provision preventing the use of federal funds for religious purposes. But we have never stated that a *statutory* restriction is constitutionally required. In this litigation, although there is no express statutory limitation on religious use of funds, there is also no intimation in the statute that at some point, or for some grantees, religious uses are permitted. To the contrary, the 1984 Senate Report on the AFLA states that "the use of Adolescent Family Life Act funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation." We note in addition that the AFLA requires each grantee to undergo evaluations of the services it provides, and also requires grantees to "make such reports concerning its use of Federal funds as the Secretary may require." The application requirements of the Act, as well, require potential grantees to disclose in detail exactly what services they intend to provide and how they will be provided. These provisions, taken together, create a mechanism whereby the Secretary can police the grants that are given out to ensure that federal funds are not used for impermissible purposes. Given this statutory scheme, we do not think that the absence of an express limitation on the use of federal funds for religious purposes means that the statute, on its face, has the primary effect of advancing religion.

This, of course, brings us to the third prong of the *Lemon* Establishment Clause "test" -- the question whether the AFLA leads to "'an excessive government entanglement with religion.'" There is no doubt that the monitoring of AFLA grants is necessary if the Secretary is to ensure that public money is to be spent in a way that comports with the Establishment Clause. Accordingly, this litigation presents us with yet another "Catch-22" argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid. For this and other reasons, the "entanglement" prong of the *Lemon* test has been much criticized over the years. Most of the cases in which the Court has divided over the "entanglement" part of the *Lemon* test have involved aid to parochial schools; in *Aguilar* v. *Felton*, for example, the Court's finding of excessive entanglement rested in large part on the undisputed fact that the elementary and secondary schools receiving aid were "pervasively sectarian" and had "'as a substantial purpose the inculcation of religious values.'"

Here, by contrast, there is no reason to assume that the religious organizations which may receive grants are "pervasively sectarian" in the same sense as the Court has held parochial schools to be. There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees. Unquestionably, the Secretary will review the programs

set up and run by the AFLA grantees, and undoubtedly this will involve a review of, for example, the educational materials that a grantee proposes to use. The Secretary may also wish to have Government employees visit the clinics or offices where AFLA programs are being carried out to see whether they are in fact being administered in accordance with statutory and constitutional requirements. But in our view, this type of grant monitoring does not amount to "excessive entanglement," at least in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily "pervasively sectarian."

In sum, in this somewhat lengthy discussion of the validity of the AFLA on its face, we have concluded that the statute has a valid secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement of church and state.

III

We turn now to consider whether the District Court correctly ruled that the AFLA was unconstitutional as applied. On the merits of the "as applied" challenge, it seems to us that the District Court did not follow the proper approach in assessing appellees' claim that the Secretary is making grants under the Act that violate the Establishment Clause. Although the District Court stated several times that AFLA aid had been given to religious organizations that were "pervasively sectarian," it did not identify which grantees it was referring to, nor did it discuss with any particularity the aspects of those organizations which in its view warranted classification as "pervasively sectarian." The District Court did identify certain instances in which it felt AFLA funds were used for constitutionally improper purposes, but the court did not adequately design its remedy to address the specific problems it found in the Secretary's administration of the statute. Accordingly, although there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees, we feel that this lawsuit should be remanded to the District Court for consideration of the evidence presented by appellees insofar as it sheds light on the manner in which the statute is presently being administered. It is the latter inquiry to which the court must direct itself on remand.

In particular, it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered "pervasively sectarian" religious institutions, such as we have held parochial schools to be. As our previous discussion has indicated, and as *Tilton, Hunt*, and *Roemer* make clear, it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired."

The District Court should also consider on remand whether in particular cases AFLA aid has been used to fund "specifically religious activit[ies] in an otherwise substantially secular setting." Here it would be relevant to determine, for example, whether the Secretary has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith. As we have pointed out in our previous discussion, evidence that the views espoused on questions such as premarital sex, abortion, and the like happen to coincide with the religious views of the AFLA grantee would not be sufficient to show that the grant funds are being used in such a way as to have a primary effect of advancing religion.

IV

We conclude, first, that the District Court erred in holding that the AFLA is invalid on its

face, and second, that the court should consider on remand whether particular AFLA grants have had the primary effect of advancing religion. Should the court conclude that the Secretary's current practice does allow such grants, it should devise a remedy to insure that grants awarded by the Secretary comply with the Constitution and the statute.

JUSTICE O'CONNOR, concurring.

This litigation raises somewhat unusual questions involving a facially valid statute that appears to have been administered in a way that led to violations of the Establishment Clause. I agree with the Court's resolution of those questions, and I join its opinion. I write separately, however, to explain why I do not believe that the Court's approach reflects any tolerance for the kind of improper administration that seems to have occurred in the program at issue here.

The dissent says, and I fully agree, that "[p]ublic funds may not be used to endorse the religious message." As the Court notes, "there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees." Because the District Court employed an analytical framework that did not require a detailed discussion of the voluminous record, the extent of this impermissible behavior and the degree to which it is attributable to poor administration by the Executive Branch is somewhat less clear. In this circumstance, two points deserve to be emphasized. First, *any* use of public funds to promote religious doctrines violates the Establishment Clause. Second, *extensive* violations -- if they can be proved in this case -- will be highly relevant in shaping an appropriate remedy that ends such abuses. For that reason, appellees may yet prevail on remand, and I do not believe that the Court's approach entails a relaxation of "the unwavering vigilance that the Constitution requires against any law 'respecting an establishment of religion.'"

The need for detailed factual findings by the District Court stems in part from the delicacy of the task given to the Executive Branch by the AFLA. Government has a strong and legitimate secular interest in encouraging sexual restraint among young people. At the same time, as the dissent rightly points out, "[t]here is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them." Using religious organizations to advance the secular goals of the AFLA, without thereby permitting religious indoctrination, is inevitably more difficult than in other projects, such as ministering to the poor and the sick. I nonetheless agree with the Court that the partnership between governmental and religious institutions contemplated by the AFLA need not result in constitutional violations, despite an undeniably greater risk than is present in cooperative undertakings that involve less sensitive objectives.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion, and write this separate concurrence to discuss one feature of the proceedings on remand. The Court states that "it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions, such as we have held parochial schools to be." In my view, such a showing will not alone be enough to make out a violation of the Establishment Clause.

Though I am not confident that the term "pervasively sectarian" is a well-founded juridical category, I recognize the thrust of our previous decisions that a statute which provides for exclusive or disproportionate funding to pervasively sectarian institutions may impermissibly advance religion and be invalid on its face. We hold today, however, that the neutrality of the grant requirements and the diversity of the organizations described in the statute before us foreclose the argument that it is disproportionately tied to pervasively sectarian groups. Having held that the statute is not facially invalid, the only purpose of further inquiring whether any particular grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being used to further religion. In sum, where, as in this litigation, a statute provides that the benefits of a program are to be distributed in a neutral fashion to religious and nonreligious applicants alike, and the program withstands a facial challenge, it is not unconstitutional as applied solely by reason of the religious character of a specific recipient. The question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

In 1981, Congress enacted the Adolescent Family Life Act (AFLA), thereby "involv[ing] families[,] . . . religious and charitable organizations, voluntary associations, and other groups," in a broad-scale effort to alleviate some of the problems associated with teenage pregnancy. It is unclear whether Congress ever envisioned that public funds would pay for a program during a session of which parents and teenagers would be instructed:

> "You want to know the church teachings on sexuality. . . . You are the church. You people sitting here are the body of Christ. The teachings of you and the things you value are, in fact, the values of the Catholic Church."

Or of curricula that taught:

> "The Church has always taught that the marriage act, or intercourse, seals the union of husband and wife, (and is a representation of their union on all levels.) Christ commits Himself to us when we come to ask for the sacrament of marriage. We ask Him to be active in our life. God is love. We ask Him to share His love in ours, and God procreates with us, He enters into our physical union with Him, and we begin new life."

Or the teaching of a method of family planning described on the grant application as "not only a method of birth regulation but also a philosophy of procreation," and promoted as helping "spouses who are striving . . . to transform their married life into testimony[,] . . . to cultivate their matrimonial spirituality[, and] to make themselves better instruments in God's plan," and as "facilitat[ing] the evangelization of homes."

Whatever Congress had in mind, however, it enacted a statute that facilitated and, indeed, encouraged the use of public funds for such instruction, by giving religious groups a central pedagogical and counseling role without imposing any restraints on the sectarian quality of the participation. As the record in this litigation makes all too clear, federal tax dollars

appropriated for AFLA have been used, with Government approval, to support religious teaching. Today the majority upholds the facial validity of this statute and remands the action for further proceedings concerning the manner in which the statute has been applied. Because I am firmly convinced that our cases require invalidating this statutory scheme, I dissent.

I

This Court in some cases has passed on the facial validity of a legislative enactment and in others limited its analysis to the particular applications at issue. While the distinction is sometimes useful in constitutional litigation, the majority misuses it here to divide and conquer appellees' challenge. By designating appellees' broad attack on the statute as a "facial" challenge, the majority justifies divorcing its analysis from the extensive record developed in the District Court, and thereby strips the challenge of much of its force and renders the evaluation of the *Lemon* "effects" prong particularly sterile and meaningless. By characterizing appellees' objections to the real-world operation of the AFLA an "as-applied" challenge, the Court risks misdirecting the litigants and the lower courts toward piecemeal litigation continuing indefinitely throughout the life of the AFLA. In my view, a more effective way to review Establishment Clause challenges is to look to the type of relief prayed for by the plaintiffs, and the force of the arguments and supporting evidence they marshal. Whether we denominate a challenge that focuses on the systematically unconstitutional operation of a statute a "facial" challenge -- because it goes to the statute as a whole -- or an "as-applied" challenge -- because we rely on real-world events -- the Court should not blind itself to the facts revealed by the undisputed record.

As is evident from the parties' arguments, the record compiled below, and the decision of the District Court, this lawsuit has been litigated primarily as a broad challenge to the statutory scheme as a whole, not just to the awarding of grants to a few individual applicants. The thousands of pages of depositions, affidavits, and documentary evidence were not intended to demonstrate merely that particular grantees should not receive further funding. This record was designed to show that the AFLA had been interpreted and implemented by the Government in a manner that was clearly unconstitutional, and appellees sought declaratory and injunctive relief as to the entire statute.

The majority declines to accept the District Court's characterization of the record, yet fails to review it independently, relying instead on its assumptions and casual observations about the character of the grantees and potential grantees. In doing so, the Court neglects its responsibilities under the Establishment Clause and gives uncharacteristically short shrift to the District Court's understanding of the facts.[1]

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[1] The majority finds support for its "observation[s]" in the statistics for the AFLA program in fiscal 1986. Because there are some organizations that were funded in 1982, but not in 1986, and vice versa, I find the cumulative funding figures for FY 1982-1986 more helpful. Looking at those figures, and the same group of recipients identified by the majority, I find that of approximately $ 53.5 million in AFLA funding, over $ 10 million went to the 13 organizations specifically cited in the District Court's opinion for constitutional violations. Another 13 organizations characterized as "religiously affiliated" received an additional $ 6

II

Before proceeding to apply Lemon's three-part analysis to the AFLA, I pause to note a particular flaw in the majority's method. A central premise of the majority opinion seems to be that the primary means of ascertaining whether a statute that appears to be neutral on its face in fact has the effect of advancing religion is to determine whether aid flows to "pervasively sectarian" institutions. This misplaced focus leads the majority to ignore the substantial body of case law the Court has developed in analyzing programs providing direct aid to parochial schools, and to rely almost exclusively on the few cases in which the Court has upheld the supplying of aid to private colleges.

"Pervasively sectarian," a vaguely defined term of art, has its roots in this Court's recognition that government must not engage in detailed supervision of the inner workings of religious institutions, and the Court's sensible distaste for the "picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction," Under the "effects" prong of the *Lemon* test, the Court has used one variant or another of the pervasively sectarian concept to explain why any but the most indirect forms of government aid to such institutions would necessarily have the effect of advancing religion.

The majority first skews the Establishment Clause analysis by adopting a cramped view of what constitutes a pervasively sectarian institution. Perhaps because most of the Court's decisions in this area have come in the context of aid to parochial schools, which traditionally have been characterized as pervasively sectarian, the majority seems to equate the characterization with the institution. In support of that illusion, the majority relies heavily on cases in which the Court has upheld direct government funding to liberal arts colleges with some religious affiliation, noting that such colleges were not "pervasively sectarian." But the happenstance that the few cases in which direct-aid statutes have been upheld have concerned religiously affiliated liberal arts colleges no more suggests that only parochial schools should be considered "pervasively sectarian," than it suggests that the only religiously affiliated institutions that may ever receive direct government funding are private liberal arts colleges. In fact, the cases on which the majority relies have stressed that the institutions' "*predominant* higher education mission is to provide their students with a *secular* education." In sharp contrast, the District Court here concluded that AFLA grantees included "organizations with institutional ties to religious denominations *and corporate requirements that the organizations abide by and not contradict religious doctrines*. On a continuum of "sectarianism" running from parochial schools at one end to the colleges funded by the statutes upheld in *Tilton, Hunt*, and *Roemer* at the other, the AFLA grantees described by the District Court clearly are much closer to the former than to the latter.

More importantly, the majority also errs in suggesting that the inapplicability of the label

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million during this period. Looking at the figures from a different perspective, a third of the approximately 100,000 "clients served" by all AFLA grantees during the 1985-1986 period received their services from the "cited" grantees, and nearly 11,000 more from the other "religiously affiliated" institutions. At a minimum, these figures already demonstrate substantial constitutionally suspect funding through the AFLA.

is generally dispositive. The Court never has treated the absence of such a finding as a license to disregard the potential for impermissible fostering of religion. The characterization of an institution as "pervasively sectarian" allows us to eschew further inquiry into the use that will be made of direct government aid. In that sense, it is a sufficient, but not a necessary, basis for a finding that a challenged program creates an unacceptable Establishment Clause risk.

The voluminous record reviewed by the District Court explains the nature of the activities funded with Government money, as well as the content of the educational programs and materials developed and disseminated. There is no basis for ignoring the volumes of depositions, pleadings, and undisputed facts reviewed by the District Court simply because the recipients of the Government funds may not in every sense resemble parochial schools.

III

As is often the case, the effect of the statute creates Establishment Clause problems. Because I find the statute's effect of advancing religion dispositive, I turn to that issue.

A

The majority's holding that the AFLA is not unconstitutional on its face marks a sharp departure from our precedents. While aid programs providing nonmonetary, verifiably secular aid have been upheld notwithstanding the indirect effect they might have on the allocation of an institution's own funds for religious activities, direct cash subsidies have always required much closer scrutiny into the expected and potential uses of the funds, and much greater guarantees that the funds would not be used inconsistently with the Establishment Clause. Parts of the AFLA prescribing various forms of outreach, education, and counseling services specifically authorize the expenditure of funds in ways previously held unconstitutional. For example, the Court has upheld the use of public funds to support a parochial school's purchase of secular textbooks already approved for use in public schools, or its grading and administering of state-prepared tests. When the books, teaching materials, or examinations were to be selected or designed by the private schools themselves, however, the Court consistently has held that such government aid risked advancing religion impermissibly. The teaching materials that may be purchased, developed, or disseminated with AFLA funding are in no way restricted to those already selected and approved for use in secular contexts.[2]

Notwithstanding the fact that Government funds are paying for religious organizations to teach and counsel impressionable adolescents on a highly sensitive subject of considerable religious significance, often on the premises of a church or parochial school and without any effort to remove religious symbols from the sites, the majority concludes that the AFLA is not

[2] Thus, for example, until discovery began in this lawsuit, St. Ann's, a home for unmarried pregnant teenagers, operated by the Order of the Daughters of Charity and owned by the Archdiocese of Washington, D.C., purchased books containing Catholic doctrine on chastity, masturbation, homosexuality, and abortion, using AFLA funds. Catholic Family Services of Amarillo, Tex., used a curriculum guide for AFLA-funded parent workshops with explicit theological references, as well as religious "reference" materials, including the film "Everyday Miracle," described as "depicting the miracle of human reproduction as a gift from God."

facially invalid. The majority acknowledges the constitutional proscription on government-sponsored religious indoctrination but, on the basis of little more than an indefensible assumption that AFLA recipients are not pervasively sectarian and consequently are presumed likely to comply with statutory and constitutional mandates, dismisses as insubstantial the risk that indoctrination will enter counseling. Similarly, the majority rejects the District Court's conclusion that the subject matter renders the risk of indoctrination unacceptable, and does so, it says, because "the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the AFLA" does not amount to the advancement of religion. I do not think the statute can be so easily and conveniently saved.

(1)

The District Court concluded that asking religious organizations to teach and counsel youngsters on matters of deep religious significance, yet expect them to refrain from making reference to religion is both foolhardy and unconstitutional. The majority's rejection of this view is illustrative of its doctrinal misstep in relying so heavily on the college-funding cases.

The majority rejects the District Court's assumptions as unwarranted outside the context of a pervasively sectarian institution. In doing so, the majority places inordinate weight on the nature of the institution receiving the funds, and ignores altogether the targets of the funded message and the nature of its content.

The AFLA, unlike any statute this Court has upheld, pays for teachers and counselors, employed by religious authorities, to educate impressionable young minds on issues of religious moment. Time and again we have recognized the difficulties inherent in asking even the best-intentioned individuals in such positions to make "a total separation between secular teaching and religious doctrine." *Lemon* v. *Kurtzman*, 403 U.S. at 619. Where the targeted audience is composed of children, the Court's insistence on adequate safeguards has always been greatest. In those cases in which funding of colleges with religious affiliations has been upheld, the Court has relied on the assumption that "college students are less impressionable and less susceptible to religious indoctrination." *Tilton* v. *Richardson*, 403 U.S., at 686.

(2)

By observing that the alignment of the statute and the religious views of the grantees do not render the AFLA a statute which funds "specifically religious activity," the majority makes light of the religious significance in the counseling provided by some grantees. Whereas there may be secular values promoted by the AFLA, it can hardly be doubted that when promoted in theological terms by religious figures, those values take on a religious nature. Not surprisingly, the record is replete with observations to that effect. It should be undeniable by now that religious dogma may not be employed by government even to accomplish laudable secular purposes. *Abington School District* v. *Schempp*.

It is true, of course, that the Court has recognized that the Constitution does not prohibit the government from supporting secular social-welfare services solely because they are provided by a religiously affiliated organization. But such recognition has been closely tied to the nature of the subsidized social service. There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to

make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.

There is also, of course, a fundamental difference between government's employing religion *because* of its unique appeal to a higher authority and the transcendental nature of its message, and government's enlisting the aid of religiously committed individuals or organizations without regard to their sectarian motivation. In the latter circumstance, religion plays little or no role. In the former, religion is at the core of the subsidized activity. For some religious organizations, the answer to a teenager's question "Why shouldn't I have an abortion?" or "Why shouldn't I use barrier contraceptives?" will undoubtedly be different from an answer based solely on secular considerations. Public funds may not be used to endorse the religious message.

B

The problems inherent in a statutory scheme specifically designed to involve religious organizations in a government funded pedagogical program are compounded by the lack of any statutory restrictions on the use of federal tax dollars to promote religion. Conscious of the remarkable omission from the AFLA of any restriction whatsoever on the use of public funds for sectarian purposes, the Court disingenuously argues that we have "never stated that a *statutory* restriction is constitutionally required."

