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POLSC 294:14 - 01
Special Topics: Religion and the Constitution
Reading Materials

RELIGION AND THE CONSTITUTION

CHAPTER II - ESTABLISHMENT CLAUSE: GOVERNMENT FINANCING OF RELIGIOUS EDUCATION

Introduction

One category of Establishment Clause case law involves government provision of financial assistance to parochial schools and their students. Three of the early cases in Chapter I fall into this category: *Everson*, *Allen* and *Lemon*. In the decade after *Lemon* was decided in 1971, in a series of cases involving financial support for parochial schools, the Court struggled to apply the *Lemon* test and reach outcomes that were consistent with the fine line it drew in distinguishing its decisions in *Allen* and *Lemon*. For example, in *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973), the Court struck down a law that reimbursed private schools, including parochial schools, for the administrative costs of teacher-prepared achievement tests mandated by the state while in *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980), the Court upheld state reimbursement for the costs of parochial school administration of state-prepared standardized tests. Despite the fact that some payment laws were upheld, during this period the Court still adhered to a strict interpretation of the Establishment Clause that banned most government spending on parochial school education until it decided *Mueller v. Allen* in 1983. Although not all the Court's decisions after *Mueller* upheld programs that benefitted parochial schools, the trend that began with *Mueller* continued in a series of cases in the 1990s and early 2000s. By the end of that time period, the Court had adopted an approach that was much more accepting of government financing of religious education, even to the point of overturning some of its earlier decisions.

1. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY v. NYQUIST

413 U.S. 756 (1973)

MR. JUSTICE POWELL delivered the opinion of the Court.

These cases raise a challenge under the Establishment Clause to the constitutionality of a law which provides financial assistance to nonpublic elementary and secondary schools. The cases involve an intertwining of societal and constitutional issues of the greatest importance.

I

In May 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three financial aid programs for nonpublic elementary and secondary schools. Immediately after the signing of

these measures a complaint was filed in the United States District Court for the Southern District of New York challenging the three forms of aid as violative of the Establishment Clause. That court's decision turned on the constitutionality of each provision on its face.

The first section of the challenged enactment, entitled "Health and Safety Grants for Nonpublic School Children," provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." A "qualifying" school is any nonpublic, nonprofit elementary or secondary school which "has been designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five." Such schools are entitled to receive a grant of $30 per pupil per year, or $40 per pupil per year if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an audited statement of its expenditures for maintenance and repair during the preceding year, and its grant may not exceed the total of such expenses. The Commissioner is also required to ascertain the average per-pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" is defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils."

The remainder of the challenged legislation -- §§ 2 through 5 -- is a single package captioned the "Elementary and Secondary Education Opportunity Program." It is composed, essentially, of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools. To qualify under this section a parent must have an annual taxable income of less than $5,000. The amount of reimbursement is limited to $50 for each grade school child and $100 for each high school child. Each parent is required, however, to submit a verified statement containing a receipted tuition bill, and the amount of state reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.

The remainder of the "Elementary and Secondary Education Opportunity Program," contained in §§ 3, 4, and 5 of the challenged law, is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement. Under these sections parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least $50 in nonpublic school tuition. If the taxpayer's adjusted gross income is less than $9,000 he may subtract $1,000 for each of as many as three dependents. As the taxpayer's income rises, the amount he may subtract diminishes. Thus, if a taxpayer has adjusted gross income of $15,000, he may subtract only $400 per dependent, and if his adjusted gross income is $25,000 or more, no deduction is allowed. The amount of the deduction is not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and is given in addition to any deductions to which the taxpayer may be entitled for other religious or charitable contributions. The actual tax benefits under these provisions were

carefully calculated in advance. Thus, comparable tax benefits pick up at approximately the point at which tuition reimbursement benefits leave off.

Although no record was developed in these cases, a number of pertinent generalizations may be made about the nonpublic schools which would benefit from these enactments. Qualifying institutions, under all three segments of the enactment, could be ones that "(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach."

Of course, the characteristics of individual schools may vary widely from that profile. Some 700,000 to 800,000 students, constituting almost 20% of the State's entire elementary and secondary school population, attend over 2,000 nonpublic schools, approximately 85% of which are church affiliated. And while "all or practically all" of the 280 schools entitled to receive "maintenance and repair" grants "are related to the Roman Catholic Church, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episcopal, Seventh Day Adventist, and other church-affiliated schools.[1]

II

It is now firmly established that a law may be one "respecting an establishment of religion" even though its consequence is not to promote a "state religion," *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971), and even though it does not aid one religion more than another but merely benefits all religions alike. It is equally well established, however, that not every law that confers an "indirect," "remote," or "incidental" benefit upon religious institutions is, for that reason alone, constitutionally invalid. What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects. Primary among those evils have been "sponsorship, financial support, and active involvement of the sovereign in religious activity." To pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion.

In applying these criteria to the three distinct forms of aid involved in this case, we need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren. And we do not doubt the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to

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[1] In the fall of 1968, there were 2,038 nonpublic schools in New York State; 1,415 Roman Catholic; 164 Jewish; 59 Lutheran; 49 Episcopal; 37 Seventh Day Adventist; 18 other church affiliated; 296 without religious affiliation.

acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State. Accordingly, we must weigh each of the three aid provisions challenged here against these criteria of effect and entanglement.

A

The "maintenance and repair" provisions of § 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low-income areas. The grants, totaling $30 or $40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

The state officials nevertheless argue that these expenditures for "maintenance and repair" are similar to other financial expenditures approved by this Court. Primarily they rely on *Everson v. Board of Education* [and] *Board of Education v. Allen*. In each of those cases it is true that the Court approved a form of financial assistance which conferred undeniable benefits upon private, sectarian schools. But a close examination of those cases illuminates their distinguishing characteristics.

These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course, it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.

It might be argued, however, that while the New York "maintenance and repair" grants lack specifically articulated secular restrictions, the statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. The legislature's supposition might have been that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep

in sectarian schools. The shortest answer to this argument is that the statute itself allows, as a ceiling, grants satisfying the entire "amount of expenditures for maintenance and repair of such school" providing only that it is neither more than $30 or $40 per pupil nor more than 50% of the comparable public school expenditures. Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education.

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools. We have no occasion, therefore, to consider the further question whether those provisions would also fail to survive scrutiny under the administrative entanglement aspect of the three-part test because assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State.

B

New York's tuition reimbursement program also fails the "effect" test, for much the same reasons that govern its maintenance and repair grants. The state program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation. To qualify, a parent must have earned less than $5,000 in taxable income and must present a tuition bill from a nonpublic school.

There can be no question that these grants could not be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair. In the absence of an effective means of guaranteeing that the state aid derived will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in *Everson*: "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 controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation." It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents. But those decisions make clear that, far from providing a *per se* immunity, the fact that aid is disbursed to parents rather than to schools is only one among many factors to be considered.

In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. Such services, provided in common to all citizens, are "so separate and so indisputably marked off from the religious function" that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize

the loan of religious books, and the State claims no right to distribute religious literature. . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law."[2]

The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid -- to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools -- are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.

Although we think it clear, for the reasons above stated, that New York's tuition grant program fares no better under the "effect" test than its maintenance and repair program, in view of the novelty of the question we will address briefly the subsidiary arguments made by the state officials and intervenors in its defense.

First, it has been suggested that it is of controlling significance that New York's program calls for *reimbursement* for tuition already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payment by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. If the grants are offered as an incentive to parents to send their children to sectarian schools, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.

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[2] Allen and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. We do not agree with the suggestion in the dissent of THE CHIEF JUSTICE that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools "totally at state expense." And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground such action is necessary if the State is to equalize the position of parents who elect such schools -- a result wholly at variance with the Establishment Clause.

Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from 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. Thus, our decision today does not compel the conclusion that the educational assistance provisions of the "G. I. Bill" impermissibly advance religion.

Second, the Majority Leader and President pro tem of the State Senate argues that it is significant here that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious school's total expenses. The New York statute limits reimbursement to 50% of any parent's actual outlay. Additionally, intervenor estimates that only 30% of the total cost of nonpublic education is covered by tuition payments. On the basis of these two statistics, appellees reason that the "maximum tuition reimbursement by the State is thus only 15% of educational costs in the nonpublic schools." And, "since the compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical guarantee of neutrality." It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs, and it can fare no better here. Our cases have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and "entanglement."

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment "is diminished or even denied." This Court repeatedly has recognized that tension inevitably exists between the Free Exercise and Establishment Clauses. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion.

C

Sections 3, 4, and 5 establish a system for providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable debate over what label best fits the New York law. Because of the peculiar nature of the benefit allowed, it is difficult to adopt any single traditional label lifted from the law of income taxation. It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income, prior to computation of the tax due. Its effect is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax "forgiveness" in exchange for performing a specific act which the State desires to encourage -- the usual attribute of a tax credit. We see no reason to select one label over another, as the constitutionality of this hybrid benefit does not turn in any event on the label we accord it.

These sections allow parents of children attending nonpublic elementary and secondary schools to subtract from adjusted gross income a specified amount if they do not receive a tuition reimbursement under § 2, and if they have an adjusted gross income of less than $25,000. The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. Thus, a parent who earns less than $5,000 is

entitled to a tuition reimbursement of $50 if he has one child attending an elementary, nonpublic school, while a parent who earns more (but less than $9,000) is entitled to have a precisely equal amount taken off his tax bill. Additionally, a taxpayer's benefit under these sections is unrelated to, and not reduced by, any deductions to which he may be entitled for charitable contributions to religious institutions.

In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. "In both instances the money involved represents a charge made upon the state for the purpose of religious education."

Appellees defend the tax portion of New York's legislative package on two grounds. First, they contend that it is of controlling significance that the grants or credits are directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements. Our treatment of this issue in Part II-B is applicable here and requires rejection of this claim. Second, appellees place their strongest reliance on *Walz* v. *Tax Comm'n*. We think that *Walz* provides no support for appellees' position. Indeed, its rationale plainly compels the conclusion that New York's tax package violates the Establishment Clause.

Tax exemptions for church property enjoyed an apparently universal approval in this country both before and after the adoption of the First Amendment. We know of no historical precedent for New York's recently promulgated tax relief program. But historical acceptance without more would not alone have sufficed, as "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz*, 397 U.S. at 678. It was the reason underlying that long history of tolerance of tax exemptions for religion that proved controlling. A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion. Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

To be sure, the exemption of church property from taxation conferred a benefit, albeit an indirect and incidental one. Yet that "aid" was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State. The granting of the tax benefits under the New York statute, unlike the exemption, would tend to increase the involvement between Church and State.

One further difference between tax exemptions for church property and tax benefits for parents should be noted. The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead, the exemption covered all property devoted to religious, educational, or charitable purposes. Tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. In terms of the potential divisiveness of any legislative measure the narrowness of the

benefitted class would be an important factor.

In conclusion, we find the *Walz* analogy unpersuasive, and in light of the practical similarity between New York's tax and tuition reimbursement programs, we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.

III

Because we have found that the challenged sections have the impermissible effect of advancing religion, we need not consider whether such aid would result in entanglement of the State with religion. But the importance of the competing societal interests implicated here prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

Few would question most of the legislative findings supporting this statute. We recognized in *Board of Education* v. *Allen* that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," and certainly private parochial schools have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided primarily to afford low-income families the option of determining where their children are to be educated is most appealing. There is no doubt that private schools are confronted with increasingly grave fiscal problems, that resolving these problems by increasing tuition forces parents to turn to public schools, and this exacerbates the problems of public education at the same time that it weakens support for the parochial schools.