The majority interprets *Tilton* "to indicate that the constitutional limitations on use of federal funds, as embodied in the statutory restriction, could not simply 'expire'" after 20 years, but concludes that the absence of a statutory restriction in the AFLA is not troubling, because "there is also no intimation in the statute that at some point, or for some grantees, religious uses are permitted." Although there is something to the notion that the lifting of a pre-existing restriction may be more likely to be perceived as affirmative authorization than would the absence of any restriction at all, there was in *Tilton* no provision that stated that after 20 years facilities could be converted into chapels. What there was in *Tilton* was an express *statutory* provision, which lapsed, leaving no restrictions; it was that *vacuum* that the Court found impermissible. In the AFLA, by contrast, there is a vacuum right from the start.

If *Tilton* were indeed the only indication that cash-grant programs must include prohibitions on the use of public funds to advance or endorse religion, one might argue more plausibly that ordinary reporting requirements, in conjunction with some presumption that Government agencies administer federal programs in a constitutional fashion, might suffice to protect a statute against facial challenge. That, however, is simply not the case. In *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), for example, the Court upheld a program whereby private schools were reimbursed for the actual cost of administering state-required tests. The statute specifically required that no payments be made for religious instruction and incorporated an extensive auditing system. The Court warned, however: "Of course, the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services."

Despite the glaring omission of a restriction on the use of funds for religious purposes, the Court attempts to resurrect the AFLA by noting a legislative intent not to promote religion, and observing that various reporting provisions of the statute "create a mechanism whereby the Secretary can police the grants." However effective this "mechanism" might be in enforcing clear statutory directives, it is of no help where, as here, no restrictions are found on the face of the statute, and the Secretary has not promulgated any by regulation.

Indeed, nothing in the AFLA precludes the funding of even "pervasively sectarian" organizations, whose work by definition cannot be segregated into religious and secular categories. In this litigation the District Court expressly found that funds have gone to pervasively sectarian institutions and tax dollars have been used for the teaching of religion. Moreover, appellees have specifically called into question the manner in which the grant program was administered and grantees were selected. These objections cannot responsibly be answered by reliance on the Secretary's enforcement mechanism.

C

By placing unsupportable weight on the "pervasively sectarian" label, and recharacterizing appellees' objections to the statute, the Court attempts to create an illusion of consistency between our prior cases and its present ruling. But our cases do not require a plaintiff to demonstrate that a government action *necessarily* promotes religion, but simply that it creates such a substantial risk. Given the nature of the subsidized activity, the lack of adequate safeguards, and the chronicle of past experience with this statute, there is no room for doubt that the AFLA creates a substantial risk of impermissible fostering of religion.

IV

While it is evident that the AFLA does not pass muster under *Lemon*'s "effects" prong, the unconstitutionality of the statute becomes even more apparent when we consider the unprecedented degree of entanglement required to prevent subsidizing the advancement of religion. The majority's brief discussion of *Lemon*'s "entanglement" prong is limited to (a) criticizing it as a "Catch-22," and (b) concluding that because there is "no reason to assume that the religious organizations which may receive grants are 'pervasively sectarian' in the same sense as the Court has held parochial schools to be," there is no need to be concerned about the degree of monitoring necessary to ensure compliance with the AFLA and the Establishment Clause. As to the former, although the majority is certainly correct that the Court's entanglement analysis has been criticized in the separate writings of some Members of the Court, the question whether a government program leads to "'an excessive government entanglement with religion'" nevertheless is and remains a part of the applicable constitutional inquiry. I accept the majority's conclusion that "[t]here is no doubt that the monitoring of AFLA grants is necessary to ensure that public money is to be spent in a way that comports with the Establishment Clause," but disagree with its easy characterization of entanglement analysis as a "Catch-22." To the extent any metaphor is helpful, I would be more inclined to characterize the Court's excessive entanglement decisions as concluding that to implement the required monitoring, we would have to kill the patient to cure what ailed him.

As to the Court's conclusion that our precedents do not indicate that the Secretary's monitoring will have to be exceedingly intensive or entangling, because the grant recipients

are not sufficiently like parochial schools, I must disagree. As discussed above, the majority's excessive reliance on the distinction between the Court's parochial-school-aid cases and college-funding cases is unwarranted. *Lemon, Meek*, and *Aguilar* cannot be so conveniently dismissed solely because the majority declines to assume that the "pervasively sectarian" label can be applied here.

To determine whether a statute fosters excessive entanglement, a court must look at three factors: (1) the character and purpose of the institutions benefitted; (2) the nature of the aid; and (3) the nature of the relationship between the government and the religious organization. Thus, in *Lemon*, it was not solely the fact that teachers performed their duties within the four walls of the parochial school that rendered monitoring unconstitutional. It seems inherent in the pedagogical function that there will be disagreements about what is or is not "religious" and which will require an intolerable degree of government intrusion and censorship.

In *Roemer*, *Tilton*, and *Hunt*, the Court relied on "the ability of the State to identify and subsidize separate secular functions carried out at the school, *without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes," Roemer* v. *Maryland Public Works Board*, 426 U.S. at 765 (emphasis added), and on the fact that onetime grants require "no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." AFLA grants, of course, are not simply one-time construction grants. As the majority readily acknowledges, the Secretary will have to "review the programs set up and run by the AFLA grantees[, including] a review of, for example, the educational materials that a grantee proposes to use." And, as the majority intimates, monitoring the use of AFLA funds will undoubtedly require more than the "minimal" inspection "necessary to ascertain that the facilities are devoted to secular education." Since teachers and counselors, unlike buildings, "are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction."

V

The AFLA, without a doubt, endorses religion. Because of its expressed solicitude for the participation of religious organizations in all AFLA programs in one form or another, the statute creates a symbolic and real partnership between the clergy and the fisc in addressing a problem with substantial religious overtones. Given the delicate subject matter and the impressionable audience, the risk that the AFLA will convey a message of Government endorsement of religion is overwhelming. The statutory language and the extensive record established in the District Court make clear that the problem lies in the statute and its systematically unconstitutional operation, and not merely in isolated instances of misapplication. I therefore would find the statute unconstitutional without remanding to the District Court.

4. Financial Aid Revisited: 1993 to the Present

LARRY ZOBREST v. CATALINA FOOTHILLS SCHOOL DISTRICT

509 U.S. 1 (1993)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner James Zobrest, who has been deaf since birth, asked respondent school district to provide a sign-language interpreter to accompany him to classes at a Roman Catholic high school in Tucson, Arizona, pursuant to the Individuals with Disabilities Education Act and its Arizona counterpart. We hold that the Establishment Clause does not bar the school district from providing the requested interpreter.

James Zobrest attended grades one through five in a school for the deaf, and grades six through eight in a public school. While he attended public school, respondent furnished him with a sign-language interpreter. For religious reasons, James' parents enrolled him for the ninth grade in Salpointe Catholic High School, a sectarian institution. When petitioners requested that respondent supply James with an interpreter at Salpointe, respondent referred the matter to the County Attorney, who concluded that providing an interpreter on the school's premises would violate the United States Constitution. The question next was referred to the Arizona Attorney General, who concurred in the County Attorney's opinion. Respondent accordingly declined to provide the requested interpreter.

Petitioners then instituted this action in the United States District Court for the District of Arizona. Petitioners asserted that the IDEA and the Free Exercise Clause of the First Amendment require respondent to provide James with an interpreter at Salpointe, and that the Establishment Clause does not bar such relief.[1] The District Court granted respondent summary judgment, on the ground that "the interpreter would act as a conduit for the religious inculcation of James." "That kind of entanglement of church and state," the District Court concluded, "is not allowed." The Court of Appeals affirmed. We now reverse.

Respondent has raised several issues unrelated to the Establishment Clause question. Respondent first argues that a regulation promulgated under the IDEA precludes it from using federal funds to provide an interpreter at Salpointe. In the alternative, respondent claims that even if there is no affirmative bar to the relief, it is not required by statute or regulation to furnish interpreters to students at sectarian schools. And respondent adds that providing such a service would offend the Arizona Constitution.

It is a familiar principle of our jurisprudence that federal courts will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible by which

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[1] During the pendency of this litigation, James graduated from Salpointe. This case nonetheless presents a continuing controversy, since petitioners seek reimbursement for the cost they incurred in hiring their own interpreter, more than $ 7,000 per year.

the constitutional question can be avoided. Here, in contrast to other cases applying the prudential rule of avoiding constitutional questions, only First Amendment questions were pressed in the Court of Appeals. Given this posture of the case, we think the prudential rule of avoiding constitutional questions has no application. The fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke this rule. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." We therefore turn to the merits of the constitutional claim.

We have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit. Nowhere have we stated this principle more clearly than in *Mueller* v. *Allen* and *Witters* v. *Washington Dept. of Services for Blind*.

In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota law allowing taxpayers to deduct certain educational expenses in computing their state income tax, even though the vast majority of those deductions went to parents whose children attended sectarian schools. Two factors, aside from States' broad taxing authority, informed our decision. We noted that the law "permits *all* parents -- whether their children attend public school or private -- to deduct their children's educational expenses." We also pointed out that under Minnesota's scheme, public funds become available to sectarian schools "only as a result of numerous private choices of individual parents of school-age children," thus distinguishing *Mueller* from our other cases involving "the direct transmission of assistance from the State to the schools themselves."

Witters was premised on virtually identical reasoning. In that case, we upheld the State of Washington's extension of vocational assistance to a blind person studying at a private Christian college to become a pastor, missionary, or youth director. We observed that "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." The program, we said, "creates no financial incentive for students to undertake sectarian education." We also remarked that, much like the law in *Mueller*, "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'" In light of these factors, we held that Washington's program -- even as applied to a student who sought state assistance so that he could become a pastor -- would not advance religion in a manner inconsistent with the Establishment Clause.

That same reasoning applies with equal force here. The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. Viewed against the backdrop of *Mueller* and *Witters*, then, the Court of Appeals erred in its decision. When the government offers a neutral service on the premises of a sectarian school as part of a general

program that "is in no way skewed towards religion," it follows under our prior decisions that provision of that service does not offend the Establishment Clause. Indeed, this is an even easier case than *Mueller* and *Witters* in the sense that, under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers. The only indirect economic benefit a sectarian school might receive is the handicapped child's tuition -- and that is, of course, assuming that, without an IDEA interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.

Respondent contends, however, that this case differs from *Mueller* and *Witters*, in that petitioners seek to have a public employee physically present in a sectarian school to assist in James' religious education. In light of this distinction, respondent argues that this case more closely resembles *Meek* v. *Pittenger* and *School Dist. of Grand Rapids* v. *Ball*. In *Meek*, we struck down a statute that provided a direct loan of teaching material and equipment. The material and equipment covered by the statute included maps, charts, and tape recorders. According to respondent, if the government could not place a tape recorder in a sectarian school in *Meek*, then it surely cannot place an interpreter in Salpointe. The statute in *Meek* also authorized state-paid personnel to furnish "auxiliary services" -- which included remedial and accelerated instruction and guidance counseling -- on the premises of religious schools. We determined that this part of the statute offended the First Amendment as well. *Ball* similarly involved two public programs that provided services on private school premises; there, public employees taught classes to students in private school classrooms. We found that those programs likewise violated the Constitution, relying largely on *Meek*. According to respondent, if the government could not provide educational services on the premises of sectarian schools in *Meek* and *Ball*, then it surely cannot provide James with an interpreter on the premises of Salpointe.

Respondent's reliance on *Meek* and *Ball* is misplaced for two reasons. First, the programs in *Meek* and *Ball* -- through direct grants of government aid -- relieved sectarian schools of costs they otherwise would have borne in educating their students. For example, the religious schools in *Meek* received teaching material and equipment from the State, relieving them of an otherwise necessary cost of performing their educational function. "Substantial aid to the educational function of such schools," we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity." So, too, was the case in Ball. The extension of aid to petitioners, however, does 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. And any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to "the private choices of individual parents." Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries.

Second, the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. The Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school. Such a flat rule, smacking of antiquated

notions of "taint," would indeed exalt form over substance.[2] Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to "transmit everything that is said in exactly the same way it was intended." James' parents have chosen of their own free will to place him in a pervasively sectarian environment. The sign-language interpreter they have requested will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause.

The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education. The judgment of the Court of Appeals is therefore *Reversed.*

JUSTICE BLACKMUN, with whom JUSTICE SOUTER joins, and with whom JUSTICE STEVENS and JUSTICE O'CONNOR join as to Part I, dissenting.

Today, the Court unnecessarily addresses an important constitutional issue, disregarding longstanding principles of constitutional adjudication. In so doing, the Court holds that placement in a parochial school classroom of a public employee whose duty consists of relaying religious messages does not violate the Establishment Clauset. I disagree both with the Court's decision to reach this question and with its disposition on the merits.

I

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." This is a "fundamental rule of judicial restraint" which has received the sanction of time and experience.

Respondent School District makes two arguments that could provide grounds for affirmance, rendering consideration of the constitutional question unnecessary. First, respondent maintains that the Individuals with Disabilities Education Act (IDEA) does not require it to furnish petitioner with an interpreter at any private school so long as special education services are made available at a public school. Second, respondent contends that 34 CFR § 76.532(a)(1) (1992), a regulation promulgated under the IDEA, which forbids the use of federal funds to pay for "religious worship, instruction, or proselytization," prohibits provision of a sign-language interpreter at a sectarian school. This Court could easily refrain from deciding the constitutional claim by vacating and remanding the case for consideration of the statutory and regulatory issues. Indeed, the majority's decision does not eliminate the

[2] Indeed, respondent readily admits, as it must, that there would be no problem under the Establishment Clause if the IDEA funds instead went directly to James' parents, who, in turn, hired the interpreter themselves. ("If such were the case, then the sign language interpreter would be the student's employee, not the School District's, and governmental involvement in the enterprise would end with the disbursement of funds").

need to resolve these remaining questions.[1]

The majority does not deny the existence of these alternative grounds, nor does it dispute the venerable principle that constitutional questions should be avoided when there are nonconstitutional grounds for a decision in the case. Because the parties chose not to litigate the federal statutory issues in the District Court and in the Court of Appeals, the majority blithely proceeds to the merits of their constitutional claim.

That the federal statutory and regulatory issues have not been properly briefed or argued does not justify the Court's decision to reach the constitutional claim. The very posture of this case should have alerted the courts that the parties were seeking what amounts to an advisory opinion. After the Arizona Attorney General concluded that provision of a sign-language interpreter would violate the Federal and State Constitutions, the parties bypassed the federal statutes and regulations and proceeded directly to litigate the constitutional issue. Under such circumstances, the weighty nonconstitutional questions that were left unresolved are hardly to be described as "buried in the record." Prudence counsels that the Court follow a similar practice here by vacating and remanding this case for consideration of the nonconstitutional questions, rather than proceeding directly to the merits of the constitutional claim.

II

Despite my disagreement with the majority's decision to reach the constitutional question, its arguments on the merits deserve a response. Until now, the Court never has authorized a public employee to participate directly in religious indoctrination. Yet that is the consequence of today's decision.

Let us be clear about exactly what is going on here. The parties have stipulated to the following facts. Petitioner requested the State to supply him with a sign-language interpreter at Salpointe High School. Salpointe is a "pervasively religious" institution where "the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined." Salpointe's overriding "objective" is to "instill a sense of Christian values." Its "distinguishing purpose" is "the inculcation in its students of the faith and morals of the Roman Catholic Church." Religion is a required subject at Salpointe, and Catholic students are "strongly encouraged" to attend daily Mass each morning. Salpointe's teachers must sign a Faculty Employment Agreement which requires them to promote the relationship among the religious, the academic, and the extracurricular. They are encouraged to do so by "assisting 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."

At Salpointe, where the secular and the sectarian are "inextricably intertwined," governmental assistance to the educational function of the school necessarily entails

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[1] Respondent also argues that public provision of a sign-language interpreter would violate the Arizona Constitution. Article II, § 12, of the Arizona Constitution provides: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." The Arizona Attorney General concluded that, under this provision, interpreter services could not be furnished to petitioner.

governmental participation in the school's inculcation of religion. A state-employed sign-language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Masses at which Salpointe encourages attendance for Catholic students. In an environment so pervaded by discussions of the divine, the interpreter's every gesture would be infused with religious significance. Indeed, petitioners willingly concede this point: "That the interpreter conveys religious messages is a given in the case." By this concession, petitioners would seem to surrender their constitutional claim.

The majority attempts to elude the impact of the record by offering three reasons why this sort of aid to petitioners survives Establishment Clause scrutiny. First, the majority observes that provision of a sign-language interpreter occurs as "part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic' nature of the school the child attends." Second, the majority finds significant the fact that aid is provided to pupils and their parents, rather than directly to sectarian schools. As a result, "'any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.'" And, finally, the majority opines that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor."

But the majority's arguments are unavailing. As to the first two, even a general welfare program may have specific applications that are constitutionally forbidden under the Establishment Clause. For example, a general program granting remedial assistance to disadvantaged schoolchildren attending public and private, secular and sectarian schools alike would clearly offend the Establishment Clause insofar as it authorized the provision of teachers. Such a program would not be saved simply because it supplied teachers to secular as well as sectarian schools. Nor would the fact that teachers were furnished to pupils and their parents, rather than directly to sectarian schools, immunize such a program from Establishment Clause scrutiny. The majority's decision must turn, then, upon the distinction between a teacher and a sign-language interpreter.

"Although Establishment Clause jurisprudence is characterized by few absolutes," at a minimum "the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." In keeping with this restriction, our cases consistently have rejected the provision by government of any resource capable of advancing a school's religious mission. Although the Court generally has permitted the provision of "secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school," *Meek*, 421 U.S. at 364, it has always proscribed the provision of benefits that afford even "the opportunity for the transmission of sectarian views," *Wolman*, 433 U.S. at 244 .

Thus, the Court has upheld the use of public school buses to transport children to and from school, *Everson*, while striking down the employment of publicly funded buses for field trips controlled by parochial school teachers, *Wolman*. Similarly, the Court has permitted the provision of secular textbooks whose content is immutable and can be ascertained in advance, *Allen*, while prohibiting the provision of any instructional materials or equipment that could be used to convey a religious message, such as slide projectors, tape recorders,

record players, and the like, *Wolman*. State-paid speech and hearing therapists have been allowed to administer diagnostic testing on the premises of parochial schools, whereas state-paid remedial teachers and counselors have not been authorized to offer their services because of the risk that they may inculcate religious beliefs.

These distinctions perhaps are somewhat fine, but "'lines must be drawn.'" And our cases make clear that government crosses the boundary when it furnishes the medium for communication of a religious message. If petitioners receive the relief they seek, it is beyond question that a state-employed sign-language interpreter would serve as the conduit for petitioner's religious education, thereby assisting Salpointe in its mission of religious indoctrination. But the Establishment Clause is violated when a sectarian school enlists "the machinery of the State to enforce a religious orthodoxy."

Witters and *Mueller* v. *Allen* are not to the contrary. Those cases dealt with the payment of cash or a tax deduction, where governmental involvement ended with the disbursement of funds or lessening of tax. This case, on the other hand, involves ongoing, daily, and intimate governmental participation in the teaching and propagation of religious doctrine. The graphic symbol of the concert of church and state that results when a public employee or instrumentality mouths a religious message is likely to "enlist -- at least in the eyes of impressionable youngsters -- the powers of government to the support of the religious denomination operating the school." And the union of church and state in pursuit of a common enterprise is likely to place the imprimatur of governmental approval upon the favored religion, conveying a message of exclusion to all who do not adhere to its tenets.