These, in summary, are the underlying reasons for the New York legislation. They are substantial reasons. Yet they must be weighed against the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State and which have been regarded from the beginning as among the most cherished features of our constitutional system.

One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program. As Mr. Justice Harlan put it, "what is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."

The Court recently addressed this issue specifically and fully in *Lemon* v. *Kurtzman*. The Court said: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."

The language of the Court applies with peculiar force to the New York statute now before us. Section 1 (grants for maintenance) and § 2 (tuition grants) will require continuing annual appropriations. Sections 3, 4, and 5 (income tax relief) will not necessarily require annual re-examination, but the pressure for frequent enlargement of the relief is predictable. All three of these programs start out at modest levels. But we know from long experience that aid programs tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated

increases. Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private schools, has a strong motivation for increasing this aid as public school costs rise and population increases. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored.

Our examination of New York's aid provisions, in light of all relevant considerations, compels the judgment that each, as written, has a "primary effect that advances religion" and offends the constitutional prohibition against laws "respecting an establishment of religion."

MR. CHIEF JUSTICE BURGER, joined in part by MR. JUSTICE WHITE, and joined by MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I join in that part of the Court's opinion in which holds the New York "maintenance and repair" provision unconstitutional under the Establishment Clause because it is a direct aid to religion. I disagree, however, with the Court's decisions to strike down the New York tuition grant program and the tax relief provisions.

While there is no straight line running through our decisions interpreting the Establishment and Free Exercise Clauses, our cases do, it seems to me, lay down one basic principle: that the Establishment Clause does not forbid governments to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that "aid" religious instruction or worship.

The Court's opinions in both *Everson* and *Allen* recognized that the statutory programs at issue there may well have facilitated the decision of many parents to send their children to religious schools. Notwithstanding, the Court held that such an indirect or incidental "benefit" to the religious institutions that sponsored parochial schools was not a conclusive indicium of a "law respecting an establishment of religion."

The essence of these decisions, I suggest, is that government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions. This fundamental principle ought to be followed here.

The tuition grant and tax relief programs now before us are, in my view, indistinguishable in principle, purpose, and effect from the statutes in *Everson* and *Allen*. In the instant cases as in *Everson* and *Allen*, the States have merely attempted to equalize the costs incurred by parents in obtaining an education for their children. The only discernible difference between the programs in *Everson* and *Allen* and these cases is in the method of the distribution of benefits: here the benefits are given only to parents of private school children, while in *Everson* and *Allen* the benefits were made available to parents of both public and private school children. But to regard that difference as constitutionally meaningful is to exalt form over substance. It is beyond dispute that the parents of public school children in New York presently receive the "benefit" of having their children educated totally at state expense; the statute at issue merely attempt to equalize that "benefit" by giving to parents of private school children, in the form of dollars or tax deductions, what the parents of public school children receive in kind. It is no more than

simple equity to grant partial relief to parents who support the public schools they do not use.

The Court appears to distinguish the New York statute from *Everson* and *Allen* on the ground that here the state aid is not apportioned between the religious and secular activities of the sectarian schools attended by some recipients, while in *Everson* and *Allen* the state aid was purely secular in nature. There are at present many forms of government assistance to individuals that can be used to serve religious ends, such as social security benefits or "G. I. Bill" payments, which are not subject to nonreligious-use restrictions. Yet, I doubt that today's majority would hold those statutes unconstitutional under the Establishment Clause.

Since I am unable to discern in the Court's analysis of *Everson* and *Allen* any neutral principle to explain the result in these cases, I fear that the Court has followed the unsupportable approach of measuring the "effect" of a law by the percentage of recipients who choose to use the money for religious, rather than secular, education. With all due respect, such a consideration is irrelevant to a constitutional determination of the "effect" of a statute. The "primary effect" branch of our test was never intended to vary with the *number* of churches benefitted.

I would uphold the New York statute.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE concur, dissenting in part.

I dissent from those portions of the Court's opinion which strike down §§ 2 through 5. I find both the Court's reasoning and result all but impossible to reconcile with *Walz*, decided only three years ago, and with *Allen* and *Everson*.

I

The opinions in *Walz* make it clear that tax deductions and exemptions, even when directed to religious institutions, occupy quite a different constitutional status under the Religion Clauses than do outright grants to such institutions. Here the effect of the tax benefit is trebly attenuated as compared with the outright exemption considered in *Walz*. There the result was a complete forgiveness of taxes, while here the result is merely a reduction in taxes. There the ultimate benefit was available to an actual house of worship, while here even the ultimate benefit redounds only to a religiously sponsored school. There the churches themselves received the direct reduction in the tax bill, while here it is only the parents of the children who are sent to religiously sponsored schools who receive the direct benefit.

The Court seeks to avoid the controlling effect of *Walz* by comparing its historical background to the relative recency of the challenged deduction plan; by noting that in its historical context, a property tax exemption is religiously neutral, whereas the educational cost deduction here is not; and by finding no substantive difference between a direct reimbursement from the State to parents and the State's abstention from collecting the full tax bill which the parents would otherwise have had to pay.

While it is true that the Court reached its result in *Walz* in part by examining the unbroken history of property tax exemptions for religious organizations in this country, there is no suggestion in the opinion that only those particular tax exemption schemes that have roots in pre-Revolutionary days are sustainable against an Establishment Clause challenge. If long-

established use of a particular tax exemption scheme leads to a holding that the scheme is constitutional, that holding should extend equally to newly devised tax benefit plans which are indistinguishable in principle from those long established.

The Court's statements that "special tax benefits, however, cannot be squared with the principle of neutrality," and that "insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions," are impossible to reconcile with *Walz*. Who can doubt that the tax exemptions which that case upheld were every bit as much of a "special tax benefit" as the New York tax deduction plan, or that the benefits resulting from the exemption in *Walz* had every bit as much tendency to "aid and advance religious institutions" as did New York's plan here?

The Court nonetheless declares that what has been authorized by the legislature is not a true deduction and in substance provides an incentive for parents to send their children to sectarian schools because the amount deductible from adjusted gross income bears no relationship to amounts actually expended for nonpublic education. But the deduction here allowed is analytically no different from any other flat-rate exemptions or deductions. Surely neither the standard deduction, usable by those taxpayers who do not itemize their deductions, nor dependency exemptions, for example, bear any relationship to the actual expenses accrued in earning any of them. Yet none of these could properly be called a reimbursement from the State.

The sole difference between the flat-rate exemptions currently in widespread use and the deduction established in §§ 4 and 5 is that the latter provides a regressive benefit. This legislative judgment, however, is consonant with the State's concern that those at the lower end of the income brackets are less able to exercise freely their consciences by sending their children to nonpublic schools. Regardless of what the Court chooses to call the New York plan, it is still abstention from taxation, and that abstention stands on no different theoretical footing, in terms of running afoul of the Establishment Clause, from any other deduction or exemption currently allowable for religious contributions or activities. The invalidation of the New York plan is directly contrary to this Court's pronouncements in *Walz*.

II

In striking down both plans, the Court places controlling weight on the fact that the State has not purported to restrict to secular purposes either the reimbursements or the money which it has not taxed. This factor assertedly serves to distinguish *Board of Education* v. *Allen*, and *Everson* v. *Board of Education*, and compels the result that inevitably the primary effect of the plans is to provide financial support for sectarian schools.

The reimbursement and tax benefit plans today struck down, no less than the plans in *Everson* and *Allen*, are consistent with the principle of neutrality. New York has recognized that parents who are sending their children to nonpublic schools are rendering the State a service by decreasing the costs of public education. Such parents are nonetheless compelled to support public school services unused by them and to pay for their own children's education. Rather than offering "an incentive to parents to send their children to sectarian schools," New York is effectuating the secular purpose of the equalization of the cost of educating New York children that are borne by parents who send their children to nonpublic schools. As in *Everson* and *Allen*, the impact, if any, on religious education from the aid granted is significantly diminished by the

fact that the benefits go to parents rather than to institutions.

If the Constitution does indeed allow for play in the legislative joints, the Court must distinguish between a new exercise of power within constitutional limits and an exercise of legislative power which transgresses those limits. I believe the Court has failed to make that distinction here, and I therefore dissent.

MR. JUSTICE WHITE, joined in part by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, dissenting.

This Court has held that the Due Process Clause of the Fourteenth Amendment entitles parents to send their children to nonpublic schools, secular or sectarian, if those schools are sufficiently competent to educate the child in the necessary secular subjects. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). About 10% of the Nation's children now take this option. Under state law these children have a right to a free public education and it would not appear unreasonable if the State, relieved of the expense of educating a child in the public school, contributed to the expense of his education elsewhere. The parents of such children pay taxes, including school taxes. Constitutional considerations aside, it would be understandable if a State gave such parents a call on the public treasury up to the amount the parents save the State by not sending their children to public school.

A State should put no unnecessary obstacles in the way of religious training for the young. Positing an obligation on the State to educate its children, which every State acknowledges, it should be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools.

Historically, the States of the Union have not furnished public aid for education in private schools. But in the last few years, as private education, particularly the parochial school system, has encountered financial difficulties, there has developed a variety of programs seeking to extend at least some aid to private educational institutions.

There are, then, the most profound reasons for this Court to proceed with the utmost care. It should not, absent a clear mandate in the Constitution, invalidate these New York statutes and thereby not only scuttle state efforts to hold off serious financial problems in their public schools but also make it more difficult, if not impossible, for parents to follow the dictates of their conscience and seek a religious as well as secular education for their children.

I am quite unreconciled to the Court's decision in *Lemon* v. *Kurtzman*. I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment. I therefore have little difficulty in accepting the New York maintenance grant, which does not approach the actual repair and maintenance cost incurred in connection with the secular education services performed for the State in parochial schools.

The Court strikes down the maintenance law because its "effect is to subsidize and advance the religious mission of sectarian schools," and for the same reason invalidates the tuition grants. But the test is one of "primary" effect not *any* effect. There is no doubt that New York sought to keep the parochial schools system alive and capable of providing adequate secular education. By the same token, preserving the secular functions of these schools is the overriding consequence of these laws and the resulting, but incidental, benefit to religion should not invalidate them.

2. MEEK *v.* PITTENGER, SECRETARY OF EDUCATION
421 U.S. 349 (1975)

MR. JUSTICE STEWART announced the judgment of the Court and delivered the opinion of the Court (Parts I, II, IV, and V), together with an opinion (Part III), in which MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL, joined.

This case requires us to determine once again whether a state law providing assistance to nonpublic, church-related, elementary and secondary schools is constitutional under the Establishment Clause of the First Amendment.

I

With the stated purpose of assuring that every schoolchild in the Commonwealth will equitably share in the benefits of auxiliary services, textbooks, and instructional material provided free of charge to children attending public schools, the Pennsylvania General Assembly in 1972 added Acts 194 and 195 to the Pennsylvania Public School Code of 1949.

Act 194 authorizes the Commonwealth to provide "auxiliary services" to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory-attendance requirements. "Auxiliary services" include counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, "and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." Act 194 specifies that the teaching and services are to be provided in the nonpublic schools themselves by personnel drawn from the appropriate "intermediate unit," part of the public school system of the Commonwealth established to provide special services to local school districts.

Act 195 authorizes the State Secretary of Education, either directly or through the intermediate units, to lend textbooks without charge to children attending nonpublic elementary and secondary schools that meet the Commonwealth's compulsory-attendance requirements. The books that may be lent are limited to those "which are acceptable for use in any public, elementary, or secondary school of the Commonwealth."

Act 195 also authorizes the Secretary of Education, pursuant to requests from the appropriate nonpublic school officials, to lend directly to the nonpublic schools "instructional materials and equipment, useful to the education" of nonpublic school children. "Instructional materials" are defined to include periodicals, photographs, maps, charts, sound recordings, films, "or any other printed and published materials of a similar nature." "Instructional equipment," as defined by the Act, includes projection equipment, recording equipment, and laboratory equipment.

On February 7, 1973, three individuals and four organizations filed a complaint in the District Court challenging the constitutionality of Acts 194 and 195.

II

In judging the constitutionality of the assistance authorized by Acts 194 and 195, the District Court applied the three-part test that has been clearly stated, if not easily applied, by this Court in recent Establishment Clause cases. First, the statute must have a secular legislative purpose.

Second, it must have a "primary effect" that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive government entanglement with religion.

These tests provide the proper framework of analysis for the issues presented in the case before us. It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired.

Primary among the evils against which the Establishment Clause protects "have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' The Court has broadly stated that "[n]o 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." But it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. "The problem, like many problems in constitutional law, is one of degree."

III

The District Court held that the textbook loan provisions of Act 195 are constitutionally indistinguishable from the New York textbook loan program upheld in *Allen*. We agree.

Approval of New York's textbook loan program in *Allen* was based primarily on this Court's decision in *Everson*. The Court in *Allen* found that the New York textbook law "merely makes available to all children the benefits of a general program to lend school books free of charge."

Like the New York program, the textbook provisions of Act 195 extend to all schoolchildren the benefits of Pennsylvania's well-established policy of lending textbooks free of charge to elementary and secondary school students.[1] As in *Allen*, Act 195 provides that the textbooks are to be lent directly to the student, although, again as in *Allen*, the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials. Thus, the financial benefit of Pennsylvania's textbook program, like New York's, is to parents and children, not to the nonpublic schools.[2]

Under New York law the books that could be lent were limited to textbooks "which are

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[1] New York in a single statute authorized the loan of textbooks without charge to students attending both public and nonpublic schools. The Pennsylvania General Assembly has used two separate provisions of the Public School Code of 1949 to accomplish the same result. Pennsylvania Stat. Ann., Tit. 24, § 8-801, requires that textbooks be provided free of charge for use in the Pennsylvania public schools. Act 195 provides the authorization for the loan of textbooks to nonpublic elementary and secondary school students. So long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two.

[2] In Pennsylvania, as in New York, prior to commencement of the state-supported textbook loan program, the parents of nonpublic school children had to purchase their own textbooks.

designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities." Act 195 similarly limits the books that may be lent.[3] Moreover, the record in the case before us, like the record in *Allen,* contains no suggestion that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes.

In sum, the textbook loan provisions of Act 195 are in every material respect identical to the loan program approved in *Allen.* As such, those provisions of Act 195 do not offend the constitutional prohibition against laws "respecting an establishment of religion."

IV

Although textbooks are lent only to students, Act 195 authorizes the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools. The appellants assert that such direct aid to Pennsylvania's nonpublic schools, including church-related institutions, constitutes an impermissible establishment of religion.

Act 195 is accompanied by legislative findings that the welfare of the Commonwealth requires that present and future generations of schoolchildren be assured ample opportunity to develop their intellectual capacities. Act 195 is intended to further that objective by extending the benefits of free educational aids to every schoolchild in the Commonwealth, including nonpublic school students. We accept the legitimacy of this secular legislative purpose. But we agree with the appellants that the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act.[4]

Commonwealth officials, as a matter of state policy, do not inquire into the religious characteristics, if any, of the nonpublic schools requesting aid pursuant to Act 195. The chief administrator of Acts 194 and 195 testified that a school would not be barred from receiving loans of instructional material and equipment even though its dominant purpose was the inculcation of religious values, even if it imposed religious restrictions on admissions or on faculty appointments, and even if it required attendance at classes in theology or at religious services. In fact, of the 1,320 nonpublic schools in Pennsylvania that comply with the requirements of the compulsory-attendance law and thus qualify for aid under Act 195, more than 75% are church-related or religiously affiliated educational institutions. Thus, the primary

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[3] Indeed, under the statutory scheme approved in *Allen,* the books lent to nonpublic school students might never have been approved for use in any public school of the State. The statute permitted the loan of books initially selected for use by the nonpublic schools, subject only to subsequent approval by "any boards of education." In contrast, only those books which have the antecedent approval of Pennsylvania school officials qualify for loans under Act 195.

[4] Because we have concluded that the direct loan of instructional material and equipment to church-related schools has the impermissible effect of advancing religion, there is no need to consider whether such aid would result in excessive entanglement of the Commonwealth with religion through "comprehensive, discriminating, and continuing state surveillance." *Lemon* v. *Kurtzman,* 403 U.S. 602, 619.

beneficiaries of Act 195's instructional material and equipment loan provisions are nonpublic schools with a predominant sectarian character.

It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities - secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school. The indirect and incidental benefits to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion. But the massive aid provided church-related nonpublic schools by Act 195 is neither indirect nor incidental.

For the 1972-1973 school year the Commonwealth authorized just under $12 million of direct aid to the predominantly church-related nonpublic schools of Pennsylvania through the loan of instructional material and equipment pursuant to Act 195. To be sure, the material and equipment that are the subjects of the loan - maps, charts, and laboratory equipment, for example - are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "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," state aid has the primary effect of advancing religion.

The church-related schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." For this reason, Act 195's direct aid to predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity and thus constitutes an impermissible establishment of religion.

V

Unlike Act 195, which provides only for the loan of teaching material and equipment, Act 194 authorizes the Secretary of Education to supply professional staff, as well as supportive materials, equipment, and personnel, to the nonpublic schools of the Commonwealth. The "auxiliary services" authorized by Act 194 - remedial and accelerated instruction, guidance counseling and testing, speech and hearing services - are provided directly to nonpublic school children with the appropriate special need. But the services are provided only on the nonpublic school premises, and only when "requested by nonpublic school representatives."

Act 194 is intended to assure full development of the intellectual capacities of the children of Pennsylvania by extending the benefits of free auxiliary services to all students in the Commonwealth. The appellants concede the validity of this secular legislative purpose. Nonetheless, they argue that Act 194 constitutes an impermissible establishment of religion because the services are provided on the premises of predominantly church-related schools.

We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity. For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained. The prophylactic contacts required to ensure that teachers play a strictly nonideological role necessarily give rise to a constitutionally intolerable degree of entanglement between church and state. The excessive entanglement would be required for Pennsylvania to be "certain," as it must be, that Act 194 personnel do not advance the religious mission of the church-related schools in which they serve.

That Act 194 authorizes state funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case from *Lemon.* Whether the subject is "remedial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities.

The fact that the teachers and counselors providing auxiliary services are [not] employees of the church-related schools in which they work does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.

In addition, Act 194 creates a serious potential for divisive conflict over the issue of aid to religion - "entanglement in the broader sense of continuing political strife." The recurrent nature of the appropriation process guarantees annual reconsideration of Act 194 and the prospect of repeated confrontation between proponents and opponents of the auxiliary-services program. The Act thus provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect. This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological compels the conclusion that Act 194 violates the constitutional prohibition against laws "respecting an establishment of religion."

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I dissent from Part III and the affirmance of the judgment upholding the constitutionality of the textbook provisions of Act 195.

A three-factor test by which to determine the compatibility with the Establishment Clause of state subsidies of sectarian educational institutions has evolved over 50 years. But four years ago, the Court, albeit without express recognition of the fact, added a significant fourth factor to the test: "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." The evaluation of this factor in determining compatibility of a state subsidy law with the Establishment Clause is essential, said the Court.

This factor was key in [*Lemon'* s] determination that Pennsylvania and Rhode Island statutes violated the Establishment Clause. *Nyquist*, decided two years later, emphasized the importance to be attached by judges to this fourth factor.

The Court today also relies on the factor of divisive political potential but only as support for its holding that Act 194 is unconstitutional. Contrary to the plain and explicit teaching of [*Lemon*] and *Nyquist,* however, and inconsistently with its own treatment of Act 194, the plurality, in considering the constitutionality of Act 195 says not a single word about the political-divisiveness factor in upholding the textbook loan program, and makes only a passing reference to the factor in holding that Act 195's program for loans of instructional materials and equipment "constitutes an impermissible establishment of religion."

Giving the factor the weight that [*Lemon*] and *Nyquist* require, compels, in my view the conclusion that the textbook loan program of Act 195, equally with the program for loan of instructional materials and equipment, violates the Establishment Clause.

In sum, I join the Court's opinion as to Parts I, II, IV and V, except that I would go further in Part IV and rest the invalidation of the provisions of Act 195 for loans of instructional materials and equipment also upon the political-divisiveness factor. I dissent from Part III.

MR. CHIEF JUSTICE BURGER, concurring in the judgment in part and dissenting in part.

To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads.

The melancholy consequence of what the Court does today is to force the parent to choose between the "free exercise" of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with - or overcome - serious congenital learning handicaps, through remedial assistance financed by his taxes. One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully

limited aid to children is not a step toward establishing a state religion.

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

I agree with MR. JUSTICE STEWART that [the textbook] program is constitutionally indistinguishable from the New York textbook loan program upheld in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), and on the authority of that case I join the judgment of the Court insofar as it upholds the textbook loan program.

The Court strikes down other provisions of Act 195 dealing with instructional materials and equipment because it finds that they have "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act." This apparently follows from the high percentage of nonpublic schools that are "church-related or religiously affiliated educational institutions." The Court thus again appears to follow "the unsupportable approach of measuring the 'effect' of a law by the percentage of" sectarian schools benefitted. I find that approach to the "primary effect" branch of our three-pronged test no more satisfactory in the context of this instructional materials and equipment program than it was in the context of tuition reimbursement and tax relief.

One need look no further than to the majority opinion for a demonstration of the arbitrariness of the percentage approach to primary effect. In determining the constitutionality of the textbook loan program, the plurality views the program in the context of the State's "well-established policy of lending textbooks free of charge to elementary and secondary school students." But when it comes time to consider the same Act's instructional materials and equipment program, which is not alleged to make available to private schools any materials and equipment that are not provided to public schools, the majority strikes down this program because more than 75% of the nonpublic schools are religiously affiliated.

If the number of sectarian schools were measured as a percentage of all schools, public and private, then no doubt the majority would conclude that the primary effect of the instructional materials and equipment program is not to advance religion. One looks in vain, however, for an explanation of the majority's selection of the number of private schools as the denominator in its instructional materials and equipment calculations.

The failure of the majority to justify the differing approaches to textbooks and instructional materials and equipment in the above respect is symptomatic of its failure even to attempt to distinguish the Pennsylvania textbook loan program, which the plurality upholds, from the Pennsylvania instructional materials and equipment loan program, which the majority finds unconstitutional. I fail to see how the instructional materials and equipment program can be distinguished in any significant respect. Under both programs "ownership remains, at least technically, in the State." Once it is conceded that no danger of diversion exists, it is difficult to articulate any principled basis upon which to distinguish the two Act 195 programs.