Moreover, this distinction between the provision of funds and the provision of a human being is not merely one of form. It goes to the heart of the principles animating the Establishment Clause. The provision of a state-paid sign-language interpreter may pose serious problems for the church as well as for the state. Many sectarian schools impose religiously based rules of conduct, as Salpointe has in this case. A traditional Hindu school would be likely to instruct its students and staff to dress modestly, avoiding any display of their bodies. And an orthodox Jewish yeshiva might forbid all but kosher food upon its premises. To require public employees to obey such rules would impermissibly threaten individual liberty, but to fail to do so might endanger religious autonomy. For such reasons, it long has been feared that "a union of government and religion tends to destroy government and to degrade religion." The Establishment Clause was designed to avert this sort of conflict.

III

Our cases have strived to "chart a course that preserves the autonomy and freedom of religious bodies while avoiding any semblance of established religion." I would not stray, as the Court does today, from the course set by nearly five decades of Establishment Clause jurisprudence. Accordingly, I dissent.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS joins, dissenting.

I join Part I of JUSTICE BLACKMUN's dissent. In my view, the Court should vacate and remand this case for consideration of the various threshold problems, statutory and regulatory, that may moot the constitutional question urged upon us by the parties.

AGOSTINI v. FELTON

***521 U.S. 203* (1997)**

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Aguilar v. Felton*, 473 U.S. 402 (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, petitioners--the parties bound by that injunction--seek relief from its operation. Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners are entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the operation of the District Court's prospective injunction.

I

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965 to "provide full educational opportunity to every child regardless of economic background." Toward that end, Title I channels federal funds, through the States, to "local educational agencies" (LEA's). The LEA's spend these funds to provide remedial education, guidance, and job counseling to eligible students. An eligible student is one (i) who resides within the attendance boundaries of a public school located in a low-income area, and (ii) who is failing, or is at risk of failing, the State's student performance standards. Title I funds must be made available to *all* eligible children, regardless of whether they attend public schools, and the services provided to children attending private schools must be "equitable in comparison to services and other benefits for public school children."

An LEA providing services to children enrolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a "school-wide" basis. In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. The Title I services themselves must be "secular, neutral, and nonideological," and must "supplement, and in no case supplant, the level of services" already provided by the private school.

Petitioner Board of Education of the City of New York (Board), an LEA, first applied for Title I funds in 1966 and has grappled ever since with how to provide Title I services to the private school students within its jurisdiction. Approximately 10% of the total number of students eligible for Title I services are private school students. Recognizing that more than 90% of the private schools within the Board's jurisdiction are sectarian, the Board initially

arranged to transport children to public schools for after-school Title I instruction. But this enterprise was largely unsuccessful. Attendance was poor, teachers and children were tired, and parents were concerned for the safety of their children. The Board then moved the after-school instruction onto private school campuses. After this program also yielded mixed results, the Board implemented the plan we evaluated in *Aguilar v. Felton.*

That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. Assignments to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. A large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. The vast majority of Title I teachers also moved among the private schools.

Before any public employee could provide Title I instruction at a private school, she would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised. Specifically, employees would be told that (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only those children who met the eligibility criteria for Title I; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team-teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. All religious symbols were to be removed from classrooms used for Title I services. The rules acknowledged that it might be necessary for Title I teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month.

In 1978, six federal taxpayers--respondents here--sued the Board in the District Court for the Eastern District of New York claiming that the Board's Title I program violated the Establishment Clause. In a 5-4 decision, this Court [held] that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits." On remand, the District Court permanently enjoined the Board "from using public funds for any plan or program under [Title I] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City."

The Board, like other LEA's across the United States, modified its Title I program so it could continue serving those students who attended private religious schools. The Board reverted to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional units (essentially vans converted into classrooms) parked near the sectarian school. The Board also offered computer-aided instruction, which could be provided "on premises" because it did not require public employees to be physically present on the premises of a religious school.

In October and December of 1995, petitioners--the Board and a new group of parents of parochial school students entitled to Title I services--filed motions in the District Court seeking relief under Federal Rule of Civil Procedure 60(b) from the permanent injunction entered by the District Court on remand from our decision in *Aguilar*. Petitioners argued that relief was proper under Rule 60(b)(5) and our decision in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992), because the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." Despite its observations that "the landscape of Establishment Clause decisions has changed," and that "there may be good reason to conclude that *Aguilar*'s demise is imminent," the District Court denied the Rule 60(b) motion on the merits because *Aguilar*'s demise had "not yet occurred." The Court of Appeals for the Second Circuit affirmed. We granted certiorari and now reverse.

II

The question we must answer is a simple one: Are petitioners entitled to relief from the District Court's permanent injunction under Rule 60(b)? Rule 60(b)(5) states: "On motion, the court may relieve a party from a final judgment [when] it is no longer equitable that the judgment should have prospective application." In *Rufo v. Inmates of Suffolk County Jail*, we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction can show "a significant change either in factual conditions or in law." A court errs when it refuses to modify an injunction or consent decree in light of such changes.

Petitioners point to changes in the factual and legal landscape that they believe justify their claim for relief under Rule 60(b)(5). They argue that there have been two significant legal developments since *Aguilar* was decided: a majority of Justices have expressed their views that *Aguilar* should be reconsidered or overruled; and *Aguilar* has in any event been undermined by subsequent Establishment Clause decisions. Respondents counter that because the relevant case law has not changed, the District Court did not err in denying petitioners' motions. Obviously, if neither the law supporting our original decision nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) motion. Accordingly, we turn to the threshold issue whether the factual or legal landscape has changed since we decided *Aguilar*.

The views of five Justices that [*Aguilar*] should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law. Petitioners' ability to satisfy the prerequisites of Rule 60(b)(5) hinges on whether our later Establishment Clause cases have so undermined *Aguilar* that it is no longer good law. We now turn to that inquiry.

III

A

In order to evaluate whether *Aguilar* has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which *Aguilar*, as well as its companion case, *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), rested.

In *Ball*, the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district's Shared Time program, the one most analogous to Title I, provided remedial and "enrichment" classes, at public expense, to students attending

nonpublic schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of nonpublic schools. The Shared Time courses were in subjects designed to supplement the "core curriculum" of the nonpublic schools. Of the 41 nonpublic schools eligible for the program, 40 were "'pervasively sectarian'" in character. The Court concluded that the program had the impermissible effect of advancing religion.

The New York City Title I program challenged in *Aguilar* closely resembled the Shared Time program struck down in *Ball*, but the the Board had "adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools." Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the level of monitoring necessary would "inevitably result in the excessive entanglement of church and state," thereby running afoul of *Lemon*'s third prong.

Distilled to essentials, the Court's conclusion that the Shared Time program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in *Aguilar* there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

B

Our more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion. Likewise, we continue to explore whether the aid has the "effect" of advancing or inhibiting religion. What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

1

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In *Zobrest v. Catalina Foothills School Dist.*, we examined whether the IDEA was constitutional as applied to a deaf student who sought to bring his state-employed sign-language interpreter with him to his Roman Catholic high school. We held that this was permissible, expressly disavowing the notion that "the Establishment Clause [laid] down [an] absolute bar to the

placing of a public employee in a sectarian school." "Such a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by "adding to [or] subtracting from" the lectures translated. In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place and we were able to conclude that "the provision of such assistance [was] not barred by the Establishment Clause." *Zobrest* therefore expressly rejected the notion--relied on in *Ball* and *Aguilar*--that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students. *Zobrest* also implicitly repudiated another assumption on which *Ball* and *Aguilar* turned: that the presence of a public employee on private school property creates an impermissible "symbolic link" between government and religion.

JUSTICE SOUTER contends that *Zobrest* did not undermine the "presumption of inculcation" erected in *Ball* and *Aguilar*, and that our conclusion to the contrary rests on a "mistaken reading" of *Zobrest*. In his view, *Zobrest* held that the Establishment Clause tolerates the presence of public employees in sectarian schools "only in ... limited circumstances"--*i.e.*, when the employee "simply translates for one student the material presented to the class." The sign-language interpreter is unlike the remedial instructors in *Ball* and *Aguilar* because signing "[cannot] be understood as an opportunity to inject religious content in what [is] supposed to be secular instruction." He is thus able to conclude that *Zobrest* is distinguishable from--and therefore perfectly consistent with--*Ball* and *Aguilar*.

In *Zobrest*, however, we did not expressly or implicitly rely upon the basis JUSTICE SOUTER advances for distinguishing *Ball* and *Aguilar*. If we had thought that signers had no "opportunity to inject religious content" into their translations, we would have had no reason to consult the record for evidence of inaccurate translations. The signer in *Zobrest* had the same opportunity to inculcate religion as do Title I employees, and there is no basis upon which to confine *Zobrest*'s rationale to sign-language interpreters. Thus, *Zobrest* created "fresh law." Our refusal to limit *Zobrest* to its facts does not amount to a "misreading" of precedent.

Second, we have departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid. In *Witters v. Washington Dept. of Servs. for Blind*, we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice. Any money that ultimately went to religious institutions did so "only as a result of the genuinely independent and private choices of" individuals. The same logic applied in *Zobrest*, where we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction, because the

IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a "result of the private decision of individual parents" and "[could] not be attributed to *state* decisionmaking." Because the private school would not have provided an interpreter on its own, we also concluded that the aid in *Zobrest* did not indirectly finance religious education by "relieving the sectarian school of costs [it] otherwise would have borne in educating [its] students."

Zobrest and *Witters* make clear that, under current law, the Shared Time program in *Ball* and New York City's Title I program in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in *Ball* to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures.

As discussed above, *Zobrest* also repudiates *Ball*'s assumption that the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a "symbolic union" between church and state. JUSTICE SOUTER maintains that *Zobrest* is not dispositive on this point because *Aguilar*'s implicit conclusion that New York City's Title I program created a "symbolic union" rested on more than the presence of Title I employees on parochial school grounds. To him, Title I continues to foster a "symbolic union" between the Board and sectarian schools because it mandates "the involvement of public teachers in the instruction provided within sectarian schools," and "fuses public and private faculties." JUSTICE SOUTER does not disavow the notion that Title I services may be provided to sectarian school students in off-campus locations, even though that notion presupposes that the danger of "symbolic union" evaporates once the services are provided off-campus. Taking this view, the only difference between a constitutional program and an unconstitutional one is the location of the classroom, since the degree of cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided. We do not see any perceptible difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked at the school's curbside. To draw this line based on the location of the public employee is neither "sensible" nor "sound," and the Court in *Zobrest* rejected it.

Nor under current law can we conclude that a program placing full-time public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients. That aid is provided to students at whatever school they choose to attend. Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. Moreover, as 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."

JUSTICE SOUTER finds our conclusion that the IDEA and Title I programs are similar

to be "puzzling," and points to three differences he perceives between the programs: (i) Title I services are distributed by LEA's "directly to the religious schools" instead of to individual students pursuant to a formal application process; (ii) Title I services "necessarily relieve a religious school of 'an expense that it otherwise would have assumed'"; and (iii) Title I provides services to more students than did the programs in *Witters* and *Zobrest*. None of these distinctions is meaningful. While it is true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed "directly to the religious schools." In fact, they are not. No Title I funds ever reach the coffers of religious schools, and Title I services may not be provided to religious schools on a school-wide basis. Title I funds are instead distributed to a *public* agency (an LEA) that dispenses services directly to the eligible students within its boundaries, no matter where they choose to attend school. Moreover, we fail to see how providing Title I services directly to eligible students results in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application.

We are also not persuaded that Title I services supplant the remedial instruction and guidance counseling already provided in New York City's sectarian schools. Although JUSTICE SOUTER maintains that the sectarian schools provide such services and that those schools reduce those services once their students begin to receive Title I instruction, his claims rest on speculation and not on any evidence in the record. We are unwilling to speculate. Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school.

What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off-campus. We find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on-campus, but not when offered off-campus. Accordingly, contrary to our conclusion in *Aguilar*, placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.

2

Although we examined in *Witters* and *Zobrest* the criteria by which an aid program identifies its beneficiaries, we did so solely to assess whether any use of that aid to indoctrinate religion could be attributed to the State. A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.

In *Ball* and *Aguilar*, the Court gave this consideration no weight. Before and since those

decisions, we have sustained programs that provided aid to *all* eligible children regardless of where they attended school. Applying this reasoning to New York City's program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school. The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.

3

We turn now to *Aguilar*'s conclusion that New York City's Title I program resulted in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, and as a factor separate and apart from "effect," Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." Similarly, we have assessed a law's "effect" by examining the character of the institutions benefitted, and the nature of the aid that the State provided (*e.g.*, whether it was neutral and nonideological). Thus, it is simplest to recognize why entanglement is significant and treat it--as we did in *Walz*--as an aspect of the inquiry into a statute's effect.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause.

The pre-*Aguilar* Title I program does not result in "excessive" entanglement that advances or inhibits religion. The Court's finding of "excessive" entanglement in *Aguilar* rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the Board and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive" entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off-campus. Further, the assumption underlying the first consideration has been undermined. In *Aguilar*, the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion. Because of this risk *pervasive* monitoring would be required. But after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are

insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here.

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this program also cannot reasonably be viewed as an endorsement of religion. Accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law.

IV

We therefore conclude that our Establishment Clause law has "significantly changed" since we decided *Aguilar*. We are only left to decide whether this change in law entitles petitioners to relief under Rule 60(b)(5). We conclude that it does.

Respondents contend that we should not grant Rule 60(b)(5) relief. They contend that petitioners have used Rule 60(b)(5) in an unprecedented way--not as a means of *recognizing* changes in the law, but as a vehicle for *effecting* them. If we were to sanction this use of Rule 60(b)(5), respondents argue, we would encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions. We think their fears are overstated. Given that Rule 60(b)(5) specifically contemplates the grant of relief in the circumstances presented here, it can hardly be said that we have warped the Rule into a means of "allowing an 'anytime' rehearing."

For these reasons, we reverse the judgment of the Court of Appeals and remand to the District Court with instructions to vacate its September 26, 1985, order.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, and with whom JUSTICE BREYER joins as to Part II, dissenting.

In this novel proceeding, petitioners seek relief from an injunction the District Court entered 12 years ago to implement our decision in *Aguilar v. Felton.* For the reasons given by JUSTICE GINSBURG, the Court's holding that petitioners are entitled to relief under Rule 60(b) is seriously mistaken. The Court's misapplication of the rule is tied to its equally erroneous reading of our more recent Establishment Clause cases, which the Court describes as having rejected the underpinnings of *Aguilar* and portions of *Aguilar*'s companion case, *School Dist. of Grand Rapids v. Ball.* The result is to repudiate the very reasonable line drawn in *Aguilar* and *Ball*, and to authorize direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government.

I

In both *Aguilar* and *Ball*, we held that supplemental instruction by public school teachers on the premises of religious schools during regular school hours violated the Establishment Clause. *Aguilar*, of course, concerned the very school system before us here and the same Title I program at issue now. *Ball* involved a program similar in many respects to Title I called Shared Time.

We held that both schemes ran afoul of the Establishment Clause. The Shared Time program had the impermissible effect of promoting religion in three ways: first, state-paid teachers conducting classes in a sectarian environment might inadvertently (or intentionally) manifest sympathy with the sectarian aims to the point of using public funds for religious educational purposes; second, the government's provision of secular instruction in religious schools produced a symbolic union of church and state that tended to convey a message to students and to the public that the State supported religion; and, finally, the Shared Time program subsidized the religious functions of the religious schools by assuming responsibility for teaching secular subjects the schools would otherwise be required to provide. Our decision in *Aguilar* noted the similarity between the Title I and Shared Time programs, and held that the system New York City had adopted to monitor the religious content of Title I classes held in religious schools would necessarily result in excessive entanglement of church and state, and violate the Establishment Clause for that reason.

As I will indicate as I go along, I believe *Aguilar* was a correct and sensible decision, and my only reservation about its opinion is that the emphasis on the excessive entanglement produced by monitoring religious instructional content obscured those facts that independently called for the application of two central tenets of Establishment Clause jurisprudence. The State is forbidden to subsidize religion directly and is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement.

The flat ban on subsidization antedates the Bill of Rights and has been an unwavering rule in Establishment Clause cases, qualified only by the conclusion two Terms ago that state exactions from college students are not the sort of public revenues subject to the ban. The rule expresses the hard lesson learned over and over again in the American past, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion. "When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being 'tainted ... with corrosive secularism.' The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." The ban against state endorsement of religion addresses the same historical lessons. Governmental approval of religion tends to reinforce the religious message (at least in the short run) and, by the same token, to carry a message of exclusion to those of less favored views. The human tendency is to forget the hard lessons, and to overlook the history of governmental partnership with religion when a cause is worthy. That tendency to forget is the reason for having the Establishment Clause, in the hope of stopping the corrosion before it starts.

These principles were violated by the programs at issue in *Aguilar* and *Ball*, as a

consequence of several significant features common to both Title I, as implemented in New York City before *Aguilar*, and the Grand Rapids Shared Time program: each provided classes on the premises of the religious schools, covering a wide range of subjects including some at the core of primary and secondary education; while their services were termed "supplemental," the programs and their instructors necessarily assumed responsibility for teaching subjects that the religious schools would otherwise have been obligated to provide; the public employees carrying out the programs had broad responsibilities involving the exercise of considerable discretion; while the programs offered aid to nonpublic school students generally (and Title I went to public school students as well), participation by religious school students in each program was extensive; and, finally, aid under Title I and Shared Time flowed directly to the schools in the form of classes and programs, as distinct from indirect aid that reaches schools only as a result of independent private choice.

What, therefore, was significant in *Aguilar* and *Ball* about the placement of state-paid teachers into the physical and social settings of the religious schools was not only the consequent temptation of some of those teachers to reflect the schools' religious missions in the rhetoric of their instruction, with a resulting need for monitoring and the certainty of entanglement. 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.

What was true of the Title I scheme as struck down in *Aguilar* will be just as true when New York reverts to the old practices with the Court's approval after today. There is simply no line that can be drawn between the instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious. 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. If a State may constitutionally enter the schools to teach in the manner in question, it must in constitutional principle be free to assume, or assume payment for, the entire cost of instruction in any ostensibly secular subject in any religious school. This Court explicitly recognized this in *Ball*, that there was no stopping place in principle once the public teacher entered the religious schools to teach their secular subjects.

It may be objected that there is some subsidy in remedial education even when it takes place off the religious premises. In these circumstances, too, what the State does, the religious school need not do; the schools save money and the program makes it easier for them to survive and concentrate their resources on their religious objectives. This argument does nothing to undermine the sense of drawing a line between remedial teaching on and off-premises. The off-premises teaching is arguably less likely to open the door to relieving religious schools of their responsibilities for secular subjects simply because these schools are less likely (and presumably legally unable) to dispense with those subjects from their curriculums or to make patently significant cut-backs in basic teaching within the schools to offset the outside instruction; if the aid is delivered outside of the schools, it is less likely to

supplant some of what would otherwise go on inside them and to subsidize what remains. On top of that, the difference in the degree of reasonably perceptible endorsement is substantial. Sharing the teaching responsibilities within a school having religious objectives is far more likely to telegraph approval of the school's mission than keeping the State's distance would do. This is clear at every level. As the Court observed in *Ball*, "the symbolism of a union between church and state [effected by placing the public school teachers into the religious schools] is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."