The Court eschews its primary-effect analysis in striking down Act 194, and relies instead upon the proposition that the Act "give[s] rise to a constitutionally intolerable degree of entanglement between church and state." Acknowledging that Act 194 authorizes state financing "of teachers only for remedial and exceptional students, and not for normal students participating

in the core curriculum," the Court nonetheless finds this case indistinguishable from *Lemon* v. *Kurtzman* and companion cases, in which salary supplement programs for core curriculum teachers were found unconstitutional. "[A] state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities."

I find this portion of the Court's opinion insupportable as a matter of law. As a matter of constitutional law, the holding by the majority that this case is controlled by *Lemon* and companion cases marks a significant *sub silentio* extension of that 1971 decision. The auxiliary services program differs from the programs struck down in *Lemon* in two important respects. First the opportunities for religious instruction are greatly reduced. Unlike the core curriculum instruction in *Lemon*, "auxiliary services" are defined to embrace a narrower range of services.

Even if the distinction between these services and core curricula is thought to be a matter of degree, the second distinction between the programs involved in *Lemon* and Act 194 is a difference in kind. Act 194 provides that these auxiliary services shall be provided by personnel of the *public* school system. Since the danger of entanglement articulated in *Lemon* flowed from the susceptibility of parochial school teachers to "religious control and discipline," I would have assumed that exorcisation of that constitutional "evil" would lead to a different constitutional result. The Court does not contend that the public school employees who would administer the auxiliary services are subject to "religious control and discipline." The decision of the Court that Act 194 is unconstitutional rests ultimately upon the unsubstantiated factual proposition that "[t]he potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present." "The test [of entanglement] is inescapably one of degree," but if the Court is free to ignore the record, then appellees are left to wonder whether the possibility of meeting the entanglement test is now anything more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California,* 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

I am disturbed as much by the overtones of the Court's opinion as by its holding. The Court apparently believes that the Establishment Clause not only mandates religious neutrality but also requires that this Court throw its weight on the side of those who believe that our society should be a purely secular one. Nothing in the First Amendment requires such an extreme approach to this difficult question, and "[a]ny interpretation of [the Establishment Clause] and the constitutional values it serves must also take account of the free exercise clause and the values it serves." Except insofar as the Court upholds the textbook loan program, I respectfully dissent.

3. WOLMAN *v.* WALTER
433 U.S. 229 (1977)

MR. JUSTICE BLACKMUN delivered the opinion of the Court (Parts I, V, VI, VII, and VIII), together with an opinion (Parts II, III, and IV), in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL joined.

This is still another case presenting the recurrent issue of the limitations imposed by the Establishment Clause on state aid to pupils in church-related elementary and secondary schools. Appellants challenge all but one of the provisions of Ohio Rev. Code Ann. § 3317.06 (Supp.

1976) which authorize various forms of aid.

I

Section 3317.06 was enacted after this Court's May 1975 decision in *Meek* v. *Pittenger,* and is an attempt to conform to that decision. In broad outline, the statute authorizes the State to provide nonpublic school pupils with books, instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation.

The initial biennial appropriation for implementation of the statute was the sum of $88,800,000. Funds so appropriated are paid to the State's public school districts and are then expended by them. All disbursements made with respect to nonpublic schools have their equivalents in disbursements for public schools, and the amount expended per pupil in nonpublic schools may not exceed the amount expended per pupil in the public schools.

The parties stipulated that during the 1974-1975 school year there were 720 chartered nonpublic schools in Ohio. Of these, all but 29 were sectarian. More than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools. All such schools teach the secular subjects required to meet the State's minimum standards. The state-mandated five-hour day is expanded to include, usually, one-half hour of religious instruction. Pupils who are not members of the Catholic faith are not required to attend religion classes or to participate in religious exercises or activities, and no teacher is required to teach religious doctrine as a part of the secular courses taught in the schools.

The District Court concluded: "The character of these schools is substantially comparable to that of the schools involved in *Lemon* v. *Kurtzman,* 403 U.S. 602, 615-618 (1971)."

II

The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.

In the present case we have no difficulty with the first prong of this three-part test. We are satisfied that the challenged statute reflects Ohio's legitimate interest in protecting the health of its youth and in providing a fertile educational environment for all the schoolchildren of the State. As is usual in our cases, the analytical difficulty has to do with the effect and entanglement criteria.

We have acknowledged before, and we do so again here, that the wall of separation that must be maintained between church and state "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon,* 403 U.S. at 614. Nonetheless, the Court's numerous precedents provide substantial guidance. We therefore turn to the task of applying the rules derived from our decisions to the respective provisions of the statute at issue.

III. Textbooks

Section 3317.06 authorizes the expenditure of funds:

"(A) To purchase such secular textbooks as have been approved by the superintendent of

public instruction for use in public schools and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such requests shall be submitted to the local public school district. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district."

In addition, it was stipulated:

"The secular textbooks used in nonpublic schools will be the same as the textbooks used in the public schools of the state. Common suppliers will be used to supply books to both public and nonpublic school pupils."

"Textbooks provided under this Act shall be limited to books, reusable workbooks, or manuals intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil."

This system for the loan of textbooks to individual students bears a striking resemblance to the systems approved in *Allen* and *Meek*.[1] Accordingly, we conclude that § 3317.06 (A) is constitutional.

IV. Testing and Scoring

Section 3317.06 authorizes expenditure of funds:

"(J) To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state."

These tests "are used to measure the progress of students in secular subjects." Nonpublic school personnel are not involved in either the drafting or scoring of the tests. The statute does not authorize any payment to nonpublic school personnel for administering the tests.

There is no question that the State has a substantial interest in insuring that its youth receive an adequate secular education. The State may require that schools that are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction. Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching. Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. We therefore agree that § 3317.06(J) is constitutional.

V. Diagnostic Services

Section 3317.06 authorizes expenditures of funds:

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[1] The Ohio Code provides in separate sections for the loan of textbooks to public school children and to nonpublic school children. The Court observed in *Meek:* "So long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two."

"(D) To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil.

. . .

"(F) To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil."

It will be observed that these speech and hearing and psychological diagnostic services are to be provided within the nonpublic school. It is stipulated, however, that the personnel (with the exception of physicians) who perform the services are employees of the local board of education; that physicians may be hired on a contract basis; that the purpose of these services is to determine the pupil's deficiency or need of assistance; and that treatment of any defect so found would take place off the nonpublic school premises.

Appellants assert that the funding of these services is constitutionally impermissible. They argue that the speech and hearing staff might engage in unrestricted conversation with the pupil and, on occasion, might fail to separate religious instruction from secular responsibilities. They further assert that the communication between the psychological diagnostician and the pupil will provide an impermissible opportunity for the intrusion of religious influence.

The District Court found these dangers so insubstantial as not to render the statute unconstitutional. We agree. This Court's decisions contain a common thread to the effect that the provision of health services to all schoolchildren - public and nonpublic - does not have the primary effect of aiding religion.

Indeed, appellants recognize this fact in not challenging subsection (E) of the statute that authorizes publicly funded physician, nursing, dental, and optometric services in nonpublic schools. We perceive no basis for drawing a different conclusion with respect to diagnostic speech and hearing services and diagnostic psychological services.

The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

We conclude that providing diagnostic services on the nonpublic school premises will not create an impermissible risk of the fostering of ideological views. It follows that there is no need for excessive surveillance, and there will not be impermissible entanglement. We therefore hold that §§ 3317.06 (D) and (F) are constitutional.

VI. Therapeutic Services

Sections 3317.06 (G), (H), (I), and (K) authorize expenditures of funds for certain therapeutic, guidance, and remedial services for students who have been identified as having a

need for specialized attention. Personnel providing the services must be employees of the local board of education or under contract with the State Department of Health. The services are to be performed only in public schools, in public centers, or in mobile units located off the nonpublic school premises.

Appellants concede that the provision of remedial, therapeutic, and guidance services in public schools, public centers, or mobile units is constitutional if both public and nonpublic school students are served simultaneously. Their challenge is limited to the situation where a facility is used to service only nonpublic school students. They argue that any program that isolates sectarian pupils is impermissible because the public employee providing the service might tailor his approach to reflect and reinforce the ideological view of the sectarian school attended by the children. Appellants express particular concern over mobile units because they perceive a danger that such a unit might operate merely as an annex of the school it services.

We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views. In *Meek* the Court acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction and advance religious beliefs in their activities. But the Court emphasized that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise.

The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek*. The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils.

Accordingly, we hold that providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. Sections 3317.06(G), (H), (I), and (K) are constitutional.

VII. Instructional Materials and Equipment

Sections 3317.06(B) and (C) authorize expenditures of funds for the purchase and loan to pupils or their parents upon individual request of instructional materials and instructional equipment of the kind in use in the public schools within the district and which is "incapable of diversion to religious use." Section 3317.06 also provides that the materials and equipment may be stored on the premises of a nonpublic school.

Although the exact nature of the material and equipment is not clearly revealed, the parties have stipulated: "It is expected that materials and equipment loaned to pupils or parents under the new law will be similar to such former materials and equipment except that to the extent that

the law requires that materials and equipment capable of diversion to religious issues will not be supplied." Equipment provided under the predecessor statute included projectors, tape recorders, record players, maps and globes, science kits, weather forecasting charts, and the like. The District Court found the new statute constitutional because the court could not distinguish the loan of material and equipment from the textbook provisions upheld in *Meek* and in *Allen*.

In *Meek,* however, the Court considered the constitutional validity of a direct loan to nonpublic schools of instructional material and equipment, and, despite the apparent secular nature of the goods, held the loan impermissible.

Appellees seek to avoid *Meek* by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek.* Before *Meek* was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of *Meek,* the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.

Indeed, this conclusion is compelled by the Court's prior consideration of an analogous issue in *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973). There the Court considered, among others, a tuition reimbursement program whereby New York gave low-income parents who sent their children to nonpublic schools a direct and unrestricted cash grant of $50 to $100 per child (but no more than 50% of tuition actually paid). The State attempted to justify the program, as Ohio does here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that, unlike the bus program in *Everson* and the book program in *Allen,* there "has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.'" The Court thus found that the grant program served to establish religion. If a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better. Accordingly, we hold §§ 3317.06(B) and (C) to be unconstitutional.[2]

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[2] There is a tension between this result and *Board of Education* v. *Allen*. *Allen* was premised on the view that the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses. *Allen* has remained law, and we now follow as a matter of *stare decisis* the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes. In more recent cases, we have declined to extend that presumption of neutrality to other items in the lower school setting. See *Meek*. It has been argued that the Court should extend *Allen* to cover all items similar to textbooks. When faced, however, with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles announced in our subsequent cases, we choose the latter course.

VIII. Field Trips

Section 3317.06 also authorizes expenditures of funds:

"(L) To provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district. School districts may contract with commercial transportation companies for such transportation service if school district busses are unavailable."

There is no restriction on the timing of field trips; the only restriction on number lies in the parallel the statute draws to field trips provided to public school students in the district. The parties have stipulated that the trips "would consist of visits to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students." The choice of destination will be made by the nonpublic school teacher from a wide range of locations.

The District Court held this feature to be constitutionally indistinguishable from that with which the Court was concerned in *Everson* v. *Board of Education,* 330 U. S. 1 (1947). We do not agree. The critical factors in *Everson* are that the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided.