In sum, if a line is to be drawn short of barring all state aid to religious schools for teaching standard subjects, the *Aguilar-Ball* line was a sensible one capable of principled adherence. It is no less sound, and no less necessary, today.

II

The Court today ignores this doctrine and claims that recent cases rejected the elemental assumptions underlying *Aguilar* and much of *Ball*. But the Court errs. Its holding that *Aguilar* and the portion of *Ball* addressing the Shared Time program are "no longer good law" rests on mistaken reading.

A

Zobrest v. Catalina Foothills School Dist. held that the Establishment Clause does not prevent a school district from providing a sign-language interpreter to a deaf student enrolled in a sectarian school. The Court today relies solely on *Zobrest* to support its contention that we have "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Zobrest*, however, is no such sanction for overruling *Aguilar* or any portion of *Ball*.

In *Zobrest* the Court did indeed recognize that the Establishment Clause lays down no absolute bar to placing public employees in a sectarian school, but the rejection of such a *per se* rule was hinged expressly on the nature of the employee's job, sign-language interpretation (or signing) and the circumscribed role of the signer. On this point (and without reference to the facts that the benefitted student had received the same aid before enrolling in the religious school and the employee was to be assigned to the student not to the school), the Court explained itself this way: "The task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. ... Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to 'transmit everything that is said in exactly the same way it was intended.'" The signer could thus be seen as more like a hearing aid than a teacher, and the signing could not be understood as an opportunity to inject religious content in what was supposed to be secular instruction. *Zobrest* accordingly holds only that in these limited circumstances where a public employee simply translates for one student the material presented to the class for the benefit of all students, the employee's presence in the sectarian school does not violate the Establishment Clause.

The Court, however, ignores the careful distinction drawn in *Zobrest* and insists that a

full-time public employee such as a Title I teacher is just like the signer, asserting that "there is no reason to presume that, simply because she enters a parochial school classroom, ... [this] teacher will depart from her assigned duties and instructions and embark on religious indoctrination ...." Whatever may be the merits of this position (and I find it short on merit), it does not enjoy the authority of *Zobrest*. The Court may disagree with *Ball*'s assertion that a publicly employed teacher working in a sectarian school is apt to reinforce the pervasive inculcation of religious beliefs, but its disagreement is fresh law.

The Court tries to press *Zobrest* into performing another service beyond its reach. The Court says that *Ball* and *Aguilar* assumed "that the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion," and that *Zobrest* repudiated this assumption. First, *Ball* and *Aguilar* said nothing about the "mere presence" of public employees at religious schools. It was *Ball* that specifically addressed the point and held only that when teachers employed by public schools are placed in religious schools to provide instruction to students during the school day a symbolic union of church and state is created and will reasonably be seen by the students as endorsement; *Aguilar* adopted the same conclusion by reference. *Zobrest* did not, implicitly or otherwise, repudiate the view that the involvement of public teachers in the instruction provided within sectarian schools looks like a partnership or union and implies approval of the sectarian aim. On the subject of symbolic unions and the strength of their implications, the lesson of *Zobrest* is merely that less is less.

B

The Court next claims that *Ball* rested on the assumption that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision-making." After *Ball*, the opinion continues, the Court departed from the rule that "all government aid that directly aids the educational function of religious schools is invalid." But this mischaracterizes *Ball*'s discussion on the point, and misreads *Witters* and *Zobrest* as repudiating the more modest proposition on which *Ball* in fact rested.

Ball did not establish that "any and all" such aid to religious schools necessarily violates the Establishment Clause. It held that the Shared Time program subsidized the religious functions of the parochial schools by taking over a significant portion of their responsibility for teaching secular subjects. The Court noted that it had "never accepted the mere possibility of subsidization ... as sufficient to invalidate an aid program," and instead enquired whether the effect of the proffered aid was "direct and substantial" (and, so, unconstitutional) or merely "indirect and incidental," (and, so, permissible) emphasizing that the question "is one of degree." *Witters* and *Zobrest* did nothing to repudiate the principle, emphasizing rather the limited nature of the aid at issue in each case as well as the fact that religious institutions did not receive it directly from the State. In *Witters*, the Court noted that the State would issue the disputed vocational aid directly to one student who would then transmit it to the school of his choice, and that there was no evidence that "any significant portion of the aid expended under the program as a whole will end up flowing to religious education." *Zobrest* also presented an instance of a single beneficiary, and emphasized that the student determined where the aid would be used, that the aid was limited, and that the religious school was "not relieved of an

expense that it otherwise would have assumed."

It is accordingly puzzling to find the Court insisting that the aid scheme administered under Title I and considered in *Aguilar* was comparable to the programs in *Witters* and *Zobrest*. Instead of aiding isolated individuals within a school system, New York City's Title I program before *Aguilar* served about 22,000 private school students, all but 52 of whom attended religious schools.[2] Instead of serving individual blind or deaf students, Title I as administered in New York City before *Aguilar* (and as now to be revived) funded instruction in core subjects (remedial reading, reading skills, remedial mathematics, English as a second language) and provided guidance services. Instead of providing a service the school would not otherwise furnish, the Title I services necessarily relieved a religious school of "an expense that it otherwise would have assumed," and freed its funds for other, and sectarian uses.

Finally, instead of aid that comes to the religious school indirectly in the sense that its distribution results from private decisionmaking, a public educational agency distributes Title I aid in the form of programs and services directly to the religious schools. In *Zobrest* and *Witters*, it was fair to say that individual students were themselves applicants for individual benefits on a scale that could not amount to a systemic supplement. But under Title I, a local educational agency may receive federal funding by proposing programs approved to serve individual students who meet the criteria of need, which it then uses to provide such programs at the religious schools; students eligible for such programs may not apply directly for Title I funds. The aid, accordingly, is not even formally aid to the individual students (and even formally individual aid must be seen as aid to a school system when so many individuals receive it that it becomes a significant feature of the system).

In sum, nothing since *Ball* and *Aguilar* and before this case has eroded the distinction between "direct and substantial" and "indirect and incidental." That principled line is being breached only here and now.

C

The Court notes that aid programs providing benefits solely to religious groups may be constitutionally suspect, while aid allocated under neutral, secular criteria is less likely to have the effect of advancing religion. The opinion then says that *Ball* and *Aguilar* "gave this consideration no weight," and accordingly conflict with a number of decisions. But what exactly the Court thinks *Ball* and *Aguilar* inadequately considered is not clear, given that evenhandedness is a necessary but not a sufficient condition for an aid program to satisfy constitutional scrutiny. Title I services are available to all eligible children regardless whether they go to religious or public schools, but that fact does not define the reach of the Establishment Clause. If a scheme of government aid results in support for religion in some

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[2] The Court's refusal to recognize the extent of student participation as relevant to the constitutionality of an aid program, ignores the contrary conclusion in *Witters v. Washington Dept. of Servs. for Blind*, on this very point. See *id., at 488* (noting, among relevant factors, that "no evidence had been presented indicating that any other person had ever sought to finance religious education or activity pursuant to the State's program").

substantial degree, or in endorsement of its value, the formal neutrality of the scheme does not render the Establishment Clause helpless or the holdings in *Aguilar* and *Ball* inapposite.

III

Finally, there is the issue of precedent. *Stare decisis* is no barrier in the Court's eyes because it reads *Aguilar* and *Ball* for exaggerated propositions that *Witters* and *Zobrest* are supposed to have limited to the point of abandoned doctrine. The Court's dispensation from *stare decisis* is, accordingly, no more convincing than its reading of those cases. Since *Aguilar* came down, no case has held that there need be no concern about a risk that publicly paid school teachers may further religious doctrine; no case has repudiated the distinction between direct and substantial aid and aid that is indirect and incidental; no case has held that fusing public and private faculties in one religious school does not create an impermissible union or carry an impermissible endorsement; and no case has held that direct subsidization of religious education is constitutional or that the assumption of a portion of a religious school's teaching responsibility is not direct subsidization.

In the short run there is much that is genuinely unfortunate about the administration of the scheme under *Aguilar*'s rule. But constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

The Court today finds a way to rehear a legal question decided in respondents' favor in this very case some 12 years ago. Subsequent decisions, the majority says, have undermined *Aguilar* and justify our immediate reconsideration. This Court's Rules do not countenance the rehearing here granted. A proper application of those rules and the Federal Rules of Civil Procedure would lead us to defer reconsideration of *Aguilar* until we are presented with the issue in another case.

Lacking any rule or practice allowing us to reconsider the *Aguilar* judgment directly, the majority accepts as a substitute a rule governing relief from judgments or orders of the federal trial courts. The service to which Rule 60(b) has been impressed is unprecedented, and neither the Court nor those urging reconsideration of *Aguilar* contend otherwise.

Appellate courts review denials of Rule 60(b) motions for abuse of discretion. Thus, under settled practice, the sole question legitimately presented on appeal of the District Court's decision denying petitioners' Rule 60(b)(5) motion to modify the *Aguilar* injunction would be: Did the District Court abuse its discretion when it concluded that neither the facts nor the law had so changed as to warrant alteration of the injunction?

The majority recognizes that *Aguilar* had not been overruled, but remained the governing Establishment Clause law, until this very day. Because *Aguilar* had not been overruled, the law the District Court was bound to respect had not changed. The District Court therefore did not abuse its discretion in denying petitioners' Rule 60(b) motion.

The Court says that the District Court was right to "entertain" the Rule 60(b) motion and also right to reject it, leaving to this Court the option of overruling our previously binding decision. The Court thus acknowledges that Rule 60(b)(5) had no office to perform in the District Court. All the lower courts could do was pass the case up to us. The Court thus bends Rule 60(b) to a purpose--allowing an "anytime" rehearing in this case--unrelated to the governance of district court proceedings to which the rule is directed.

In an effort to make today's use of Rule 60(b) appear palatable, the Court describes its decision not as a determination of whether *Aguilar should be* overruled, but as an exploration whether *Aguilar already has been* "so undermined that it is no longer good law." But nothing can disguise the reality that, until today, *Aguilar* had not been overruled. Good or bad, it was in fact the law. Unlike the majority, I find just cause to await the arrival of another case in which our review appropriately may be sought, before deciding whether *Aguilar* should remain the law of the land.

MITCHELL v. HELMS

530 U.S. 793 (2000)

JUSTICE THOMAS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join.

As part of a longstanding school aid program known as Chapter 2, the Federal Government distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools, with the enrollment of each participating school determining the amount of aid that it receives. The question is whether Chapter 2, as applied in Jefferson Parish, Louisiana, is a law respecting an establishment of religion, because many of the private schools receiving Chapter 2 aid are religiously affiliated. We hold that Chapter 2 is not such a law.

I

A

Chapter 2 of the Education Consolidation and Improvement Act of 1981 has its origins in the Elementary and Secondary Education Act of 1965 and is a close cousin of the provision of the ESEA that we considered in *Agostini* v. *Felton,* 521 U.S. 203 (1997). Like the provision in *Agostini*, Chapter 2 channels federal funds to local educational agencies (LEA's), which are usually public school districts, via state educational agencies (SEA's), to implement programs to assist children in elementary and secondary schools. Among other things, Chapter 2 provides aid "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials."

LEA's and SEA's must offer assistance to both public and private schools (although any private school must be nonprofit). Participating private schools receive Chapter 2 aid based on the number of children enrolled and allocations of Chapter 2 funds for those schools must

generally be "equal (consistent with the number of children to be served) to expenditures for programs . . . for children enrolled in the public schools of the [LEA]. LEA's must in all cases "assure equitable participation" of the children of private schools "in the benefits" of Chapter 2. Further, Chapter 2 funds may only "supplement and, to the extent practical, increase the level of funds that would . . . be made available from non-Federal sources." LEA's and SEA's may not operate their programs "so as to supplant funds from non-Federal sources."

Several restrictions apply to aid to private schools. Most significantly, the "services, materials, and equipment" provided to private schools must be "secular, neutral, and nonideological." In addition, private schools may not acquire control of Chapter 2 funds or title to Chapter 2 materials, equipment, or property. A private school receives materials and equipment by submitting an application detailing which items the school seeks and how it will use them; the LEA, if it approves the application, purchases those items from the school's allocation of funds, and then lends them to that school.

In Jefferson Parish, private schools have primarily used their allocations for nonrecurring expenses, usually materials and equipment. In the 1986-1987 fiscal year, 44% of the money budgeted for private schools in Jefferson Parish was spent by LEA's for acquiring library and media materials, and 48% for instructional equipment. Among the materials and equipment provided have been library books, computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings.

In an average year, about 30% of Chapter 2 funds spent in Jefferson Parish are allocated for private schools. For the 1985-1986 fiscal year, 41 private schools participated in Chapter 2. For the following year, 46 participated, and the participation level has remained relatively constant since then. Of these 46, 34 were Roman Catholic; 7 were otherwise religiously affiliated; and 5 were not religiously affiliated.

II

The Establishment Clause of the First Amendment dictates that "Congress shall make no law respecting an establishment of religion." In the over 50 years since *Everson*, we have consistently struggled to apply these simple words in the context of governmental aid to religious schools. As we admitted in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area."

In *Agostini*, however, we brought some clarity to our case law, by overruling two anomalous precedents (one in whole, the other in part) and by consolidating some of our previously disparate considerations under a revised test. Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect. We also acknowledged that our cases

had pared somewhat the factors that could justify a finding of excessive entanglement. We then set out revised criteria for determining the effect of a statute:

"To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."

In this case, our inquiry under *Agostini*'s purpose and effect test is a narrow one. Because respondents do not challenge the District Court's holding that Chapter 2 has a secular purpose, and because the Fifth Circuit did not question that holding, we will consider only Chapter 2's effect. Further, in determining that effect, we will consider only the first two *Agostini* criteria, since neither respondents nor the Fifth Circuit has questioned the District Court's holding that Chapter 2 does not create an excessive entanglement. Considering Chapter 2 in light of our more recent case law, we conclude that it neither results in religious indoctrination by the government nor defines its recipients by reference to religion. We therefore hold that Chapter 2 is not a "law respecting an establishment of religion." In so holding, we acknowledge [that] *Meek* and *Wolman* are anomalies in our case law. We therefore conclude that they are no longer good law.

A

As we indicated in *Agostini*, the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action. We have also indicated that the answer to the question of indoctrination will resolve the question whether a program of educational aid "subsidizes" religion.

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all eligible for governmental aid, no one would conclude that any indoctrination that any recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.

As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so "only as a result of the genuinely independent and private choices of individuals." *Agostini*, *supra*, at 226. We have viewed as significant whether the "private choices of individual parents," as opposed to the "unmediated" will of government determine what schools ultimately benefit from the governmental aid, and how much. For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot easily grant special favors that might lead to a religious establishment. Private choice

also helps guarantee neutrality by mitigating the preference for pre-existing recipients arguably inherent in any governmental aid program, and that could lead to inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones.

The principles of neutrality and private choice, and their relationship to each other, were prominent not only in *Agostini*, but also in *Zobrest*, *Witters*, and *Mueller*. In *Zobrest*, the private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government even when the interpreter translated classes on Catholic doctrine. *Witters*[1] and *Mueller* employed similar reasoning.

Agostini's second primary criterion for determining the effect of governmental aid is closely related to the first. The second criterion requires a court to consider whether an aid program "defines its recipients by reference to religion." This second criterion looks to the same set of facts as does our focus, under the first criterion, on neutrality, but uses those facts to answer a somewhat different question -- whether the criteria for allocating the aid "create a financial incentive to undertake religious indoctrination." In *Agostini* we set out the following rule for answering this question:

"This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion."

The cases on which *Agostini* relied for this rule, and *Agostini* itself, make clear the close relationship between this rule, incentives, and private choice. For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly "independent." When such an incentive does exist, there is a greater risk that one could attribute to the government any indoctrination by the religious schools.

We hasten to add, 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, by reducing the cost of securing a religious education, creates, under *Agostini*'s second criterion, an "incentive" for parents to choose such an education for their children. For *any* aid will have some such effect.

B

Respondents make no effort to address Chapter 2 under the *Agostini* test. Instead, dismissing *Agostini* as factually distinguishable, they offer two rules that they contend should govern our determination of whether Chapter 2 has the effect of advancing religion. They argue first that "direct, nonincidental" aid to the primary educational mission of religious schools is always impermissible. Second, they argue that provision to religious schools of aid that is divertible to religious use is impermissible. Respondents' arguments are inconsistent with our recent case law, in particular *Agostini* and *Zobrest*, and we therefore reject them.

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[1] The majority opinion also noted that only a small portion of the overall aid under the State's program would go to religious education, see *Witters*, 474 U.S. at 488, but it appears that five Members of the Court thought this point irrelevant.

1

Although some of our earlier cases, particularly *Ball*, did emphasize the distinction between direct and indirect aid, the purpose of this distinction was merely to prevent "subsidization" of religion. As even the dissent all but admits, our more recent cases address this purpose not through the direct/indirect distinction but rather through the principle of private choice, as incorporated in the first *Agostini* criterion (*i.e.*, whether any indoctrination could be attributed to the government). If aid to schools, even "direct aid," is neutrally available and, before reaching or benefitting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any "support of religion." Although the presence of private choice is easier to see when aid literally passes through the hands of individuals -- which is why we have mentioned directness in the same breath with private choice, there is no reason why the Establishment Clause requires such a form.

Indeed, *Agostini* expressly rejected the absolute line that respondents would have us draw. We there explained that "we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid." *Agostini* relied on *Witters* for this conclusion and made clear that private choice and neutrality would resolve the concerns formerly addressed by the rule in *Ball*. It was undeniable in *Witters* that the aid (tuition) would ultimately support religious education. We viewed this arrangement, however, as no different from a government issuing a paycheck to one of its employees knowing that the employee would direct the funds to a religious institution. Both arrangements would be valid, for the same reason: "Any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of' individuals."

As *Agostini* explained, the same reasoning was at work in *Zobrest*, where we allowed the government-funded interpreter to provide assistance at a Catholic school, "even though she would be a mouthpiece for religious instruction," because the interpreter was provided according to neutral eligibility criteria and private choice. Therefore, the religious messages interpreted by the interpreter could not be attributed to the government (We saw no difference in *Zobrest* between the government hiring the interpreter directly and the government providing funds to the parents who then would hire the interpreter.) We rejected the dissent's objection that we had never before allowed "a public employee to participate directly in religious indoctrination." Finally, in *Agostini* itself, we used the reasoning of *Witters* and *Zobrest* to conclude that remedial classes provided under Title I of the ESEA by public employees did not impermissibly finance religious indoctrination. We found it insignificant that students did not have to directly apply for Title I services, that Title I instruction was provided to students in groups rather than individually, and that instruction was provided in the facilities of the private schools.

To the extent that respondents intend their direct/indirect distinction to require that any aid be literally placed in the hands of schoolchildren, the very cases on which respondents most rely, *Meek* and *Wolman*, demonstrate the irrelevance of such formalism. Further, respondents' formalistic line breaks down in the application to real-world programs. In *Allen*,

for example, although we did recognize that students themselves received and owned the textbooks, we also noted that the books provided were those that the private schools required for courses, that the schools could collect students' requests for books and submit them to the board of education, that the schools could store the textbooks, and that the textbooks were essential to the schools' teaching of secular subjects. Whether one chooses to label this program "direct" or "indirect" is a rather arbitrary choice, one that does not further the constitutional analysis.