The Ohio situation is in sharp contrast. First, the nonpublic school controls the timing of the trips and, within a certain range, their frequency and destinations. Thus, the schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid. Second, although a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest; and it ends with a discussion of the experience. The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct. In *Lemon* the Court stated:

"We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral."

Funding of field trips, therefore, must be treated as was the funding of maps and charts in *Meek* v. *Pittenger,* the funding of buildings and tuition in *Committee for Public Education* v. *Nyquist,* and the funding of teacher-prepared tests in *Levitt* v. *Committee for Public Education;* it must be declared an impermissible direct aid to sectarian education.

Moreover, the public school authorities will be unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement. We hold § 3317.06(L) to be unconstitutional.

IX

In summary, we hold constitutional those portions of the Ohio statute authorizing the State to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic

services, and therapeutic and remedial services. We hold unconstitutional those portions relating to instructional materials and equipment and field trip services.

THE CHIEF JUSTICE dissents from Parts VII and VIII of the Court's opinion.

MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST concur in the judgment with respect to textbooks, testing and scoring, and diagnostic and therapeutic services (Parts III, IV, V and VI of the opinion) and dissent from the judgment with respect to instructional materials and equipment and field trips (Parts VII and VIII of the opinion).

MR. JUSTICE BRENNAN, concurring in part and dissenting.

I join Parts I, VII, and VIII of the Court's opinion. I dissent however from Parts II, III, and IV (plurality opinion) and Parts V and VI of the courts opinion. The Court holds that Ohio has managed in these respects to fashion a statute that avoids an effect or entanglement condemned by the Establishment Clause. But ingenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to $88,800,000 (less now the sums appropriated to finance §§ 3317.06(B) andd (C) which today are invalidated) just for the initial biennium. The Court nowhere evaluates this factor in determining the compatibility of the statute with the Establishment Clause, as that Clause requires. Its evaluation compels in my view the conclusion that a divisive political potential of unusual magnitude inheres in the Ohio program. This suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws "respecting an establishment of religion."

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I join Parts I, V, VII, and VIII of the Court's opinion. For the reasons stated below, however, I am unable to join the remainder of the Court's opinion.

The court upholds the textbook loan provision on the precedent of *Board of Education* v. *Allen*. It also recognizes that there is "a tension" between *Allen* and the reasoning of the Court in *Meek* v. *Pittenger*. I would resolve that tension by overruling *Allen*. I am now convinced that *Allen* is largely responsible for reducing the "high and impregnable" wall between church and state erected by the First Amendment to "a blurred, indistinct, and variable barrier" incapable of performing its vital functions of protecting both church and state.

In *Allen,* we upheld a texbook loan program on the assumption that the sectarian school's twin functions of religious instruction and secular education were separable. In *Meek,* we flatly rejected that assumption as a basis for allowing a State to loan secular teaching materials and equipment to such schools.

It is, of course, unquestionable that textbooks are central to the educational process. Under the rationale of *Meek,* therefore, they should not be provided by the State to sectarian schools because "[substantial] aid to the educational function of such schools necessarily results in aid to the sectarian school enterprise as a whole." It is also unquestionable that the cost of textbooks is certain to be substantial. Under the rationale of *Lemon*, therefore, they should not be provided because of the dangers of political "divisiveness on religious lines." I would, accordingly, overrule *Board of Education* v. *Allen* and hold unconstitutional § 3317.06 (A).

By overruling *Allen,* we would free ourselves to draw a line between acceptable and unacceptable forms of aid that would be both capable of consistent application and responsive to the concerns discussed above. That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance. General welfare programs do not provide "[s]ubstantial aid to the educational function" of schools, and therefore do not provide the kind of assistance to the religious mission of sectarian schools we found impermissible in *Meek.* Moreover, because general welfare programs do not assist the sectarian functions of denominational schools, there is no reason to expect that political disputes over the merits of those programs will divide the public along religious lines.

In addition to § 3317.06(A), which authorizes the textbook loan program, paragraphs (B), (C), and (L), held unconstitutional by the Court, clearly fall on the wrong side of the constitutional line I propose. Those paragraphs authorize, respectively, the loan of instructional materials and equipment and the provision of transportation for school field trips. There can be no contention that these programs provide anything other than educational assistance.

I also agree with the Court that the services authorized by paragraphs (D), (F), and (G) are constitutionally permissible. Those services are speech and hearing diagnosis, psychological diagnosis, and psychological and speech and hearing therapy. Like the medical, nursing, dental, and optometric services authorized by paragraph (E) and not challenged by appellants, these services promote the children's health and well-being, and have only an indirect and remote impact on their educational progress.

The Court upholds paragraphs (H), (I), and (K), which it groups with paragraph (G), under the rubric of "therapeutic services." I cannot agree that the services authorized by these three paragraphs should be treated like the psychological services provided by paragraph (G). Paragraph (H) authorizes the provision of guidance and counseling services. The parties stipulated that the functions to be performed by the guidance and counseling personnel would include assisting students in "developing meaningful educational and career goals," and "planning school programs of study." In addition, these personnel will discuss with parents "their children's a) educational progress and needs, b) course selections, c) educational and vocational opportunities and plans, and d) study skills." This description makes clear that paragraph (H) authorizes services that would directly support the educational programs of sectarian schools. It is, therefore, in violation of the First Amendment.

Paragraphs (I) and (K) provide remedial services and programs for disabled children. These paragraphs will fund specialized teachers who will both provide instruction and create instructional plans for use in the students' regular classrooms. These "therapeutic services" are clearly intended to aid the sectarian schools to improve the performance of their students. I would not treat them as if they were programs of physical or psychological therapy.

Finally, the Court upholds paragraph (J), which provides standardized tests and scoring services, on the ground that these tests are clearly nonideological and that the State has an interest in assuring that the education received by sectarian school students meets minimum standards. I do not question the legitimacy of this interest. The record contains no indication that the measurements are taken to assure compliance with state standards rather than for internal

administrative purposes of the schools. To the extent that the testing is done to serve the purposes of the sectarian schools rather than the State, I would hold that its provision by the State violates the First Amendment.

MR. JUSTICE POWELL, concurring in part, concurring in the judgment in part, and dissenting in part.

Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek* v. *Pittenger,* 421 U. S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools... necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind - even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek* itself would have to be overruled, along with *Board of Education* v. *Allen,* and even perhaps *Everson* v. *Board of Education*. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Parochial schools have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes - or even of deep political division along religious lines - is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable. Most of the Court's decision today follows in this tradition, and I join Parts I through VI of the opinion.

With respect to Part VII, I concur only in the judgment. I am not persuaded that all loans of secular instructional material and equipment "inescapably [have] the primary effect of providing a direct and substantial advancement of the sectarian enterprise." If that were the case, then *Meek* surely would have overruled *Allen.* Instead the Court reaffirmed *Allen*, thereby necessarily holding that at least some such loans are permissible - so long as the aid is incapable of diversion to religious uses, and so long as the materials are lent to the individual students or their parents. Here the statute is expressly limited to materials incapable of diversion. Therefore the relevant question is whether the materials are such that they are "furnished for the use of *individual* students and at their request."

The Ohio statute includes some materials such as wall maps, charts, and other classroom paraphernalia for which the concept of a loan to individuals is a transparent fiction. Since the provision makes no attempt to separate these instructional materials from others meaningfully lent to individuals, I agree with the Court that it cannot be sustained. But I would find no

constitutional defect in a properly limited provision lending to the individuals themselves only appropriate instructional materials and equipment.

I dissent as to Part VIII, concerning field trip transportation. The Court writes as though the statute funded the salary of the teacher who takes the students on the outing. In fact only the bus and driver are provided for the limited purpose of movement between the school and the secular destination of the field trip. As I find this aid indistinguishable in principle from that upheld in *Everson*, I would sustain the District Court's judgment approving this part of the Ohio statute.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

The line drawn by the Establishment Clause of the First Amendment must have a fundamental character. It should not differentiate between direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other. For that reason, rather than the three-part test described in Part II of the plurality's opinion, I would adhere to the test enunciated for the Court by Mr. Justice Black: "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." *Everson* v. *Board of Education,* 330 U.S. 1, 16.

Under that test, a state subsidy of sectarian schools is invalid regardless of the form it takes. The financing of buildings, field trips, instructional materials, educational tests, and schoolbooks are all equally invalid. For all give aid to the school's educational mission, which at heart is religious. On the other hand, I am not prepared to exclude the possibility that some parts of the statute before us may be administered in a constitutional manner. The State can plainly provide public health services to children attending nonpublic schools. The diagnostic and therapeutic services described in Parts V and VI of the Court's opinion may fall into this category.

This Court's efforts to improve on the *Everson* test have not proved successful. "Corrosive precedents" have left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways of achieving forbidden ends. What should be a "high and impregnable" wall between church and state, has been reduced to a "'blurred, indistinct, and variable barrier.'" The result has been harm to "both the public and the religion that [this aid] would pretend to serve."

Accordingly, I dissent from Parts II, III, and IV of the plurality's opinion.

4. MUELLER v. ALLEN
463 U.S. 388 (1983)

JUSTICE REHNQUIST delivered the opinion of the Court.

Minnesota, like every other State, provides its citizens with free elementary and secondary schooling. It seems to be agreed that about 820,000 students attended this school system in the most recent school year. During the same year, approximately 91,000 elementary and secondary students attended some 500 privately supported schools located in Minnesota, and about 95% of these students attended schools considering themselves to be sectarian.

Minnesota, by a law originally enacted in 1955 and revised in 1976 and again in 1978,

permits state taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools. A deduction may not exceed $500 per dependent in grades K through 6 and $700 per dependent in grades 7 through 12.[1]

Today's case is no exception to our oft-repeated statement that the Establishment Clause presents difficult questions of interpretation and application. One fixed principle is our consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. For example, it is now well established that a State may reimburse parents for expenses incurred in transporting their children to school, and that it may loan secular textbooks to all schoolchildren within the State.

Notwithstanding the repeated approval given programs such as those in *Allen* and *Everson*, our decisions also have struck down arrangements resembling, in many respects, these forms of assistance. In this case we are asked to decide whether Minnesota's tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down. Petitioners place particular reliance on our decision in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973). As explained below, we conclude that § 290.09, subd. 22, bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions.

Our inquiry in this area has been guided, since *Lemon* v. *Kurtzman*, by the "three-part" test laid down in that case. Our cases have also emphasized that it provides "no more than [a] helpful [signpost]" in dealing with Establishment Clause challenges. With this caveat in mind, we turn to the specific challenges raised against § 290.09, subd. 22, under the *Lemon* framework.

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[1] The statute permits deduction of a range of educational expenses. The District Court found that deductible expenses included: "1. Tuition in the ordinary sense; 2. Tuition to public school students who attend public schools outside their residence school districts; 3. Certain summer school tuition; 4. Tuition charged by a school for slow learner private tutoring services; 5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school; 6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school; 7. Montessori School tuition for grades K through 12; 8. Tuition for driver education when it is part of the school curriculum." In addition, the District Court found that the statutory deduction for "textbooks" included not only "secular textbooks" but also: 1. Cost of tennis shoes and sweatsuits for physical education; 2. Camera rental fees paid to the school for photography classes; 3. Ice skates rental fee paid to the school; 4. Rental fee paid to the school for calculators for mathematics classes; 5. Costs of home economics materials needed to meet minimum requirements; 6. Costs of special metal or wood needed to meet minimum requirements of shop classes; 7. Costs of supplies needed to meet minimum requirements of art classes; 8. Rental fees paid to the school for musical instruments; 9. Cost of pencils and special notebooks required for class."

Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry.

We turn therefore to the more difficult question whether the Minnesota statute has "the primary effect of advancing the sectarian aims of the nonpublic schools." In concluding that it does not, we find several features of the Minnesota tax deduction particularly significant. First is the fact that § 290.09, subd. 22, is only one among many deductions -- such as those for medical expenses and charitable contributions -- available under the Minnesota tax laws. Our decisions consistently have recognized that "[legislatures] have broad latitude in creating classifications and distinctions in tax statutes." Under our prior decisions, the Minnesota Legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.[2]

Other characteristics of § 290.09, subd. 22, argue equally strongly for the provision's constitutionality. Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools.

In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools. This fact had considerable bearing on our decision; we explicitly distinguished both *Allen* and *Everson* on the grounds that "[in] both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." Moreover, we intimated that "public assistance (*e. g*., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted," might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it is to the arrangement struck down in *Nyquist*. A program, like § 290.09, subd. 22, that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We also agree that, by channeling assistance to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to aid given directly to schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children. Where aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of state approval" can be deemed to have been conferred on any particular religion, or on religion generally.

The Establishment Clause of course extends beyond prohibition of a state church or payment

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[2] Our decision in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), is not to the contrary on this point. We expressed considerable doubt there that the "tax benefits" provided by New York law properly could be regarded as parts of a genuine system of tax laws. The fact that the Minnesota plan embodies a "genuine tax deduction" is thus of some relevance.

of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Petitioners argue that, notwithstanding the facial neutrality of § 290.09, subd. 22, in application the statute primarily benefits religious institutions. Petitioners rely on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses, and that other expenses deductible are negligible; moreover, they claim that 96% of the children in private schools in 1978-1979 attended religiously affiliated institutions. Because of this, they reason, the bulk of deductions taken will be claimed by parents of children in sectarian schools.

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled should be of little importance in determining the constitutionality of permitting such relief.

Finally, if parents of children in private schools choose to take especial advantage of § 290.09, subd. 22, it is no doubt due to the fact that they bear a particularly great financial burden in educating their children. More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits provided to the State and all taxpayers by parents sending their children to parochial schools. In the light of all this, we believe it wiser to decline to engage in the type of empirical inquiry into those persons benefitted by state law which petitioners urge.

Thus, we hold that the Minnesota tax deduction for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases.

Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not "excessively entangle" the State in religion. The only plausible source of the "comprehensive, discriminating, and continuing state surveillance" necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. In making this decision, state officials must disallow deductions taken for "instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship." Making decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court.[3]

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[3] No party has urged that the Minnesota plan is invalid because it runs afoul of the rather elusive inquiry, subsumed under the third part of the *Lemon* test, whether the Minnesota statute partakes of the "divisive political potential" condemned in *Lemon*. The argument is advanced, however, by *amici*. This aspect of the "entanglement" inquiry originated with *Lemon*. The

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

The Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so directly or indirectly. In my view, this principle of neutrality forbids not only the tax benefits struck down in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), but any tax benefit, including the tax deduction at issue here, which subsidizes tuition payments to sectarian schools. I also believe that the Establishment Clause prohibits the tax deductions that Minnesota authorizes for the cost of books and other instructional materials used for sectarian purposes.

I

The majority today does not question the continuing vitality of this Court's decision in *Nyquist*. That decision established that a State may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students. *Nyquist* also established that financial aid to parents of students attending parochial schools is no more permissible if it is in the form of a tax credit than if provided in the form of cash payments. Notwithstanding these principles, the Court upholds a statute that provides a tax deduction for the tuition charged by religious schools. The Court concludes that the Minnesota statute is "vitally different" from the statute in *Nyquist*. As demonstrated below, there is no significant difference between the two. The Minnesota tax statute violates the Establishment Clause for the same reason as the statute in *Nyquist*: it has a direct and immediate effect of advancing religion.

A

In calculating their net income for state income tax purposes, Minnesota residents are permitted to deduct the cost of their children's tuition, subject to a ceiling of $500 or $700 per child. Although this tax benefit is available to any parents whose children attend schools which charge tuition, the vast majority of the taxpayers who are eligible are parents whose children attend religious schools. Although the statute also allows a deduction for the tuition expenses of children attending public schools, Minnesota public schools are generally prohibited by law from charging tuition. Public schools may assess tuition only for students accepted from outside the district. In the 1978-1979 school year, only 79 public school students fell into this category.

Like the law involved in *Nyquist*, the Minnesota law can be said to serve a secular purpose: promoting pluralism and diversity among the State's public and nonpublic schools. But the Establishment Clause requires more than a secular purpose. [The] propriety of a legislature's purposes may not immunize from further scrutiny a law which has a primary effect that advances religion." Moreover, even if one "'primary' effect [is] to promote some legitimate end," the legislation is not "immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion."

Court's language in *Lemon* respecting political divisiveness was made in the context of statutes which provided for either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

As we recognized in *Nyquist*, direct government subsidization of parochial school tuition is impermissible because "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." "[Aid] to the educational function of [parochial] schools necessarily results in aid to the school as a whole" because "[the] very purpose of many of those schools is to provide an integrated secular and religious education." For this reason, aid to sectarian schools must be restricted to ensure that it may be not used to further the religious mission of those schools. While "services such as police and fire protection, sewage disposal, and sidewalks" may be provided to parochial schools because this type of assistance is "'marked off from the religious function,'" unrestricted financial assistance may not be provided. "In the absence of an effective means of guaranteeing that the state aid will be used exclusively for secular, neutral, and nonideological purposes, direct aid in whatever form is invalid."

Indirect assistance in the form of financial aid to parents for tuition payments is similarly impermissible because it is not "subject to restrictions" which "'guarantee the separation between secular and religious educational functions and ensure that State financial aid supports only the former.'" By ensuring that parents will be reimbursed for tuition payments, the Minnesota statute requires that taxpayers in general pay for the cost of parochial education and extends a financial "incentive to parents to send their children to sectarian schools."

That parents receive a reduction of their tax liability, rather than a direct reimbursement, is of no greater significance here than it was in *Nyquist*. It is equally irrelevant whether a reduction in taxes takes the form of a tax "credit," a tax "modification," or a tax "deduction." What is of controlling significance is not the form but the "substantive impact" of the financial aid. "[Insofar] as such benefits render assistance to parents who send their children to *sectarian* schools, their purpose and inevitable effect are to aid and advance those religious institutions."

B

The majority attempts to distinguish *Nyquist* by pointing to two differences between the Minnesota program and the program struck down in *Nyquist*. Neither of these distinctions can withstand scrutiny. The majority attempts to distinguish *Nyquist* on the ground that Minnesota makes all parents eligible to deduct up to $500 or $700 for each dependent, whereas the New York law allowed a deduction only for parents whose children attended nonpublic schools. Although Minnesota taxpayers who send their children to local public schools may not deduct tuition expenses because they incur none, they may deduct other expenses, such as the cost of pencils and notebooks. This, in the majority's view, distinguishes the Minnesota scheme.

That the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition. It is simply undeniable that the single largest expense that may be deducted under the Minnesota statute is tuition. The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses. The other deductible expenses are *de minimis* in comparison to tuition expenses.[1]

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[1] Even if the Minnesota statute allowed parents of public school students to deduct expenses that were likely to be equivalent to the tuition expenses of private school students, it

That this deduction has a primary effect of promoting religion can easily be determined. The only factual inquiry necessary is the same as that employed in *Nyquist*: whether the deduction permitted for tuition expenses primarily benefits those who send their children to religious schools. In *Nyquist* we unequivocally rejected any suggestion that, in determining the effect of a tax statute, this Court should look exclusively to what the statute on its face purports to do and ignore the actual operation of the challenged provision. In determining the effect of the New York statute, we emphasized that "virtually all" of the schools receiving direct grants for maintenance and repair were Roman Catholic schools, that reimbursements were given to parents "who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation," that "it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian," and that "tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools."

In this case, it is undisputed that well over 90% of the children attending tuition-charging schools in Minnesota are enrolled in sectarian schools. Any generally available financial assistance for elementary and secondary school tuition expenses mainly will further religious education because the majority of the schools which charge tuition are sectarian.

The majority also asserts that the Minnesota statute is distinguishable from the statute struck down in *Nyquist* in another respect: the tax benefit available under Minnesota law is a "genuine tax deduction." Under the Minnesota law, the amount of the tax benefit varies directly with the amount of the expenditure. Under the New York law, the amount of deduction was not dependent upon the amount actually paid for tuition but was a predetermined amount which depended on the tax bracket of each taxpayer. The deduction was designed to yield roughly the same amount of tax "forgiveness" for each taxpayer.

This is a distinction without a difference. Our prior decisions have rejected the relevance of the majority's formalistic distinction between tax deductions and the tax benefit at issue in *Nyquist*. The deduction afforded by Minnesota law was "designed to yield a [tax benefit] in exchange for performing a specific act which the State desires to encourage." Like the tax benefit in *Nyquist*, the tax deduction at issue here concededly was designed to "[encourage] desirable expenditures for educational purposes." Of equal importance, as the majority also concedes, the "economic [consequence]" of these programs is the same, for in each case the "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools." It was precisely the substantive impact of the financial support, and not its particular form, that rendered the program in *Nyquist* unconstitutional.

C

The majority incorrectly asserts that Minnesota's tax deduction for tuition expenses "bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs

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would still be unconstitutional. Insofar as the Minnesota statute provides a deduction for parochial school tuition, it provides a benefit to parochial schools that furthers the religious mission of those schools. *Nyquist* makes clear that the State may not provide any financial assistance to parochial schools unless that assistance is limited to secular uses.

upheld in our prior decisions." One might as well say that a tangerine bears less resemblance to an orange than to an apple. The two cases relied on by the majority, *Allen* and *Everson*, are inapposite today for precisely the same reasons that they were inapposite in *Nyquist*.

We distinguished these cases in *Nyquist*. Financial assistance for tuition payments has a consequence that "is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. *Such benefits were carefully restricted to the purely secular side of church-affiliated institutions* and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the 'verge' of the constitutionally impermissible."

As previously noted, the Minnesota tuition tax deduction is not available to *all* parents, but only to parents whose children attend schools that charge tuition, which are comprised almost entirely of sectarian schools. More importantly, the assistance to parochial schools as a result of the tax benefit is not restricted, and cannot be restricted, to the secular functions of those schools.

II

In my view, Minnesota's tax deduction for the cost of textbooks and other instructional materials is also constitutionally infirm. The instructional materials which are subsidized by the Minnesota tax deduction plainly may be used to inculcate religious values and belief. In *Meek* v. *Pittenger*, we held that even the use of "wholly neutral, secular instructional material and equipment" by church-related schools contributes to religious instruction because "'[the] secular education those schools provide goes hand in hand with the religious mission.'" In *Wolman* v. *Walter*, we concluded that precisely the same impermissible effect results when the instructional materials are loaned to the pupil or his parent, rather than directly to the schools. We stated that "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." It follows that a tax deduction to offset the cost of purchasing instructional materials for use in sectarian schools, like a loan of such materials to parents, "necessarily results in aid to the sectarian school enterprise as a whole" and is therefore a "substantial advancement of religious activity" that "constitutes an impermissible establishment of religion."