Of course, we have seen "special Establishment Clause dangers" when *money* is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly.[2] But direct payments of money are not at issue in this case, and we refuse to allow a "special" case to create a rule for all cases.

2

Respondents also contend that the Establishment Clause requires that aid to religious schools not be impermissibly religious in nature or be divertible to religious use. We agree with the first part of this argument but not the second. Respondents' "no divertibility" rule is inconsistent with our more recent case law and is unworkable. So long as the governmental aid is not itself "unsuitable for use in the public schools because of religious content" and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern. And, of course, the use to which the aid is put does not affect the criteria governing the aid's allocation and thus does not create any impermissible incentive under *Agostini*'s second criterion.

Our recent precedents, particularly *Zobrest*, require us to reject respondents' argument. For *Zobrest* gave no consideration to divertibility or even to actual diversion. Had such things mattered to the Court in *Zobrest*, we would have found the case to be quite easy -- for *striking down* rather than, as we did, upholding the program -- which is just how the dissent saw the case. See, *e.g.*, 509 U.S. at 18 (Blackmun, J., dissenting) ("Until now, the Court never has authorized a public employee to participate directly in religious indoctrination"). Quite clearly, then, we did not think that the *use* of governmental aid to further religious indoctrination was synonymous with religious indoctrination *by* the government.

Similarly, had we, in *Witters*, been concerned with divertibility or diversion, we would have unhesitatingly struck down the program, because it was certain that Witters sought to participate in it to acquire an education in a religious career from a sectarian institution. Diversion was guaranteed.

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[2] The reason for such concern is not that the form *per se* is bad, but that such a form creates special risks that governmental aid will have the effect of advancing religion (or, even more, a purpose of doing so). An indirect form of payment reduces these risks. It is arguable, however, at least after *Witters*, that the principles of neutrality and private choice would be adequate to address those special risks, for it is hard to see the basis for deciding *Witters* differently simply if the State had sent the tuition check directly to whichever school Witters chose to attend.

The issue is not divertibility of aid but rather whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school. Similarly, the prohibition against the government providing impermissible content resolves the Establishment Clause concerns that exist if aid is actually diverted to religious uses. In *Agostini*, we explained *Zobrest* by making just this distinction between the content of aid and the use of that aid: "Because the only *government* aid in *Zobrest* was the interpreter, who was *herself not inculcating* any religious messages, no *government* indoctrination took place." *Agostini* also acknowledged that what the dissenters in *Zobrest* had charged was essentially true: *Zobrest* did effect a "shift . . . in our Establishment Clause law." The interpreter herself had "no inherent religious significance," and so it did not matter (given the neutrality and private choice involved in the program) that she "would be a mouthpiece for religious instruction," *Agostini*, *supra*, at 226 (discussing *Zobrest*). And just as a government interpreter does not herself inculcate a religious message -- even when she is conveying one -- so also a government computer or overhead projector does not itself inculcate a religious message, even when it is conveying one.

A concern for divertibility, as opposed to improper content, 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." Presumably, government-provided lecterns, chalk, crayons, pens, paper, and paintbrushes would have to be excluded from religious schools under respondents' proposed rule. But we fail to see how indoctrination by means of (*i.e.*, diversion of) such aid could be attributed to the government. In fact, the risk of improper attribution is *less* when the aid *lacks* content, for there is no risk (as there is with books), of the government inadvertently providing improper content. Finally, *any* aid, with or without content, is "divertible" in the sense that it allows schools to "divert" resources. Yet we have "'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.'"

C

The dissent serves up a smorgasbord of 11 factors that, depending on the facts of each case "in all its particularity," could be relevant to the constitutionality of a school-aid program. One of the dissent's factors deserves mention: whether a school that receives aid (or whose students receive aid) is pervasively sectarian. The dissent is correct that there was a period when this factor mattered, particularly if the school was a primary or secondary school. But that period is one that the Court should regret, and it is thankfully long past.

There are numerous reasons to formally dispense with this factor. First, its relevance in our precedents is in sharp decline. Second, the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. Third, the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. Finally, hostility to aid to

pervasively sectarian schools has a shameful pedigree. Of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt* v. *McNair*, 413 U.S. at 743, it coined the term "pervasively sectarian" -- a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools. In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

III

Applying the two relevant *Agostini* criteria, we see no basis for concluding that Jefferson Parish's Chapter 2 program "has the effect of advancing religion." Chapter 2 does not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content. Nor does Chapter 2 define its recipients by reference to religion.

Taking the second criterion first, it is clear that Chapter 2 aid "is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini, supra,* at 231. Aid is allocated based on enrollment and allocations to private schools must "be equal (consistent with the number of children to be served) to expenditures for programs under this subchapter for children enrolled in the public schools of the [LEA]." LEA's must provide Chapter 2 materials and equipment for the benefit of children in private schools "to the extent consistent with the number of children in the school district of [an LEA] . . . who are enrolled in private nonprofit elementary and secondary schools." See App. to Pet. for Cert. 87a (LEA's are told that "'for every dollar you spend for the public school student, you spend the same dollar for the non-public school student.'") The allocation criteria therefore create no improper incentive.

Chapter 2 also satisfies the first *Agostini* criterion. The program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof. We therefore have no difficulty concluding that Chapter 2 is neutral with regard to religion. Chapter 2 aid also, like the aid in *Agostini*, *Zobrest*, and *Witters*, reaches participating schools only "as a consequence of private decisionmaking." Private decisionmaking controls because of the per capita allocation scheme, and those decisions are independent because of the program's neutrality. It is the students and their parents -- not the government -- who, through their choice of school, determine who receives Chapter 2 funds. The aid follows the child.

Because Chapter 2 aid is provided pursuant to private choices, it is not problematic that one could fairly describe Chapter 2 as providing "direct" aid. The materials and equipment provided under Chapter 2 are presumably used from time to time by entire classes rather than by individual students and students themselves do not need to apply for Chapter 2 aid in order for their schools to receive it, but, as we explained in *Agostini*, these traits are not constitutionally significant or meaningful. Nor is it of constitutional significance that the schools themselves are the bailees of the aid. The ultimate beneficiaries of Chapter 2 aid are

the students who attend the schools that receive that aid, and this is so regardless of whether individual students lug computers to school each day or the schools receive the computers.

Finally, Chapter 2 satisfies the first *Agostini* criterion because it does not provide to religious schools aid that has an impermissible content. The statute explicitly bars anything of the sort, providing that all Chapter 2 aid for the benefit of children in private schools shall be "secular, neutral, and nonideological," and the record indicates that the Louisiana SEA and the Jefferson Parish LEA have faithfully enforced this requirement insofar as relevant to this case. The chief aid at issue is computers, computer software, and library books. The computers presumably have no pre-existing content, or at least none that would be impermissible for use in public schools. Respondents also offer no evidence that religious schools have received software from the government that has an impermissible content.

There is evidence that equipment has been, or at least easily could be, diverted for use in religious classes. JUSTICE O'CONNOR, however, finds the safeguards against diversion adequate to prevent and detect actual diversion. The safeguards on which she relies reduce to three: (1) signed assurances, (2) monitoring visits, and (3) the requirement that equipment be labeled as belonging to Chapter 2. As to the first, JUSTICE O'CONNOR rightly places little reliance on it. As to the second, monitoring by SEA and LEA officials is highly unlikely to prevent or catch diversion. As to the third, we fail to see how a label prevents diversion. In addition, we agree with the dissent that there is evidence of actual diversion and that, were the safeguards anything other than anemic, there would almost certainly be more such evidence. In any event, the evidence of actual diversion and the weakness of the safeguards against actual diversion are not relevant to the constitutional inquiry.

Respondents do, however, point to some religious books that the LEA improperly allowed to be loaned to several religious schools, and they contend that the monitoring programs are insufficient to prevent such errors. The evidence, however, establishes just the opposite, for the improper lending of library books occurred -- and was discovered and remedied -- before this litigation began almost 15 years ago. In other words, the monitoring system worked. Further, the violation by the LEA and the private schools was minor and inadvertent. There were approximately 191 improper book requests over three years (the 1982-1983 through 1984-1985 school years); these requests came from fewer than half of the 40 private schools then participating; and the cost of the 191 books amounted to "less than one percent of the total allocation over all those years." We are unwilling to elevate scattered *de minimis* statutory violations, discovered and remedied by the relevant authorities themselves prior to any litigation, to such a level as to convert an otherwise unobjectionable parishwide program into a law that has the effect of advancing religion.

IV

In short, Chapter 2 satisfies both the first and second primary criteria of *Agostini*. It therefore does not have the effect of advancing religion. For the same reason, Chapter 2 also "cannot reasonably be viewed as an endorsement of religion," *Agostini*, *supra*, at 235. Accordingly, we hold that Chapter 2 is not a law respecting an establishment of religion. To the extent that *Meek* and *Wolman* conflict with this holding, we overrule them.

Our conclusion regarding *Meek* and *Wolman* should come as no surprise. The Court as early as *Wolman* itself left no doubt that *Meek* and *Allen* were irreconcilable and we have repeatedly reaffirmed *Allen* since then. In *Mueller*, we conceded that the aid at issue in *Meek* and *Wolman* did "resemble, in many respects," the aid that we had upheld in *Everson* and *Allen*. Most recently, *Agostini*, in rejecting *Ball*'s assumption that "all government aid that directly assists the educational function of religious schools is invalid," necessarily rejected a large portion (perhaps all) of the reasoning of *Meek* and *Wolman* in invalidating the lending of materials and equipment, for *Ball* borrowed that assumption from those cases. See 521 U.S. at 220-221 (Shared Time program at issue in *Ball* was "surely invalid . . . given the holdings in *Meek* and *Wolman*" regarding instructional materials and equipment). Today we simply acknowledge what has long been evident.

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, concurring in the judgment.

I believe that *Agostini* controls the constitutional inquiry presented here, and requires the reversal of the Court of Appeals' judgment that the program is unconstitutional as applied in Jefferson Parish. To the extent our decisions in *Meek* v. *Pittenger* and *Wolman* v. *Walter* are inconsistent with the Court's judgment today, I agree that those decisions should be overruled.

I

I write separately because, in my view, the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs. Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible. Although the expansive scope of the plurality's rule is troubling, two specific aspects of the opinion compel me to write separately. First, the plurality's treatment of neutrality comes close to assigning that factor singular importance in the adjudication of Establishment Clause challenges to government school-aid programs. Second, the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and unnecessary to decide the instant case.

The clearest example of the plurality's near-absolute position with respect to neutrality is found in its following statement:

"If the religious, irreligious, and a religious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who

adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose."

I agree with JUSTICE SOUTER that the plurality, by taking such a stance, "appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test for the constitutionality of school aid."

I do not quarrel with the plurality's recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. We have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid. Nevertheless, we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs for distributing aid..

JUSTICE SOUTER provides a comprehensive review of our Establishment Clause cases on government aid to religious institutions that is useful for its explanation of the various ways in which we have used the term "neutrality" in our decisions. Even if we at one time used the term "neutrality" in a descriptive sense to refer to those aid programs characterized by the requisite equipoise between support of religion and antagonism to religion, JUSTICE SOUTER's discussion convincingly demonstrates that the evolution in the meaning of the term in our jurisprudence is cause to hesitate before equating the neutrality of recent decisions with the neutrality of old. As I have previously explained, neutrality is important, but it is by no means the only "axiom in the history and precedent of the Establishment Clause." Thus, I agree with JUSTICE SOUTER's conclusion that our "most recent use of 'neutrality' to refer to generality or evenhandedness of distribution . . . is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious mission, but this neutrality is not alone sufficient to qualify the aid as constitutional."

I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause. Although "our cases have permitted some government funding of secular functions performed by sectarian organizations," our decisions "provide no precedent for the use of public funds to finance religious activities." At least two of the decisions at the heart of today's case demonstrate that we have long been concerned that secular government aid not be diverted to the advancement of religion. In both *Agostini* and *Allen*, we rested our approval of the relevant programs in part on the fact that the aid had not been used to advance the religious missions of the recipient schools. Of course, our focus on the lack of such evidence would have been entirely unnecessary if we had believed that the Establishment Clause permits the actual diversion of secular government aid to religious indoctrination.

The plurality bases its holding that actual diversion is permissible on *Witters* and *Zobrest*. Those decisions, however, rested on a significant factual premise missing from this case. Specifically, we decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use. This characteristic of both programs made them less like a direct subsidy, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution.

Recognizing this distinction, the plurality nevertheless finds *Witters* and *Zobrest* relevant in any case involving a neutral, per-capita-aid program. Like JUSTICE SOUTER, I do not believe that we should treat a per-capita-aid program the same as the true private-choice programs considered in *Witters* and *Zobrest*. First, when the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision. It is for this reason that in *Agostini* we relied on *Witters* and *Zobrest* to reject the rule "that all government aid that directly assists the educational function of religious schools is invalid," yet also rested our approval of New York City's Title I program in part on the lack of evidence of actual diversion.

Second, I believe the distinction between a per-capita school-aid program and a true private-choice program is significant for purposes of endorsement. In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion. That the amount of aid received by the school is based on the school's enrollment does not separate the government from the endorsement of the religious message. The aid formula does not -- and could not -- indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school, who each affirmatively choose to direct the secular government aid to the school. No such choices have been made. In contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Witters*, *supra*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment). Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

Finally, the distinction between a per-capita-aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies. This Court has "recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." If, as the plurality contends, a per-capita-aid program is identical in relevant constitutional respects to a true private-choice program, then there is no reason that, under the plurality's reasoning, the government should be precluded from providing direct money payments to religious organizations (including churches) based on the number of persons belonging to each organization. And, because actual diversion is permissible under the plurality's holding, the participating religious organizations could use that aid to support religious indoctrination. To be sure, the plurality does not actually hold that its theory extends to direct money payments. That omission, however, is of little comfort.

In its logic, the plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives.

Our school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule. *Agostini* represents our most recent attempt to devise a general framework for approaching questions concerning neutral school-aid programs. *Agostini* also concerned a school-aid program closely related to the one at issue here. For these reasons, as well as my disagreement with the plurality's approach, I would decide today's case by applying the criteria set forth in *Agostini*.

II

In *Agostini*, we articulated three primary criteria to guide the determination whether a government-aid program impermissibly advances religion: (1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion. Finally, we noted that the same criteria could be reviewed to determine whether a government-aid program constitutes an endorsement of religion..

Respondents neither question the secular purpose of the Chapter 2 program nor contend that it creates an excessive entanglement. Accordingly, we need ask only whether the program results in governmental indoctrination or defines its recipients by reference to religion.

Taking the second inquiry first, it is clear that Chapter 2 does not define aid recipients by reference to religion. In *Agostini*, we explained that scrutiny of the manner in which a government-aid program identifies its recipients is important because "the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." We then clarified that this financial incentive is not present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion." Under Chapter 2, the Secretary of Education allocates funds to the States based on each State's share of the Nation's school-age population. The state educational agency (SEA), in turn, must distribute the State's Chapter 2 funds to local educational agencies (LEA's) "according to the relative enrollments in public and private, nonprofit schools within the school districts of such agencies," adjusted to take into account those LEA's "which have the greatest numbers or percentages of children whose education imposes a higher than average cost per child." The LEA must then expend those funds on "innovative assistance programs" designed to improve student achievement. The statute generally requires that an LEA ensure the "equitable participation" of children enrolled in private nonprofit elementary and secondary schools and specifically mandates that all LEA expenditures on behalf of children enrolled in private schools "be equal (consistent with the number of children to be served) to expenditures for programs . . . for children enrolled in the public schools of the [LEA]." As these statutory provisions make clear, Chapter 2 uses wholly neutral and secular criteria to allocate aid to students enrolled in religious and secular schools alike. As a result, it creates no financial incentive to undertake religious indoctrination.

Agostini next requires us to ask whether Chapter 2 "results in governmental indoctrination." The Chapter 2 program at issue here bears the same hallmarks of the Title I

program that we found important in *Agostini*. First, aid is distributed on the basis of neutral, secular criteria. The aid is available to assist students regardless of whether they attend public or private nonprofit religious schools. Second, the statute requires SEA's and LEA's to use and allocate Chapter 2 funds only to supplement the funds otherwise available to a religious school. Chapter 2 funds must in no case be used to supplant funds from non-Federal sources. Third, no Chapter 2 funds ever reach the coffers of a religious school. The LEA's purchase instructional and educational materials and then lend those materials to public and private schools. The statute specifically provides that the relevant public agency must retain title to the materials and equipment. Together with the supplantation restriction, this provision ensures that religious schools reap no financial benefit by virtue of receiving loans of materials and equipment. Finally, the statute provides that all Chapter 2 materials and equipment must be "secular, neutral, and nonideological."

III

Respondents contend that *Agostini* is distinguishable. In *Agostini*, federal funds paid for public-school teachers to provide secular instruction to eligible children on the premises of their religious schools. Here, in contrast, federal funds pay for instructional materials and equipment that LEA's lend to religious schools for use by those schools' own teachers in their classes. Because we held similar programs unconstitutional in *Meek* and *Wolman*, respondents contend that those decisions, and not *Agostini*, are controlling. Like respondents, JUSTICE SOUTER also relies on *Meek* and *Wolman*.

At the time they were decided, *Meek* and *Wolman* created an inexplicable rift within our Establishment Clause jurisprudence. Seven years before *Meek*, we held in *Allen* that a New York statute that authorized the lending of textbooks to students attending religious schools did not violate the Establishment Clause. In *Meek* and *Wolman*, we adhered to *Allen*, holding that the textbook lending programs did not violate the Establishment Clause. At the same time, however, we held in both cases that the lending of instructional materials and equipment to religious schools was unconstitutional. We reasoned that, because the religious schools were pervasively sectarian, any assistance in support of the schools' educational missions would inevitably have the impermissible effect of advancing religion.

For whatever reason, the Court was not willing to extend this presumption of inevitable religious indoctrination to school aid when it instead consisted of textbooks lent free of charge. Accordingly, while the Court was willing to apply an irrebuttable presumption that secular instructional materials and equipment would be diverted to use for religious indoctrination, it required evidence that religious schools were diverting secular textbooks to religious instruction. The inconsistency between the two strands of the Court's jurisprudence did not go unnoticed, as Justices on both sides of the *Meek* and *Wolman* decisions relied on the contradiction to support their arguments.

Technology's advance since the *Allen*, *Meek*, and *Wolman* decisions has only made the distinction between textbooks and instructional materials and equipment more suspect. In this case, for example, we are asked to draw a constitutional line between lending textbooks and lending computers. Because computers constitute instructional equipment, adherence to *Meek* and *Wolman* would require the exclusion of computers from any government school aid

program that includes religious schools. Yet, computers are now as necessary as were schoolbooks 30 years ago, and they play a somewhat similar role in the educational process. That *Allen*, *Meek*, and *Wolman* would permit the constitutionality of a school-aid program to turn on whether the aid took the form of a computer rather than a book further reveals the inconsistency inherent in their logic..

Respondents insist that there is a reasoned basis for the distinction between textbooks and instructional materials and equipment. They claim that the presumption that religious schools will use instructional materials and equipment to inculcate religion is sound because such materials and equipment, unlike textbooks, are reasonably divertible to religious uses. For example, no matter what secular criteria the government employs in selecting a film projector to lend to a religious school, school officials can always divert that projector to religious instruction. Respondents therefore claim that the Establishment Clause prohibits the government from giving or lending aid to religious schools when that aid is reasonably divertible to religious uses. JUSTICE SOUTER also states that the divertibility of secular government aid is an important consideration under the Establishment Clause.

I would reject respondents' proposed divertibility rule. Stated simply, the theory does not provide a logical distinction between the lending of textbooks and the lending of instructional materials and equipment. An educator can use virtually any instructional tool, whether it has ascertainable content or not, to teach a religious message. In this respect, I agree with the plurality that "it is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message." If the mere ability of a teacher to devise a religious lesson involving the secular aid in question suffices to hold the provision of that aid unconstitutional, it is difficult to discern any limiting principle to the divertibility rule.

JUSTICE SOUTER is correct to note our continued recognition of the special dangers associated with direct money grants to religious institutions. It does not follow, however, that we should treat as suspect any form of secular aid that might conceivably be diverted to a religious use. Our concern with direct monetary aid is based on more than diversion. The most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition..

IV

Because divertibility fails to explain the distinction our cases have drawn between textbooks and instructional materials and equipment, there remains the question of which of the two irreconcilable strands of our Establishment Clause jurisprudence we should now follow. Between the two, I would adhere to the rule that we have applied in the context of textbook lending programs: To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes. I would now hold that *Agostini* and the cases on which it relied have undermined the assumptions underlying *Meek* and *Wolman*. Presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause. In *Agostini*, we repeatedly emphasized that it would be inappropriate to presume inculcation of religion; rather, plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination.

Respondents note that in *Agostini* we did not overrule that portion of *Ball* holding the Community Education program unconstitutional. Under that program, the government paid religious-school teachers to operate as part-time public teachers at their religious schools by teaching secular classes at the conclusion of the regular school day. Respondents therefore contend that we must presume that religious-school teachers will inculcate religion in their students. If that is so, they argue, we must also presume that religious-school teachers will be unable to follow secular restrictions on the use of instructional materials and equipment lent to their schools by the government.

I disagree, however, that the latter proposition follows from the former. First, as our holding in *Allen* and its reaffirmance in *Meek* and *Wolman* demonstrate, the Court's willingness to assume that religious-school instructors will inculcate religion has not caused us to presume also that such instructors will be unable to follow secular restrictions on the use of textbooks. I would similarly reject any such presumption regarding the use of instructional materials and equipment. When a religious school receives textbooks or instructional materials and equipment lent with secular restrictions, the school's teachers need not refrain from teaching religion altogether. Rather, the instructors need only ensure that any such religious teaching is done without the instructional aids provided by the government. We have always been willing to assume that religious-school instructors can abide by such restrictions when the aid consists of textbooks. The same assumption should extend to instructional materials and equipment.

For the same reason, my position in *Ball* is distinguishable. There, the government paid for religious-school instructors to teach classes supplemental to those offered during the normal school day. In that context, I was willing to presume that the religious-school teacher who works throughout the day to advance the school's religious mission would also do so, at least to some extent, during the supplemental classes provided at the end of the day. Because the government financed the entirety of such classes, any religious indoctrination taking place therein would be directly attributable to the government. In the instant case, because the Chapter 2 aid concerns only teaching tools that must remain supplementary, the aid comprises only a portion of the teacher's educational efforts during any single class. In this context, I find it easier to believe that a religious-school teacher can abide by the secular restrictions placed on the government assistance. I therefore would not presume that the Chapter 2 aid will advance, or be perceived to advance, the school's religious mission.

V

Respondents also contend that the evidence respecting the actual administration of Chapter 2 in Jefferson Parish demonstrates that the program violated the Establishment Clause. The limited evidence amassed by respondents during 4 years of discovery is at best *de minimis* and therefore insufficient to affect the constitutional inquiry.

The safeguards employed by the program are constitutionally sufficient. The statute limits aid to "secular, neutral, and nonideological services, materials, and equipment;" requires that the aid only supplement and not supplant funds from non-Federal sources; and prohibits "any payment . . . for religious worship or instruction." The Louisiana Department of Education (the SEA) requires all nonpublic schools to submit signed assurances that they will use

Chapter 2 aid only to supplement and not to supplant non-Federal funds, and that the instructional materials and equipment "will only be used for secular, neutral and nonideological purposes." The SEA also conducts monitoring visits to each of the State's LEA's -- and one or two of the nonpublic schools covered by the relevant LEA -- once every three years. In addition to other tasks performed on such visits, SEA representatives conduct a random review of a school's library books for religious content.

At the local level, the Jefferson Parish Public School System (JPPSS) requires nonpublic schools seeking Chapter 2 aid to submit applications for approval. The JPPSS then conducts annual monitoring visits to each of the nonpublic schools receiving Chapter 2 aid. On each visit, a JPPSS representative meets with a contact person from the nonpublic school and reviews with that person the manner in which the school has used the Chapter 2 materials and equipment. The JPPSS representative also reminds the contact person of the prohibition on the use of Chapter 2 aid for religious purposes and conducts a random sample of the school's Chapter 2 materials and equipment to ensure that they are appropriately labeled and that the school has maintained a record of their usage. Finally, the JPPSS representative randomly selects library books the nonpublic school has acquired through Chapter 2 and reviews their content to ensure that they comply with the program's secular content restriction. If the monitoring does not satisfy the JPPSS representative, another visit is scheduled. Apart from conducting monitoring visits, the JPPSS reviews Chapter 2 requests filed by participating nonpublic schools. As part of this process, a JPPSS employee examines the titles of requested library books and rejects any book whose title reveals (or suggests) a religious subject matter.

Given the similarities between the Chapter 2 program and the Title I program at issue in *Agostini*, respondents' Establishment Clause challenge must fail. As in *Agostini*, the Chapter 2 aid is allocated on the basis of neutral, secular criteria; the aid must be supplementary and cannot supplant non-Federal funds; no Chapter 2 funds ever reach the coffers of religious schools; the aid must be secular; any evidence of actual diversion is *de minimis*; and the program includes adequate safeguards. Regardless of whether these factors are constitutional requirements, they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion. For the same reasons, "this carefully constrained program also cannot reasonably be viewed as an endorsement of religion."

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The view revealed in the plurality opinion, which espouses a new conception of neutrality as a practically sufficient test of constitutionality, would, if adopted by the Court, eliminate enquiry into a law's effects. The plurality position breaks fundamentally with Establishment Clause principle, and with the methodology painstakingly worked out in support of it. From that new view of the law, and from a majority's mistaken application of the old, I respectfully dissent.

I

Today, the substantive principle of no aid to religious mission remains the governing understanding of the Establishment Clause as applied to public benefits inuring to religious

schools. The governing opinions on the subject in the 35 years since *Allen* have never challenged this principle. The cases have, however, recognized that there is no pure aid to religion and no purely secular welfare benefit; the effects of the laws fall somewhere in between, with the judicial task being to make a realistic allocation between the two. The Court's decisions demonstrate its repeated attempts to isolate considerations relevant in classifying particular benefits as between those that do not discernibly support of a school's religious mission, and those that cross or threaten to cross the line into support for religion.

II

A

The most deceptively familiar of those considerations is "neutrality," the presence or absence of which, in some sense, we have addressed from the moment of *Everson* itself. I say "some sense," for we have used the term in at least three ways in our cases. "Neutrality" has been employed as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate evenhandedness in distributing it.

The Court first referred to neutrality in *Everson*, simply stating that government is required "to be a neutral" among religions and between religion and nonreligion. *Everson* provided no explicit definition of the term. In practical terms, "neutral" in *Everson* was simply a term for government in its required median position between aiding and handicapping religion. The second major case on aid to religious schools, *Allen*, used "neutrality" to describe an adequate state of balance between government as ally and as adversary to religion. The term was not further defined, and a few subsequent school cases used "neutrality" simply to designate the required relationship to religion, without explaining how to attain it.

The Court began to employ "neutrality" in a sense different from equipoise, however, as it explicated the distinction between "religious" and "secular" benefits to religious schools, the latter being in some circumstances permissible. Even though both *Everson* and *Allen* had anticipated some such distinction, neither case had used the term "neutral" in this way. In *Everson*, Justice Black indicated that providing police, fire, and similar government services to religious institutions was permissible, in part because they were "so separate and so indisputably marked off from the religious function." *Allen* similarly focused on the fact that the textbooks lent out were "secular" and approved by secular authorities, and assumed that the secular textbooks and the secular elements of education they supported were not so intertwined with religious instruction as "[to be] instrumental in the teaching of religion." Such was the Court's premise in *Lemon* for shifting the use of the word "neutral" from labeling the required position of government to describing a benefit that was nonreligious. We spoke of "our decisions from *Everson* to *Allen* [as] permitting the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials," and thereafter, we regularly used "neutral" in this second sense of "secular" or "nonreligious."

The shift from equipoise to secular was not, however, our last redefinition, for the Court again transformed the sense of "neutrality" in the 1980's. Reexamining and reinterpreting

Everson and *Allen*, we began to use the word "neutral" to mean "evenhanded," in the sense of allocating aid on some common basis to religious and secular recipients.

The increased attention to a notion of evenhanded distribution was evident in *Nyquist*, where the Court distinguished the program under consideration from the services approved in *Allen* and *Everson*, in part because "the beneficiaries [in *Everson* and *Allen*] included *all* schoolchildren, those in public as well as those in private schools." Subsequent cases continued the focus on the "generality" of the approved government services.

Justice Blackmun, writing in *Roemer*, first called such a "general" or evenhanded program "neutral," in speaking of "facial neutrality" as a relevant consideration in determining whether there was an Establishment Clause violation. In *Mueller* v. *Allen*, the Court adopted the redefinition of neutrality as evenhandedness, citing *Nyquist*. The Court upheld a system of tax deductions, in part because such a "facially neutral law" made the deduction available for "*all* parents." Subsequent cases carried the point forward.

In sum, "neutrality" originally entered this field of jurisprudence as a conclusory term, a label for the required relationship between the government and religion as a state of equipoise between government as ally and government as adversary. Reexamining *Everson*'s paradigm cases to derive a prescriptive guideline, we first determined that "neutral" aid was secular, nonideological, or unrelated to religious education. Our subsequent reexamination of *Everson* and *Allen*, beginning in *Nyquist* and culminating in *Mueller* and most recently in *Agostini*, recast neutrality as a concept of "evenhandedness."

There is, of course, good reason for considering the generality of aid and the evenhandedness of its distribution in making close calls between benefits that in purpose or effect support a school's religious mission and those that do not. The breadth of evenhanded distribution is one pointer toward the law's purpose, since on the face of it aid distributed generally and without a religious criterion is less likely to be meant to aid religion than a benefit going only to religious institutions or people. And, depending on the breadth of distribution, looking to evenhandedness is a way of asking whether a benefit can reasonably be seen to aid religion in fact. But one crucial point must be borne in mind.

In the days when "neutral" was used in *Everson*'s sense of equipoise, neutrality was tantamount to constitutionality; the term was conclusory, but when it applied it meant that the government's position was constitutional under the Establishment Clause. This is not so at all, however, under the most recent use of "neutrality" to refer to generality or evenhandedness of distribution. This kind of neutrality is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious mission, but this neutrality is not alone sufficient to qualify the aid as constitutional. It is to be considered only along with other characteristics of aid, its administration, its recipients, or its potential that have been emphasized over the years as indicators of just how religious the intent and effect of a given aid scheme really is.

B

The insufficiency of evenhandedness neutrality as a stand-alone criterion of constitutional intent or effect has been clear from the beginning of our interpretative efforts, for an obvious reason. Evenhandedness in distributing a benefit approaches the equivalence of

constitutionality in this area only when the term refers to such universality of distribution that it makes no sense to think of the benefit as going to any discrete group. Conversely, when evenhandedness refers to distribution to limited groups within society, like groups of schools or schoolchildren, it does make sense to regard the benefit as aid to the recipients.

Hence, if we looked no further than evenhandedness, and failed to ask what activities the aid might support, or in fact did support, religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts, and religious missions would thrive on public money. This is why the consideration of less than universal neutrality has never been recognized as dispositive and has always been teamed with attention to other facts bearing on the substantive prohibition of support for a school's religious objective.

At least three main lines of enquiry addressed to school aid have emerged to complement evenhandedness neutrality. First, we have noted that two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools. Second, we have identified two important characteristics of the method of distributing aid: directness or indirectness of distribution and distribution by genuinely independent choice. Third, we have found relevance in at least five characteristics of the aid: its religious content; its cash form; its divertibility or actually diversion to religious support; its supplantation of traditional items of religious school expense; and its substantiality.

C

The substance of the law has thus not changed since *Everson*. Emphasis on one sort of fact or another has varied depending on the perceived utility of the enquiry, but all that has been added is repeated explanation of relevant considerations, confirming that our predecessors were right in their prophecies that no simple test would emerge to allow easy application of the establishment principle. The plurality would reject that lesson. The majority misapplies it.

III

A

The nub of the plurality's new position is this:

"If the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients."

As a break with consistent doctrine the plurality's new criterion is unequaled in the history of Establishment Clause interpretation. Simple on its face, it appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test for the establishment constitutionality of school aid. Even on its own terms, its errors are manifold, and attention to at least three of its mistaken assumptions will show the degree to which the plurality's proposal would replace the principle of no aid with a formula for generous religious support.

First, the plurality treats an external observer's attribution of religious support to the government as the sole impermissible effect of a government aid scheme. Second, the plurality apparently assumes as a fact that equal amounts of aid to religious and nonreligious schools will have exclusively secular and equal effects, on both external perception and on incentives to attend different schools. Third, the plurality assumes that per capita distribution rules safeguard the same principles as independent, private choices. But that is clearly not so. We approved university scholarships in *Witters* because we found them close to giving a government employee a paycheck and allowing him to spend it as he chose, but a per capita aid program is a far cry from awarding scholarships to individuals, one of whom makes an independent private choice. Not the least of the significant differences between per capita aid and aid individually determined and directed is the right and genuine opportunity of the recipient to choose not to give the aid. To hold otherwise would be to license the government to donate funds to churches based on the number of their members, on the patent fiction of independent private choice.

The plurality's mistaken assumptions explain and underscore its sharp break with the Framers' understanding of establishment and this Court's consistent interpretative course. Under the plurality's regime, little would be left of the right of conscience against compelled support for religion.

B

The plurality's conception of evenhandedness does not, however, control the case, whose disposition turns on the misapplication of accepted categories of school aid analysis. The facts most obviously relevant to the Chapter 2 scheme in Jefferson Parish are those showing divertibility and actual diversion in the circumstance of pervasively sectarian religious schools. The type of aid, the structure of the program, and the lack of effective safeguards clearly demonstrate the divertibility of the aid. While little is known about its use, owing to the anemic enforcement system in the parish, even the thin record before us reveals that actual diversion occurred.

The aid that the government provided was highly susceptible to unconstitutional use. Much of the equipment provided under Chapter 2 was not of the type provided for individual students. The videocassette players, overhead projectors, and other instructional aids were of the sort that we have found can easily be used by religious teachers for religious purposes. The same was true of the computers, which were as readily employable for religious teaching as the other equipment, and presumably as immune to any countervailing safeguard. Although library books, like textbooks, have fixed content, religious teachers can assign secular library books for religious critique, and books for libraries may be religious, as any divinity school library would demonstrate. The sheer number and variety of books that could be and were ordered gave ample opportunity for such diversion.

The divertibility thus inherent in the forms of Chapter 2 aid was enhanced by the structure of the program in Jefferson Parish. Requests for specific items under Chapter 2 came not from secular officials, but from officials of the religious schools. The sectarian schools decided what they wanted and often ordered the supplies to be forwarded directly to themselves.

The concern with divertibility is underscored by the fact that the religious schools in question here covered the primary and secondary grades, the grades in which the sectarian nature of instruction is characteristically the most pervasive and in which pupils are the least critical of the schools' religious objectives. Such precautionary features as there were in the scheme were grossly inadequate to counter the threat. To be sure, the disbursement of the aid was subject to statutory admonitions against diversion, and was supposedly subject to a variety of safeguards. But the provisions for onsite monitoring visits, labeling of government property, and government oversight cannot be accepted as sufficient in the face of record evidence that the safeguard provisions proved to be empty phrases in Jefferson Parish.

The risk of immediate diversion of Chapter 2 benefits had its complement in the risk of future diversion, against which the program had absolutely no protection. By statute all purchases with Chapter 2 aid were to remain the property of the United States, merely being "lent" to the recipient nonpublic schools. In actuality, however, the record indicates that nothing in the Jefferson Parish program stood in the way of giving the Chapter 2 property outright to the religious schools when it became older.

Providing such governmental aid without effective safeguards against future diversion itself offends the Establishment Clause and even without evidence of actual diversion, our cases have repeatedly held that a "substantial risk" of it suffices to invalidate a government aid program on establishment grounds. A substantial risk of diversion in this case was more than clear. The First Amendment was violated.

But the record here goes beyond risk, to instances of actual diversion. What one would expect from such paltry efforts at monitoring naturally resulted, and the record strongly suggests that other, undocumented diversions probably occurred as well. The record shows actual diversion in the library book program. Nonpublic schools requested and the government purchased at least 191 religious books with taxpayer funds. Books such as A Child's Book of Prayers and The Illustrated Life of Jesus were discovered among others that had been ordered under the program. The evidence persuasively suggests that other aid was actually diverted as well. Computers lent with Chapter 2 funds were joined in a network with other non-Chapter 2 computers in some schools, and religious officials and teachers were allowed to develop their own unregulated software for use on this network.

Indeed, the plurality readily recognizes that the aid in question here was divertible and that substantial evidence of actual diversion exists. Although JUSTICE O'CONNOR attributes limited significance to the evidence of divertibility and actual diversion, she also recognizes that it exists. The Court has no choice but to hold that the program as applied violated the Establishment Clause.

IV

The plurality would break with the law. The majority misapplies it. That misapplication is, however, the only consolation in the case, which reaches an erroneous result but does not stage a doctrinal coup. But there is no mistaking the abandonment of doctrine that would occur if the plurality were to become a majority. It is beyond question that the plurality's

notion of evenhandedness neutrality as a practical guarantee of the validity of aid to sectarian schools would be the end of the principle of no aid to the schools' religious mission.

The plurality is candid in pointing out the extent of actual diversion of Chapter 2 aid to religious use in the case before us and equally candid in saying it does not matter. To the plurality there is nothing wrong with aiding a school's religious mission; the only question is whether religious teaching obtains its tax support under a formally evenhanded criterion of distribution. The principle of no aid to religious teaching has no independent significance.

And if this were not enough to prove that no aid in religious school aid is dead under the plurality's First Amendment, the point is nailed down in the plurality's attack on the legitimacy of considering a school's pervasively sectarian character when judging whether aid to the school is likely to aid its religious mission. The plurality condemns any enquiry into the pervasiveness of doctrinal content as a remnant of anti-Catholic bigotry and it equates a refusal to aid religious schools with hostility to religion. The plurality's choice to employ imputations of bigotry and irreligion in the Court's debate makes one point clear: that in rejecting the principle of no aid to a school's religious mission the plurality is attacking the most fundamental assumption underlying the Establishment Clause, that government can in fact operate with neutrality in its relation to religion. I believe that it can, and so respectfully dissent.