There is no reason to treat Minnesota's tax deduction for textbooks any differently. Secular textbooks, like other secular instructional materials, contribute to the religious mission of the parochial schools that use those books. Although this Court upheld the loan of secular textbooks in *Allen*, the Court believed at that time that it lacked sufficient experience to determine that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public [will always be] instrumental in the teaching of religion." This basis for distinguishing secular instructional materials and secular textbooks is simply untenable, and is inconsistent with many of our more recent decisions concerning state aid to parochial schools.

In any event, the Court's assumption in *Allen* that the textbooks at issue there might be used only for secular education was based on the fact that those very books had been chosen by the State for use in the public schools. In contrast, the Minnesota statute does not limit the tax deduction to books which the State has approved for use in public schools. Rather, it permits a deduction for books that are chosen by the parochial schools themselves.

In my view, the lines drawn in *Nyquist* were drawn on a reasoned basis with appropriate regard for the principles of neutrality embodied by the Establishment Clause. I do not believe

that the same can be said of the lines drawn by the majority today. For the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion.

5. SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS v. BALL
473 U.S. 373 (1985)

JUSTICE BRENNAN delivered the opinion of the Court.

The School District of Grand Rapids, Michigan, adopted two programs in which classes for nonpublic school students are financed by the public school system, taught by teachers hired by the public school system, and conducted in "leased" classrooms in the nonpublic schools. Most of the nonpublic schools involved in the programs are sectarian religious schools. This case raises the question whether these programs impermissibly involve the government in the support of sectarian religious activities and thus violate the Establishment Clause.

I

A

At issue in this case are the Community Education and Shared Time programs offered in the nonpublic schools of Grand Rapids, Michigan. These programs, first instituted in the 1976-1977 school year, provide classes to nonpublic school students at public expense in classrooms located in and leased from the local nonpublic schools.

The Shared Time program offers classes during the regular school day that are intended to be supplementary to the "core curriculum" courses that the State of requires as part of an accredited school program. Among the subjects offered are "remedial" and "enrichment" mathematics, "remedial" and "enrichment" reading, art, music, and physical education. A typical nonpublic school student attends these classes for one or two class periods per week; approximately "ten percent of any given nonpublic school student's time would consist of Shared Time instruction." Although Shared Time is offered only in nonpublic schools, there was testimony that the courses in that program are offered, perhaps in a different form, in the public schools as well.

The Shared Time teachers are full-time employees of the public schools, who often move from classroom to classroom during the course of the school day. A "significant portion" of the teachers (approximately 10%) "previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." The School District of Grand Rapids hires Shared Time teachers in accordance with its ordinary hiring procedures. The public school system apparently provides all of the supplies, materials, and equipment used in connection with Shared Time instruction.

The Community Education program is offered throughout the Grand Rapids community in schools and on other sites, for children as well as adults. The classes at issue here are taught in the nonpublic elementary schools and commence at the conclusion of the regular school day. Among the courses offered are Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model

Building, and Nature Appreciation.

Community Education teachers are part-time public school employees. Community Education courses are completely voluntary and are offered only if 12 or more students enroll. Because a well-known teacher is necessary to attract the requisite number of students, the School District accords a preference in hiring to instructors already teaching within the school. Thus, "virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school."

Both programs are administered similarly. The Director of the program, a public school employee, sends packets of course listings to the participating nonpublic schools before the school year begins. The nonpublic school administrators then decide which courses they want to offer. The Director works out an academic schedule for each school, taking into account the varying religious holidays celebrated by the schools of different denominations.

Nonpublic school administrators decide which classrooms will be used for the programs, and the Director then inspects the facilities and consults with Shared Time teachers to make sure the facilities are satisfactory. The public school system pays the nonpublic schools for the use of the classroom space by entering into "leases" at the rate of $6 per classroom per week. Each room used in the programs has to be free of any crucifix, religious symbol, or artifact, although such religious symbols can be present in the adjoining hallways, corridors, and other facilities used in connection with the program. During the time that a given classroom is being used in the programs, the teacher is required to post a sign stating that it is a "public school classroom."[1]

Although petitioners label the Shared Time and Community Education students as "part-time public school students," the students attending Shared Time and Community Education courses in facilities leased from a nonpublic school are the same students who attend that particular school otherwise. There is no evidence that any public school student has ever attended a Shared Time or Community Education class in a nonpublic school. The District Court found that "[though] Defendants claim the Shared Time program is available to all students, the record is clear that only nonpublic school students wearing the cloak of a 'public school student' can enroll in it." The District Court noted that these "public school" classes, in contrast to ordinary public school classes, are as segregated by religion as are the schools at which they are offered.

Forty of the forty-one schools at which the programs operate are sectarian in character.[2] The schools vary from one another, but substantial evidence suggests that they share deep religious purposes. The District Court found that the schools are "pervasively sectarian," and concluded "without hesitation that the purposes of these schools is to advance their particular religions,"

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[1] The signs read as follows: "GRAND RAPIDS PUBLIC SCHOOLS' ROOM. THIS ROOM HAS BEEN LEASED BY THE GRAND RAPIDS PUBLIC SCHOOL DISTRICT, FOR THE PURPOSE OF CONDUCTING PUBLIC SCHOOL EDUCATIONAL PROGRAMS. THE ACTIVITY IN THIS ROOM IS CONTROLLED SOLELY BY THE GRAND RAPIDS PUBLIC SCHOOL DISTRICT."

[2] Twenty-eight of the schools are Roman Catholic, seven are Christian Reformed, three are Lutheran, one is Seventh Day Adventist, and one is Baptist.

and that "a substantial portion of their functions are subsumed in the religious mission."

II

Since *Everson*, we have often grappled with the problem of state aid to nonpublic, religious schools. We have noted that the three-part test first articulated in *Lemon v. Kurtzman* guides "[the] general nature of our inquiry in this area." These tests "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic. The *Lemon* test concentrates attention on the issues -- purposes, effect, entanglement -- that determine whether a particular state action is an improper "law respecting an establishment of religion." We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria.

As has often been true in school aid cases, there is no dispute that the purpose of the Community Education and Shared Time programs was "manifestly secular." We therefore go on to consider whether the primary or principal effect is to advance or inhibit religion.

Our inquiry must begin with a consideration of the nature of the institutions in which the programs operate. Of the 41 private schools where these "part-time public schools" have operated, 40 are religious schools. At the religious schools here -- as at the sectarian schools that have been the subject of our past cases -- "the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within that institution, the two are inextricably intertwined."

Given that 40 of the 41 schools in this case are thus "pervasively sectarian," the challenged public school programs operating in the religious schools may impermissibly advance religion in three different ways. First, the teachers may become involved in intentionally or inadvertently inculcating religious beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting -- at least in the eyes of impressionable youngsters -- the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the religious mission of the institutions affected.

(1) In *Meek* v. *Pittenger*, 421 U.S. 349 (1975), the Court invalidated a statute providing for the loan of state-paid professional staff -- including teachers -- to nonpublic schools to provide remedial and accelerated instruction, guidance counseling and testing, and other services on the premises of the nonpublic schools. Such a program, if not subjected to a "comprehensive, discriminating, and continuing state surveillance," would entail an unacceptable risk that the state-sponsored instructional personnel would "advance the religious mission of the church-related schools in which they serve." Even though the teachers were paid by the State, "[the] potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present." The program in *Meek*, if not sufficiently monitored, would simply have entailed too great a risk of state-sponsored indoctrination.

The programs before us today share the defect that we identified in *Meek*. With respect to the Community Education program, the District Court found that "virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school." These instructors, many of whom no doubt teach in the religious schools precisely because they are adherents of the controlling denomination and want to serve their religious community zealously, are expected during the regular school day to inculcate their students with the tenets and beliefs of their particular religious faiths. Yet the premise of the program is that those instructors can put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the school day is over. Moreover, they are expected to do so before the same religious school students and in the same religious school classrooms that they employed to advance religious purposes during the "official" school day. Nonetheless, as petitioners themselves asserted, Community Education classes are not specifically monitored for religious content.

We do not question that the dedicated and professional religious school teachers employed by the Community Education program will attempt in good faith to perform their secular mission conscientiously. Nonetheless, there is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular school day will infuse the supposedly secular classes they teach after school. The danger arises "not because the public employee [is] likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course." "The conflict of functions inheres in the situation."

The Shared Time program, though structured somewhat differently, nonetheless also poses a substantial risk of state-sponsored indoctrination. The most important difference between the programs is that most of the instructors in the Shared Time program are full-time teachers hired by the public schools. Moreover, although "virtually every" Community Education instructor is a full-time religious school teacher, only "[a] significant portion" of the Shared Time instructors previously worked in the religious schools.[3] Nonetheless, as with the Community Education program, no attempt is made to monitor the Shared Time courses for religious content.

Thus, despite these differences between the two programs, our holding in *Meek* controls the inquiry with respect to Shared Time, as well as Community Education. Shared Time instructors are teaching academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious school day. The teachers in this program, even more than their Community Education colleagues, are "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing

[3] Approximately 10% of the Shared Time instructors were previously employed by religious schools, and many of these were reassigned back to the school at which they had previously taught.

the indoctrinating effect. As we stated in *Meek*, "[whether] the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." Unlike types of aid that the Court has upheld, such as diagnostic services, there is a "substantial risk" that programs operating in this environment would "be used for religious educational purposes."

Respondents adduced no evidence of specific incidents of religious indoctrination in this case. But the absence of proof of specific incidents is not dispositive. When conducting a supposedly secular class in the pervasively sectarian environment of a religious school, a teacher may knowingly or unwillingly tailor the content of the course to fit the school's announced goals. If so, there is no reason to believe that this kind of ideological influence would be detected or reported by students, by their parents, or by the school system itself. The students are presumably attending religious schools precisely in order to receive religious instruction. After spending the balance of their schoolday in classes heavily influenced by a religious perspective, they would have little motivation or ability to discern improper ideological content that may creep into a Shared Time or Community Education course. Neither their parents nor the parochial schools would have cause to complain if the effect of the publicly supported instruction were to advance the schools' sectarian mission. And the public school system has no incentive to detect or report any specific incidents of improper state-sponsored indoctrination. Thus, the lack of evidence of specific incidents of indoctrination is of little significance.

(2) Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. "[The] mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."

It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state 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 choice.

Our school-aid cases have recognized a sensitivity to the symbolic impact of the union of church and state. Grappling with problems in many ways parallel to those we face today, *McCollum* v. *Board of Education* held that a public school may not permit part-time religious instruction on its premises as a part of the school program, even if participation is voluntary and even if the instruction is conducted only by nonpublic school personnel. Yet in *Zorach* v. *Clauson* the Court held that a similar program conducted off the premises of the public school passed constitutional muster. The difference in symbolic impact helps explain the difference

between the cases. The symbolic connection of church and state in the *McCollum* program presented the students with a graphic symbol of the "concert or union or dependency" of church and state. This very symbolic union was conspicuously absent in the *Zorach* program.

In the programs challenged in this case, the religious school students spend their typical school day moving between religious school and "public school" classes. Both types of classes take place in the same religious school building and both are largely composed of students who are adherents of the same denomination. In this environment, the students would be unlikely to discern the crucial difference between the religious school classes and the "public school" classes, even if the latter were successfully kept free of religious indoctrination. Even the student who notices the "public school" sign would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day. This effect -- the symbolic union of government and religion in one sectarian enterprise -- is an impermissible effect under the Establishment Clause.