ZELMAN v. SIMMONS-HARRIS

536 U.S. 639 (2002)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The State of Ohio has established a pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District. The question presented is whether this program offends the Establishment Clause. We hold that it does not.

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court placed the entire Cleveland school district under state control. The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

It is against this backdrop that Ohio enacted its Pilot Project Scholarship Program. The program provides financial assistance to families in any Ohio school district that is "under federal court order requiring supervision and operational management of the district by the state superintendent." Cleveland is the only Ohio school district to fall within that category.

The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. Second, the program provides tutorial aid for students who choose to remain enrolled in public school.

The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Any public school located in a school district adjacent to the covered district may also participate in the program. Adjacent public schools are eligible to receive a $ 2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. All participating schools, whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent.

Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $ 2,250. For these lowest-income families, participating private schools may not charge a parental co-payment greater than $ 250. For all other families, the program pays 75% of tuition costs, up to $ 1,875, with no co-payment cap. These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate. Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are payable to the parents who then endorse the checks over to the school.

The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school. Parents arrange for registered tutors and then submit bills for those services to the State for payment. Students from low-income families receive 90% of the amount charged for such assistance up to $ 360. All other students receive 75% of that amount.

The program has been in operation within the Cleveland City School District since the 1996-1997 school year. In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. In the

1998-1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999-2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren. That undertaking includes programs governing community and magnet schools. Community schools are funded under state law but are run by their own school boards. These schools enjoy academic independence to hire their own teachers and to determine their own curriculum. They can have no religious affiliation and are required to accept students by lottery. During the 1999-2000 school year, there were 10 community schools in the Cleveland City School District with more than 1,900 students enrolled. For each child enrolled in a community school, the school receives state funding of $4,518, twice the funding a participating program school may receive.

Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students. For each student enrolled in a magnet school, the school district receives $ 7,746, including state funding of $ 4,167, the same amount received per student enrolled at a traditional public school. As of 1999, parents in Cleveland were able to choose from among 23 magnet schools, which together enrolled more than 13,000 students in kindergarten through eighth grade.

In 1996, respondents, a group of Ohio taxpayers, challenged the Ohio program in state court on state and federal grounds. The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution. The state legislature immediately cured this defect.

In July 1999, respondents filed this action in United States District Court, seeking to enjoin the reenacted program on the ground that it violated the Establishment Clause of the United States Constitution. In December 1999, the District Court granted summary judgment for respondents. In December 2000, the Court of Appeals affirmed the judgment of the District Court, finding that the program had the "primary effect" of advancing religion in violation of the Establishment Clause. We granted certiorari and now reverse.

The Establishment Clause prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. *Agostini* v. *Felton*, 521 U.S. 203, 222-223 (1997). There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden "effect" of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, *Mitchell* v. *Helms*, 530 U.S. 793, 810 (2000) (plurality opinion), and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals, *Mueller*; *Witters*; *Zobrest*. While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in

turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. We began by focusing on the class of beneficiaries, finding that because the class included "*all* parents," including parents with "children [who] attend nonsectarian private schools or sectarian private schools," the program was "not readily subject to challenge under the Establishment Clause." Then, viewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children." This, we said, ensured that "'no imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools. That the program was one of true private choice was sufficient for the program to survive scrutiny under the Establishment Clause.

In *Witters*, we used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. We observed that "any aid that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." We further remarked that "[the] program is made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." In light of these factors, we held that the program was not inconsistent with the Establishment Clause.

Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.

Finally, in *Zobrest*, we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. Reviewing our earlier decisions, we stated that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." Looking once again to the challenged program as a whole, we observed that its "primary beneficiaries" were "disabled children, not sectarian schools."

We further observed that "by according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools. Because the program ensured that parents were the ones to select

a religious school for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.

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 as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. It is precisely for these reasons that we have never found a program of true private choice to offend 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. The Ohio program is neutral in all respects toward religion. It is part of a general undertaking by the State to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families.

There are no "financial incentives" that "skew" the program toward religious schools. Such incentives "[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." The program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates . . . financial incentives for parents to choose a sectarian school."

Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a "public perception that the State is endorsing religious practices and beliefs." But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. Any objective observer familiar with the full history and context of

the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to choose a religious school.

JUSTICE SOUTER speculates that because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools. But Cleveland's preponderance of religiously affiliated private schools did not arise as a result of the program; it is common to many American cities.

Respondents and JUSTICE SOUTER claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice. We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. The constitutionality of a neutral educational aid program simply does not turn on whether and why most private schools are run by religious organizations, or most recipients use the aid at a religious school.

This point is aptly illustrated here. The 96% figure discounts entirely (1) the more than 1,900 Cleveland children enrolled in community schools, (2) the more than 13,000 children enrolled in magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999-2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. The 96% figure also represents but a snapshot of one particular school year. In the 1997-1998 school year, by contrast, only 78% of scholarship recipients attended religious schools. The difference was attributable to two private nonreligious schools electing to register as community schools. Many of the students enrolled in these schools as scholarship students remained enrolled as community school students, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect.

Respondents finally claim that we should look to *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), to decide these cases. We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly

secular purposes, we found that its "function" was "*unmistakably* to provide desired financial support for nonpublic, sectarian institutions."

Second, were there any doubt that the program challenged in *Nyquist* is far removed from the program challenged here, we expressly reserved judgment with respect to "a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." That, of course, is the very question now before us, and it has since been answered, first in *Mueller*, then in *Witters*, and again in *Zobrest*. To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

JUSTICE O'CONNOR, concurring.

While I join the Court's opinion, I write separately for two reasons. First, although the Court takes an important step, I do not believe that today's decision, when considered in light of our prior Establishment Clause jurisprudence, marks a dramatic break from the past. Second, given the emphasis the Court places on verifying that parents of voucher students in religious schools have exercised "true private choice," I think it is worth elaborating on the Court's conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents. To do otherwise is to ignore how the educational system in Cleveland actually functions.

I

These cases are different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds. The share of public resources that reach religious schools is not, however, as significant as respondents suggest. Data from the 1999-2000 school year indicate that 82 percent of schools participating in the voucher program were religious and that 96 percent of participating students enrolled in religious schools (46 of 56 private schools in the program are religiously-affiliated; 3,637 of 3,765 voucher students attend religious private schools), but these data are incomplete. These statistics do not take into account all of the reasonable educational choices that may be available to students in Cleveland public schools. When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent. If magnet schools are included in the mix, this percentage falls to 16.5 percent.

Even these numbers do not paint a complete picture. The Cleveland program provides voucher applicants from low-income families with up to $ 2,250 in tuition assistance and

provides the remaining applicants with up to $ 1,875 in tuition assistance. In contrast, the State provides community schools $ 4,518 per pupil and magnet schools, on average, $ 7,097 per pupil. Even if one assumes that all voucher students came from low-income families and that each voucher student used up the entire $ 2,250 voucher, at most $ 8.2 million of public funds flowed to religious schools under the voucher program in 1999-2000. The State spent over $ 1 million more -- $ 9.4 million -- on students in community schools than on students in religious private schools because per-pupil aid to community schools is more than double the per-pupil aid to private schools under the voucher program. Moreover, the amount spent on religious private schools is minor compared to the $ 114.8 million spent on students in the Cleveland magnet schools.

Although $ 8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions. Religious organizations may qualify for exemptions from the federal corporate income tax; the corporate income tax in many States; and property taxes in all 50 States. In addition, the Federal Government provides individuals, corporations, trusts, and estates a tax deduction for charitable contributions to qualified religious groups. Finally, the Federal Government and certain state governments provide tax credits for educational expenses, many of which are spent on education at religious schools.

Most of these tax policies are well established, see, *e.g.*, *Walz*, yet confer a significant relative benefit on religious institutions. The state property tax exemptions for religious institutions alone amount to very large sums annually. For example, available data suggest that Colorado's exemption lowers that State's tax revenues by more than $ 40 million annually; Maryland's exemption lowers revenues by more than $ 60 million; Wisconsin's exemption lowers revenues by approximately $ 122 million; and Louisiana's exemption, looking just at the city of New Orleans, lowers revenues by over $ 36 million. As for the Federal Government, the tax deduction for charitable contributions reduces federal tax revenues by nearly $ 25 billion annually, and it is reported that over 60 percent of household charitable contributions go to religious charities.

These tax exemptions, which have "much the same effect as [cash grants] of the amount of tax [avoided]" are just part of the picture. Federal dollars also reach religiously affiliated organizations through public health programs such as Medicare and Medicaid, through educational programs such as the Pell Grant program, and the G. I. Bill of Rights; and through child care programs such as the Child Care and Development Block Grant Program. These programs are well-established parts of our social welfare system and can be quite substantial.

A significant portion of the funds appropriated for these programs reach religiously affiliated institutions, typically without restrictions on its subsequent use. For example, it has been reported that religious hospitals, which account for 18 percent of all hospital beds nationwide, rely on Medicare funds for 36 percent of their revenue. Moreover, taking into account both Medicare and Medicaid, religious hospitals received nearly $ 45 billion from the federal fisc in 1998. Federal aid to religious schools is also substantial.

Against this background, the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs. This observation places in broader perspective alarmist claims about implications of the Cleveland program and the Court's decision in these cases.

II

Nor does today's decision signal a major departure from this Court's prior Establishment Clause jurisprudence. The Court's opinion in these cases focuses on a narrow question related to the *Lemon* test: how to apply the primary effects prong in indirect aid cases? Specifically, it clarifies the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion, or, as I have put it, of "endorsing or disapproving religion," *Lynch* v. *Donnelly*, *supra*, at 691-692 (concurring opinion). Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down.

JUSTICE SOUTER portrays this inquiry as a departure from *Everson*. A fair reading of the holding in that case suggests quite the opposite. Justice Black's opinion for the Court held that the "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." How else could the Court have upheld a state program to provide students transportation to public and religious schools alike? What the Court clarifies in these cases is that the Establishment Clause also requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries. Such a refinement of the *Lemon* test surely does not betray *Everson*.

III

There is little question in my mind that the Cleveland voucher program is neutral as between religious schools and nonreligious schools. JUSTICE SOUTER rejects the Court's notion of neutrality, proposing that the neutrality of a program should be gauged not by the opportunities it presents but rather by its effects. In particular, a "neutrality test . . . [should] focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction." JUSTICE SOUTER doubts that the Cleveland program is neutral under this view. He surmises that the cap on tuition that voucher schools may charge low-income students encourages these students to attend religious rather than nonreligious private voucher schools. But JUSTICE SOUTER's notion of neutrality is inconsistent with that in our case law. As we put it in *Agostini*, government aid must be "made available to both religious and secular beneficiaries on a nondiscriminatory basis."

I do not agree that the nonreligious schools have failed to provide Cleveland parents reasonable alternatives to religious schools in the voucher program. For nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of

parents. The District Court record demonstrates that nonreligious schools were able to compete effectively with Catholic and other religious schools in the Cleveland voucher program. The best evidence of this is that many parents with vouchers selected nonreligious private schools over religious alternatives and an even larger number of parents send their children to community and magnet schools rather than seeking vouchers at all. Moreover, there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program, let alone a community or magnet school.

To support his hunch about the effect of the cap on tuition under the voucher program, JUSTICE SOUTER cites national data to suggest that, on average, Catholic schools have a cost advantage over other types of schools. Even if national statistics were relevant, JUSTICE SOUTER ignores evidence which suggests that, at a national level, nonreligious private schools may target a market for different, if not higher, quality of education. For example, nonreligious private schools are smaller; have smaller class sizes; have more highly educated teachers; and have principals with longer job tenure than Catholic schools.

Additionally, JUSTICE SOUTER's theory that the Cleveland voucher program's cap on tuition encourages low-income student to attend religious schools ignores that these students receive nearly double the amount of tuition assistance under the community schools program than under the voucher program and that none of the community schools is religious.

In my view the more significant finding in these cases is that Cleveland parents who use vouchers to send their children to religious private schools do so as a result of true private choice. The Court rejects, correctly, the notion that the high percentage of voucher recipients who enroll in religious private schools necessarily demonstrates that parents do not actually have the option to send their children to nonreligious schools. Likewise, the mere fact that some parents enrolled their children in religious schools associated with a different faith than their own says little about whether these parents had reasonable nonreligious options. Indeed, no voucher student has been known to be turned away from a nonreligious private school participating in the voucher program. Finally, as demonstrated above, the Cleveland program does not establish financial incentives to undertake a religious education.

I find the Court's answer to the question whether parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools persuasive. In looking at the voucher program, all the choices available to potential beneficiaries should be considered. In these cases, parents who were eligible to apply for a voucher also had the option, at a minimum, to send their children to community schools. Focusing in these cases only on the program challenged by respondents ignores how the educational system in Cleveland actually functions. The record indicates that, in 1999, two nonreligious private schools that had previously served 15 percent of the students in the voucher program were prompted to convert to community schools. Many of the students that enrolled in the two schools under the voucher program transferred to the community schools program and continued to attend these schools. This incident provides strong evidence that both parents and nonreligious schools view the voucher program and the community schools program as reasonable alternatives.

Considering all the educational options available to parents whose children are eligible for vouchers, including community and magnet schools, the Court finds that parents in the Cleveland schools have an array of nonreligious options. Not surprisingly, respondents present no evidence that any students who were candidates for a voucher were denied slots in a community school or a magnet school.

JUSTICE SOUTER nonetheless claims that, of the 10 community schools operating in Cleveland during the 1999-2000 school year, 4 were unavailable to students with vouchers and 4 reported poor test scores. But that analysis unreasonably limits the choices available to Cleveland parents. It is undisputed that Cleveland's 24 magnet schools are reasonable alternatives to voucher schools. And of the four community schools JUSTICE SOUTER claims are unavailable to voucher students, he is correct only about one. Moreover, two more community schools were scheduled to open after the 1999-2000 school year.

Ultimately, JUSTICE SOUTER relies on very narrow data to draw rather broad conclusions. What appears to motivate JUSTICE SOUTER's analysis is a desire for a limiting principle to rule out certain nonreligious schools as alternatives to religious schools in the voucher program. But the goal of the Court's Establishment Clause jurisprudence is to determine whether parents were free to direct state educational aid in either a nonreligious or religious direction. That inquiry requires an evaluation of all reasonable educational options, regardless of whether they are formally made available in the same section of the Ohio Code as the voucher program.

I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause.

JUSTICE THOMAS, concurring.

Frederick Douglass once said that "education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown* v. *Board of Education*, that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," urban children have been forced into a system that continually fails them. These cases present an example of such failures.

The dissents and respondents wish to invoke the Establishment Clause to constrain a State's neutral efforts to provide greater educational opportunity for underprivileged minority students. Today's decision properly upholds the program as constitutional, and I join it in full.

I

To determine whether a federal program survives scrutiny under the Establishment Clause, we have considered whether it has a secular purpose and whether it has the primary effect of advancing or inhibiting religion. I agree that Ohio's program easily passes muster under our stringent test, but I question whether this test should be applied to the States.

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." On its face, this provision places no limit on the States. The Establishment Clause originally protected States from the imposition of an established religion by the Federal Government. Whether and how this Clause should constrain state action under the Fourteenth Amendment is a more difficult question.

The Fourteenth Amendment fundamentally restructured the relationship between individuals and the States and ensured that States would not deprive citizens of liberty without due process of law. When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty.

Consequently, in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion] -- on a neutral basis -- than the Federal Government." *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring). Thus, while the Federal Government may "make no law respecting an establishment of religion," the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.

Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights. But I cannot accept its use to oppose neutral programs of school choice through the incorporation of the Establishment Clause. There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on educational choice.

II

The wisdom of allowing States greater latitude in dealing with matters of religion and education can be easily appreciated in this context. Respondents advocate using the Fourteenth Amendment to handcuff the State's ability to experiment with education. But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment. Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform that allows voluntary participation of private and religious schools in educating poor urban children otherwise condemned to failing public schools. The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children. This is a choice that those with greater means have routinely exercised.

Cleveland parents now have a variety of educational choices. There are traditional public schools, magnet schools, and privately run community schools, in addition to the scholarship program. Currently, 46 of the 56 private schools participating in the scholarship program are church affiliated (35 are Catholic), and 96 percent of students in the program attend religious schools. Thus, were the Court to disallow the inclusion of religious schools, Cleveland children could use their scholarships at only 10 private schools.

In addition to expanding the reach of the scholarship program, the inclusion of religious schools makes sense given Ohio's purpose of increasing educational performance and opportunities. Religious schools, like other private schools, achieve far better educational results than their public counterparts. But the success of religious and private schools is in the end beside the point, because the State has a constitutional right to experiment with a variety of different programs to promote educational opportunity. That Ohio's program includes successful schools simply indicates that such reform can in fact provide improved education to underprivileged urban children.

Although one of the purposes of public schools was to promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity. At the time of Reconstruction, blacks considered public education "a matter of personal liberation and a necessary function of a free society." Today, however, the promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts. Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities. Opponents of the program raise formalistic concerns about the Establishment Clause but ignore the core purposes of the Fourteenth Amendment.

While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. As Thomas Sowell noted 30 years ago: "Most black people have faced too many grim, concrete problems to be romantics. They want and need certain tangible results, which can be achieved only by developing certain specific abilities." The same is true today. An individual's life prospects increase dramatically with each successfully completed phase of education. Staying in school and earning a degree generates real and tangible financial benefits, whereas failure to obtain even a high school degree essentially relegates students to a life of poverty and, all too often, of crime. The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects.

Ten States have enacted some form of publicly funded private school choice as one means of raising the quality of education provided to underprivileged urban children. These programs address the root of the problem with failing urban public schools that disproportionately affect minority students. Society's other solution to these educational failures is often to provide racial preferences in higher education. Such preferences, however, run afoul of the Fourteenth Amendment's prohibition against distinctions based on race. See *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting). By contrast, school choice programs that involve religious schools appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause. Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disserves those in the greatest need.

As Frederick Douglass poignantly noted "no greater benefit can be bestowed upon a long benighted people, than giving to them, as we are here earnestly this day endeavoring to do, the means of an education."

JUSTICE STEVENS, dissenting.

Is a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths a "law respecting an establishment of religion" within the meaning of the First Amendment? In answering that question, I think we should ignore three factual matters that are discussed at length by my colleagues.

First, the severe educational crisis that confronted the Cleveland City School District when Ohio enacted its voucher program is not a matter that should affect our appraisal of its constitutionality. In the 1999-2000 school year, that program provided relief to less than five percent of the students enrolled in the district's schools. The solution to the disastrous conditions that prevented over 90 percent of the student body from meeting basic proficiency standards obviously required massive improvements unrelated to the voucher program.

Second, the wide range of choices that have been made available to students *within the public school system* has no bearing on the question whether the State may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education. The fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at state expense does, however, support the claim that the law is one "respecting an establishment of religion." The State may choose to divide up its public schools into a dozen different options and label them magnet schools, community schools, or whatever else it decides to call them, but the State is still required to provide a public education and it is the State's decision to fund private school education over and above its traditional obligation that is at issue in these cases.

Third, the voluntary character of the private choice to prefer a parochial education over an education in the public school system seems to me quite irrelevant to the question whether the government's choice to pay for religious indoctrination is constitutionally permissible. Today, however, the Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds.

For the reasons stated by JUSTICE SOUTER and JUSTICE BREYER, I am convinced that the Court's decision is profoundly misguided. Admittedly, in reaching that conclusion I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these. "Constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government." I therefore respectfully dissent.

The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson* v. *Board of Ed. of Ewing,* 330 U.S. 1 (1947), which inaugurated the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent: "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." The Court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson*.

Today, however, the majority holds that the Establishment Clause is not offended by Ohio's Pilot Project Scholarship Program, under which students may be eligible to receive as much as $ 2,250 in the form of tuition vouchers transferable to religious schools. In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension. Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.

How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria.

I

The majority's statements of Establishment Clause doctrine cannot be appreciated without some historical perspective on the Court's announced limitations on government aid to religious education, and its repeated repudiation of limits previously set. My object here is not to give any nuanced exposition of the cases, but to set out the broad doctrinal stages covered in the modern era, and to show that doctrinal bankruptcy has been reached today.

Viewed with the necessary generality, the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to

draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

II

Although it has taken half a century since *Everson* to reach the majority's twin standards of neutrality and free choice, the facts show that, in the majority's hands, even these criteria cannot convincingly legitimize the Ohio scheme.

A

Consider first the criterion of neutrality. As recently as two Terms ago, a majority of the Court recognized that neutrality conceived of as evenhandedness toward aid recipients had never been treated as alone sufficient to satisfy the Establishment Clause, *Mitchell*, 530 U.S. at 838-839 (O'CONNOR, J., concurring in judgment). But at least in its limited significance, formal neutrality seemed to serve some purpose. Today, however, the majority employs the neutrality criterion in a way that renders it impossible to understand.

Neutrality in this sense refers, of course, to evenhandedness in setting eligibility as between potential religious and secular recipients of public money. Thus, for example, the aid scheme in *Witters* provided an eligible recipient with a scholarship to be used at any institution within a practically unlimited universe of schools; it did not tend to provide more or less aid depending on which one the scholarship recipient chose, and there was no indication that the maximum scholarship amount would be insufficient at secular schools. Neither did any condition of Zobrest's interpreter's subsidy favor religious education.

In order to apply the neutrality test, then, it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction. Here, one would ask whether the voucher provisions were written in a way that skewed the scheme toward benefiting religious schools.

This, however, is not what the majority asks. The majority looks not to the provisions for tuition vouchers, but to every provision for educational opportunity: "The program permits the participation of *all* schools within the district, [as well as public schools in adjacent districts], religious or nonreligious." The majority then finds confirmation that "participation of *all* schools" satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools, thus showing there is no favor of religion.

The illogic is patent. If regular, public schools (which can get no voucher payments) "participate" in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at

all. "Neutrality" as the majority employs the term is, literally, verbal and nothing more. This, indeed, is the only way the majority can gloss over the very nonneutral feature of the total scheme covering "*all* schools": public tutors may receive from the State no more than $324 per child to support extra tutoring (that is, the State's 90% of a total amount of $360), whereas the tuition voucher schools (which turn out to be mostly religious) can receive up to $2,250.

Why the majority does not simply accept the fact that the challenge here is to the more generous voucher scheme and judge its neutrality in relation to religious use of voucher money seems very odd. It seems odd, that is, until one recognizes that comparable schools for applying the criterion of neutrality are also the comparable schools for applying the other majority criterion, whether the recipients of voucher aid have a genuinely free choice of religious and secular schools to receive the voucher money. And in applying this second criterion, the consideration of "*all* schools" is ostensibly helpful to the majority position.

B

The majority addresses the issue of choice the same way it addresses neutrality, by asking whether recipients of voucher aid have a choice of public schools among secular alternatives to religious schools. Again, however, the majority asks the wrong question and misapplies the criterion. The majority has confused choice in spending scholarships with choice from the entire menu of possible educational placements, most of them open to anyone willing to attend a public school. I say "confused" because the majority's new use of the choice criterion, which it frames negatively as "whether Ohio is coercing parents into sending their children to religious schools," ignores the reason for having a private choice enquiry in the first place. Cases since *Mueller* have found private choice relevant under a rule that aid to religious schools can be permissible so long as it first passes through the hands of students or parents. The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

Defining choice as choice in spending the money or channeling the aid is, moreover, necessary if the choice criterion is to function as a limiting principle at all. If "choice" is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school. And because it is unlikely that any participating private religious school will enroll more pupils than the generally available public system, it will be easy to generate numbers suggesting that aid to religion is not the significant intent or effect of the voucher scheme.

That is, in fact, just the kind of rhetorical argument that the majority accepts in these cases. In addition to secular private schools (129 students), the majority considers public schools with tuition assistance (roughly 1,400 students), magnet schools (13,000 students), and community schools (1,900 students), and concludes that fewer than 20% of pupils receive state vouchers to attend religious schools. JUSTICE O'CONNOR focuses on how much money is spent on each educational option and notes that at most $ 8.2 million is spent on vouchers for students attending religious schools, which is only 6% of the State's expenditure if one includes separate funding for Cleveland's community ($ 9.4 million) and magnet ($ 114.8 million) public schools. The variations show how results may shift when a judge can pick and choose the alternatives to use in the comparisons, and they also show what dependably comfortable results the choice criterion will yield if the identification of relevant choices is wide open. If the choice of relevant alternatives is an open one, proponents of voucher aid will always win, because they will always be able to find a "choice" somewhere that will show the bulk of public spending to be secular. The choice enquiry will be diluted to the point that it can screen out nothing, and the result will always be determined by selecting the alternatives to be treated as choices.

Confining the relevant choices to spending choices, on the other hand, is not vulnerable to comparable criticism. Limiting the choices to spending choices will not guarantee a negative result in every case. There may, after all, be cases in which a voucher recipient will have a real choice, with enough secular private school desks in relation to the number of religious ones, and a voucher amount high enough to meet secular private school tuition levels. But, even to the extent that choice-to-spend does tend to limit the number of religious funding options that pass muster, the choice criterion has to be understood this way in order for it to function as a limiting principle. Otherwise there is no point in requiring the choice to be a genuine one.

It is not, of course, that I think even a genuine choice criterion is up to the task of the Establishment Clause when substantial state funds go to religious teaching; the discussion in Part III, *infra*, shows that it is not. The point is simply that if the majority wishes to claim that choice is a criterion, it must define choice in a way that can function as a criterion with a practical capacity to screen something out.

If, contrary to the majority, we ask the right question about genuine choice to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher program, 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones. Unfortunately for the majority position, there is no explanation for this that suggests the religious direction results simply from free choices by parents. One answer to these statistics, for example, which would be consistent with genuine choice, might be that 96.6% of families choosing to avail themselves of vouchers choose to educate their children in schools of their own religion. This would not, in my view, render the scheme constitutional, but it would speak to the majority's choice criterion. Evidence shows, however, that almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools. The families made it clear

they had not chosen the schools because they wished their children to be proselytized in a religion not their own, but because of educational opportunity.

Even so, the fact that some 2,270 students chose to apply their vouchers to schools of other religions might be consistent with true choice if the students "chose" their religious schools over a wide array of private nonreligious options, or if it could be shown generally that Ohio's program had no effect on educational choices. But both possibilities are contrary to fact. First, even if all existing nonreligious private schools in Cleveland were willing to accept large numbers of voucher students, only a few more than the 129 currently enrolled in such schools would be able to attend, as the total enrollment at all nonreligious private schools in Cleveland for kindergarten through eighth grade is only 510 children, and there is no indication that these schools have many open seats. Second, the $ 2,500 cap that the program places on tuition has the effect of curtailing the participation of nonreligious schools: "nonreligious schools with higher tuition (about $ 4,000) stated that they could afford to accommodate just a few voucher students." By comparison, the average tuition at participating Catholic schools in Cleveland in 1999-2000 was $ 1,592, almost $ 1,000 below the cap.

There is no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students. For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sake of channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian.

III

I do not dissent merely because the majority has misapplied its own law, for even if I assumed *arguendo* that the majority's formal criteria were satisfied on the facts, today's conclusion would be profoundly at odds with the Constitution. Proof of this is clear on two levels. The first is circumstantial, in the substantial dimension of the aid. The second is direct, in the defiance of every objective supposed to be served by the bar against establishment.

A

The scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported. Each measure has received attention in previous cases. On one hand, the sheer quantity of aid, when delivered to a class of religious primary and secondary schools, was suspect on the theory that the greater the aid, the greater its proportion to a religious school's existing expenditures, and the greater the likelihood that public money was supporting religious as well as secular instruction.

On the other hand, the Court has found the gross amount unhelpful for Establishment Clause analysis when the aid afforded a benefit solely to one individual, however substantial as to him, but only an incidental benefit to the religious school at which the individual chose

to spend the State's money. When neither the design nor the implementation of an aid scheme channels a series of individual students' subsidies toward religious recipients, the relevant beneficiaries for establishment purposes, the Establishment Clause is unlikely to be implicated. The majority's reliance on the observations of five Members of the Court in *Witters* as to the irrelevance of substantiality of aid in that case is therefore beside the point in the matter before us, which involves considerable sums of public funds systematically distributed through thousands of students attending religious schools in the city of Cleveland.

The Cleveland voucher program has cost Ohio taxpayers $ 33 million since its implementation in 1996. The amounts of public money are symptomatic of the scope of what the taxpayers' money buys for a broad class of religious-school students. In paying for practically the full amount of tuition for thousands of qualifying students, the scholarships purchase everything that tuition purchases, be it instruction in math or indoctrination in faith. The consequences of "substantial" aid hypothesized in *Meek* are realized here: the majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.

B

It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme, but something has to be said about the enormity of the violation. I anticipated these objectives earlier in discussing *Everson*, which cataloged them, the first being respect for freedom of conscience. Jefferson described it as the idea that no one "shall be compelled to . . . support any religious worship, place, or ministry whatsoever," and Madison thought it violated by any "'authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment.'" Madison's objection to three pence has simply been lost in the majority's formalism.

As for the second objective, to save religion from its own corruption, in the 21st century the risk is one of "corrosive secularism" to religious schools, and the specific threat is to the primacy of the schools' mission to educate children according to the unaltered precepts of their faith. Even "the favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation."

The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not "discriminate on the basis of . . . religion," which means the school may not give admission preferences to children who are members of the patron faith. Nor is the State's religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job. Indeed, a separate condition that "the school . . . not . . . teach hatred of any person or group on the basis of . . . religion" could be understood to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others if they want government money for their schools.

For perspective on this foot-in-the-door of religious regulation, it is well to remember that the money has barely begun to flow. Prior examples of aid were never significant enough to alter the basic fiscal structure of religious schools. But given the figures already involved here, there is no question that religious schools in Ohio are on the way to becoming bigger businesses with budgets enhanced to fit their new stream of tax-raised income. The administrators of those same schools are also no doubt following the politics of a move in the Ohio State Senate to raise the current maximum value of a school voucher from $ 2,250 to the base amount of current state spending on each public school student ($ 4,814 for the 2001 fiscal year). Ohio, in fact, is merely replicating the experience in Wisconsin, where a similar increase in the value of educational vouchers in Milwaukee has induced the creation of some 23 new private schools, some of which, we may safely surmise, are religious. New schools have presumably pegged their financial prospects to the government from the start, and the odds are that increases in government aid will bring the threshold voucher amount closer to the tuition at even more expensive religious schools.

When government aid goes up, so does reliance on it; the only thing likely to go down is independence. If Justice Douglas in *Allen* was concerned with state agencies, influenced by powerful religious groups, choosing the textbooks that parochial schools would use, how much more is there reason to wonder when dependence will become great enough to give the State of Ohio an effective veto over basic decisions on the content of curriculums? A day will come when religious schools will learn what political leverage can do, just as Ohio's politicians are now getting a lesson in the leverage exercised by religion.

Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord.

JUSTICE BREYER has addressed this issue in his own dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention. Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools,

that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

If the divisiveness permitted by today's majority is to be avoided in the short term, it will be avoided only by action of the political branches at the state and national levels. Legislatures not driven to desperation by the problems of public education may be able to see the threat in vouchers negotiable in sectarian schools. Perhaps even cities with problems like Cleveland's will perceive the danger, now that they know a federal court will not save them from it.

My own course as a judge on the Court cannot, however, simply be to hope that the political branches will save us from the consequences of the majority's decision. *Everson*'s statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. I hope that a future Court will reconsider today's dramatic departure from basic Establishment Clause principle.

JUSTICE *BREYER*, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

I join JUSTICE SOUTER's opinion, and I agree substantially with JUSTICE STEVENS. I write separately, however, to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. I do so because I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program. And by explaining the nature of the concern, I hope to demonstrate why, in my view, "parental choice" cannot significantly alleviate the constitutional problem. See Part IV, *infra.*

I

The First Amendment begins with a prohibition, that "Congress shall make no law respecting an establishment of religion," and a guarantee, that the government shall not prohibit "the free exercise thereof." These Clauses embody an understanding that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to "worship God in their own way," and allows all families to "teach their children and to form their characters" as they wish. The Clauses reflect the Framers' vision of an American Nation free of the religious strife that had long plagued the nations of Europe.

In part for this reason, the Court's 20th century Establishment Clause cases focused directly upon social conflict, potentially created when government becomes involved in religious education. In *Engel* v. *Vitale*, the Court held that the Establishment Clause forbids prayer in public elementary and secondary schools. It did so in part because it recognized the "anguish, hardship and bitter strife that could come when zealous religious groups struggle with one another to obtain the Government's stamp of approval."

In *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), the Court held that the Establishment Clause forbids state funding, through salary supplements, of religious school teachers. It did so in part because of the "threat" that this funding would create religious "divisiveness" that would harm "the normal political process."

When it decided these 20th century Establishment Clause cases, the Court did not deny that an earlier American society might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools -- including the first public schools -- were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict.

The 20th century Court was fully aware, however, that immigration and growth had changed American society dramatically since its early years. By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million. There were similar percentage increases in the Jewish population. Not surprisingly, with this increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. By the mid-19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination.

The 20th century Court was also aware that political efforts to right the wrong of discrimination against religious minorities in primary education had failed; in fact they had exacerbated religious conflict. Catholics sought government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)." And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (*i.e.*, Catholic) schooling for children.

These historical circumstances suggest that the Court, applying the Establishment Clause to 20th century American society, faced an interpretive dilemma that was in part practical. The Court appreciated the religious diversity of contemporary American society. It realized that the status quo favored some religions at the expense of others. And it understood the Establishment Clause to prohibit any such favoritism. Yet *how* did the Clause achieve that objective? Did it simply require the government to give each religion an equal chance to introduce religion into the primary schools -- a kind of "equal opportunity" approach to the interpretation of the Establishment Clause? Or, did that Clause avoid government favoritism of some religions by insisting upon "separation" -- that the government achieve equal treatment by removing itself from the business of providing religious education for children? This interpretive choice arose in respect both to religious activities in public schools and government aid to private education.

In both areas the Court concluded that the Establishment Clause required "separation," in part because an "equal opportunity" approach was not workable. With respect to religious activities in the public schools, how could the Clause require public primary and secondary school teachers, when reading prayers or the Bible, *only* to treat all religions alike? In many places there were too many religions, too diverse a set of religious practices, too many whose spiritual beliefs denied the virtue of formal religious training. This diversity made it difficult, if not impossible, to devise meaningful forms of "equal treatment" by providing an "equal opportunity" for all to introduce their own religious practices into the public schools.

With respect to government aid to private education, did not history show that efforts to obtain equivalent funding for the private education of children whose parents did not hold popular religious beliefs only exacerbated religious strife? As Justice Rutledge recognized:

"Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. This is precisely the history of societies which have had an established religion and dissident groups." *Everson* v. *Board of Ed. of Ewing,* 330 U.S. 1, 53-54 (1947) (dissenting opinion).

The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, *not* by providing every religion with an *equal opportunity*, but by drawing fairly clear lines of *separation* between church and state -- at least where the heartland of religious belief, such as primary religious education, is at issue.

II

The principle underlying these cases -- avoiding religiously based social conflict -- remains of great concern. America boasts more than 55 different religious groups and subgroups with a significant number of members. Under these modern-day circumstances, how is the "equal opportunity" principle to work -- without risking the "struggle of sect against sect." Consider the voucher program here at issue. That program insists that the religious school accept students of all religions. Does that criterion treat fairly groups whose religion forbids them to do so? The program also insists that no participating school "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." And it requires the State to "revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation" of the program's rules. As one *amicus* argues, "it is difficult to imagine a more divisive activity" than the appointment of state officials as referees to determine whether a particular religious doctrine "teaches hatred or advocates lawlessness."

How are state officials to adjudicate claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? How will the public react to government funding for schools that take controversial religious positions on topics that are of current popular interest -- say, the conflict in the Middle East or the war on terrorism? Yet any major funding program for primary religious education will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive. Efforts to respond to these problems not only will seriously entangle church and state, but also will promote division among religious groups, as one group or another fears that it will receive unfair treatment at the hands of the government.

In a society as religiously diverse as ours, we must rely on the Religion Clauses to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits.

III

I concede that the Establishment Clause currently permits States to channel various forms of assistance to religious schools, for example, transportation costs for students, computers, and secular texts. School voucher programs differ, however, in both *kind* and *degree* from aid programs upheld in the past. They differ in kind because they direct financing to a core function of the church: the teaching of religious truths to young children. For that reason the constitutional demand for "separation" is of particular constitutional concern.

History suggests that *government funding* of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university. Contrary to JUSTICE O'CONNOR's opinion, history also shows that government involvement in religious primary education is far more divisive than property tax exemptions for religious institutions or tax deductions for charitable contributions. Aid to religiously based hospitals is even further removed from education, which lies at the heartland of religious belief.

Vouchers also differ in *degree*. The aid programs recently upheld by the Court involved limited amounts of aid to religion. But the majority's analysis here appears to permit a considerable shift of taxpayer dollars from public secular schools to private religious schools. That fact, combined with the use to which these dollars will be put, exacerbates the conflict problem. State aid that takes the form of peripheral secular items, with prohibitions against diversion of funds to religious teaching, holds significantly less potential for social division. In this respect as well, the secular aid upheld in *Mitchell* differs dramatically from the present case. Although it was conceivable that minor amounts of money could have, contrary to the statute, found their way to the religious activities of the recipients, that case is at worst the camel's nose, while the litigation before us is the camel itself.

IV

I do not believe that the "parental choice" aspect of the voucher program sufficiently offsets the concerns I have mentioned. Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. And it does little to ameliorate the entanglement problems or the related problems of social division that Part II describes. Consequently, the fact that the parent may choose which school can cash the government's voucher check does not alleviate the Establishment Clause concerns associated with voucher programs.

V

The Court, in effect, turns the clock back. It adopts, under the name of "neutrality," an interpretation of the Establishment Clause that this Court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity to secure government funding overcomes the Establishment Clause concern for social concord. An earlier Court found that "equal opportunity" principle insufficient, at least in respect to primary education. See *Nyquist*, 413 U.S., at 783. In a society composed of many different religious creeds, I fear that this present departure from the Court's earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric. Because I believe the Establishment Clause was written in part to avoid this kind of conflict, I respectfully dissent.