(3) In *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the Court stated that "[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." With but one exception, our subsequent cases have struck down attempts by States to make payments out of tax dollars directly to primary or secondary religious educational institutions.

Aside from cash payments, the Court has distinguished between two categories of programs in which public funds are used to finance secular activities that religious schools would otherwise fund. In the first category, the Court has noted "that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." In such "indirect" aid cases, the government has used primarily secular means to accomplish a primarily secular end, and no "primary effect" of advancing religion has thus been found. On this rationale, the Court has upheld loans of secular textbooks and programs providing bus transportation for nonpublic school children.

In the second category, the Court has relied on the Establishment Clause prohibition of forms of aid that provide "direct and substantial advancement of the sectarian enterprise." Under this rationale, the Court has struck down state schemes providing for tuition grants and tax benefits for parents whose children attend religious school and programs providing for "loan" of instructional materials to be used in religious schools.

Thus, the Court has never accepted the mere possibility of subsidization as sufficient to invalidate an aid program. On the other hand, this effect is not wholly unimportant for Establishment Clause purposes. If it were, the public schools could gradually take on themselves the entire responsibility for teaching secular subjects on religious school premises. The question in each case must be whether the effect of the aid is "direct and substantial" or indirect and incidental.[4] "The problem, like many in constitutional law, is one of degree."

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[4] This "indirect subsidy" effect only evokes Establishment Clause concerns when the public funds flow to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." In this case, the District Court explicitly found that 40 of the 41 participating nonpublic schools were pervasively religious in this sense.

In *Meek* and *Wolman*, we held unconstitutional state programs providing for loans of instructional equipment and materials to religious schools, on the ground that the programs advanced the "primary, religion-oriented educational function of the sectarian school." The programs challenged here, which provide teachers in addition to instructional equipment and materials, have a similar -- and forbidden -- effect of advancing religion. This kind of direct aid to the educational function of the religious school is indistinguishable from a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause.

Petitioners claim that the aid here, like the textbooks in *Allen*, flows primarily to the students, not to the religious schools. Of course, all aid to religious schools ultimately "flows to" the students, and petitioners' argument if accepted would validate all forms of nonideological aid to religious schools, including those explicitly rejected in our prior cases. Yet in *Meek*, we held unconstitutional the loan of instructional materials to religious schools and in *Wolman*, we rejected the fiction that a similar program could be saved by masking it as aid to individual students. It follows that the aid here, which includes not only instructional materials but also the provision of instructional services by teachers in the parochial school building, "inescapably [has] the primary effect of providing a direct and substantial advancement of the sectarian enterprise." Where, as here, no meaningful distinction can be made between aid to the student and aid to the school, "the concept of a loan to individuals is a transparent fiction."

Petitioners also argue that this "subsidy" effect is not significant because the Community Education and Shared Time programs supplemented the curriculum with courses not previously offered in the religious schools. We do not find this feature controlling. First, there is no way of knowing whether the religious schools would have offered some or all of these courses if the public school system had not offered them first. The distinction between courses that "supplement" and those that "supplant" the regular curriculum is therefore not nearly as clear as petitioners allege. Second, although the precise courses offered in these programs may have been new to the religious schools, their general subject matter -- reading, mathematics, etc. -- was surely a part of the curriculum in the past, and the concerns of the Establishment Clause may thus be triggered despite the "supplemental" nature of the courses. Third, and most important, petitioners' argument would permit the public schools gradually to take over the entire secular curriculum of the religious school, for the latter could discontinue existing courses so that they might be replaced by a Community Education or Shared Time course with the same content. The average religious school student now spends 10% of the school day in Shared Time classes. But there is no principled basis on which this Court can impose a limit on the percentage of the religious school day that can be subsidized by the public school. To let the genie out of the bottle in this case would be to permit ever larger segments of the religious school curriculum to be turned over to the public school system, thus violating the cardinal principle that the State may not in effect become the prime supporter of the religious school system.

III

We conclude that the challenged programs have the effect of promoting religion in three ways. The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the

provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects. For these reasons, the conclusion is inescapable that the Community Education and Shared Time programs have the "primary or principal" effect of advancing religion, and therefore violate the dictates of the Establishment Clause of the First Amendment.

CHIEF JUSTICE BURGER, concurring in the judgment in part and dissenting in part.

I agree that the Community Education program violates the Establishment Clause. As to the Shared Time program, I dissent for the reasons stated in my opinion in *Aguilar* v. *Felton*.

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

For the reasons stated in my dissenting opinion in *Aguilar* v. *Felton*, I dissent from the Court's holding that the Grand Rapids Shared Time program impermissibly advances religion. Like the New York Title I program, the Grand Rapids Shared Time program employs full-time public school teachers who offer supplemental instruction to parochial school children on the premises of religious schools. Nothing indicates that Shared Time instructors have attempted to proselytize their students. I see no reason why public school teachers in Grand Rapids are any more likely than their counterparts in New York to disobey their instructions.

The Court relies on the District Court's finding that a "significant portion of the Shared Time instructors previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." In fact, only 13 Shared Time instructors have ever been employed by any parochial school, and only a fraction of those 13 now work in a parochial school where they were previously employed. The experience of these few teachers does not significantly increase the risk that the perceived or actual effect of the Shared Time program will be to inculcate religion at public expense. I would uphold the Shared Time program.

I agree with the Court, however, that the Community Education program violates the Establishment Clause. The record indicates that Community Education courses in the parochial schools are overwhelmingly taught by instructors who are current full-time employees of the parochial school. The teachers offer secular subjects to the same students who attend their regular parochial school classes. In addition, the supervisors of the program in the parochial schools are by and large the principals of the very schools where the classes are offered. When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools.

JUSTICE WHITE, dissenting. [This opinion also applies to *Aguilar v. Felton*]

As evidenced by my dissenting opinions in *Lemon* and *Nyquist*, I have long disagreed with the Court's interpretation and application of the Establishment Clause in the context of state aid to private schools. For the reasons stated in those dissents, I am satisfied that what the States

have sought to do in these cases is not forbidden by the Establishment Clause. Hence, I dissent.

JUSTICE REHNQUIST, dissenting. [This opinion also applies to *Aguilar v. Felton*]

A most unfortunate result of this case is that to support its holding the Court, despite its disclaimers, impugns the integrity of public school teachers. They are assumed to be eager inculcators of religious dogma, requiring "ongoing inspection." Not one instance of attempted religious inculcation exists in the records of the cases decided today, even though both the Grand Rapids and New York programs have been in operation for a number of years. I would reverse.

6. AGUILAR v. FELTON
473 U.S. 402 (1985)

JUSTICE BRENNAN delivered the opinion of the Court.

The City of New York uses federal funds to pay the salaries of public employees who teach in parochial schools. In this companion case to *School District of Grand Rapids v. Ball*, we determine whether this practice violates the Establishment Clause.

I

The program at issue in this case, originally enacted as Title I of the Elementary and Secondary Education Act of 1965, authorizes the Secretary of Education to distribute financial assistance to local educational institutions to meet the needs of educationally deprived children from low-income families. The funds are to be appropriated in accordance with programs proposed by local educational agencies and approved by state educational agencies. "To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements in which such children can participate." The proposed programs must also meet the following statutory requirements: the children involved in the program must be educationally deprived, the children must reside in areas comprising a high concentration of low-income families, and the programs must supplement, not supplant, programs that would exist absent funding under Title I.

Since 1966, the City of New York has provided instructional services funded by Title I to parochial school students on the premises of parochial schools. Of those students eligible to receive funds in 1981-1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools. With respect to the religious atmosphere of these schools, "the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values."

The programs conducted at these schools include remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services. These programs are carried out by regular employees of the public schools (teachers, guidance counselors, psychologists, psychiatrists, and social workers) who have volunteered to teach in the parochial schools. The amount of time that each professional spends in the parochial school is determined by the

number of students in the program and the needs of these students.

The City's Bureau of Nonpublic School Reimbursement makes teacher assignments, and the instructors are supervised by field personnel, who attempt to pay at least one unannounced visit per month. The field supervisors, in turn, report to program coordinators, who also pay occasional unannounced supervisory visits to monitor Title I classes in the parochial schools. The professionals in the program are directed to avoid involvement with religious activities within the private schools and to bar religious materials in their classrooms. All material and equipment used in the programs funded under Title I are supplied by the Government and are used only in those programs. The professional personnel are solely responsible for the selection of the students. Additionally, the professionals are informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols.

II

In *School District of Grand Rapids v. Ball*, the Court has today held unconstitutional two remedial and enhancement programs operated by the Grand Rapids Public School District. The New York City programs in this case are very similar to the programs we examined in *Ball*. In both cases, publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both cases, an overwhelming number of the participating private schools are religiously affiliated. In both cases, the publicly funded programs provide not only professional personnel, but also all materials and supplies necessary for the operation of the programs. Finally, the instructors in both cases are told that they are public school employees under the sole control of the public school system.

Appellants attempt to distinguish this case on the ground that the City of New York, unlike Grand Rapids, has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools. At best, the supervision in this case would assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school. But appellants' argument fails in any event, because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine.

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.

In *Lemon* v. *Kurtzman*, the Court held that the supervision necessary to ensure that teachers in parochial schools were not conveying religious messages to their students would constitute the excessive entanglement of church and state. Similarly, in *Meek* v. *Pittenger*, we invalidated a state program that offered guidance, testing, and remedial and therapeutic services performed by public employees on the premises of the parochial schools. As in *Lemon*, we observed that though a comprehensive system of supervision might conceivably prevent teachers from having

the primary effect of advancing religion, such a system would inevitably lead to an unconstitutional administrative entanglement between church and state.

Moreover, our holding in *Meek* invalidating instructional services much like those at issue in this case rested on the ground that the publicly funded teachers were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." The court below found that the schools involved in this case were "well within this characterization." Many of the schools here receive funds and report back to their affiliated church, require attendance at church religious exercises, begin the school day or class period with prayer, and grant preference in admission to members of the sponsoring denominations. In addition, the Catholic schools at issue here, the vast majority of the aided schools, are under the general supervision and control of the local parish.

The critical elements of the entanglement proscribed in *Lemon* and *Meek* are present in this case. First, as noted above, the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message. The scope and duration of New York City's Title I program would require a permanent and pervasive state presence in the sectarian schools receiving aid.

This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes. In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a "religious symbol" and thus off limits in a Title I classroom. In short, the religious school, which has as a primary purpose the advancement of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.

The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in still another way that infringes interests at the heart of the Establishment Clause. Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program. Furthermore, the program necessitates "frequent contacts between the regular and the remedial teachers, in which each side reports on individual student needs, problems encountered, and results achieved."

We have long recognized that underlying the Establishment Clause is "the objective . . . to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." Although "[separation] in this context cannot mean absence of all contact," the detailed monitoring and close administrative contact required to maintain New York City's Title I program can only produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers

of political divisiveness along religious lines increase. At the same time, "[the] picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'"

III

Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate.

JUSTICE POWELL, concurring.

I concur in the Court's opinions and judgments today in this case and in *School District of Grand Rapids* v. *Ball*. I write to emphasize additional reasons why precedents of this Court require us to invalidate these two educational programs that concededly have "done so much good and little, if any, detectable harm."

I agree with the Court that in this case the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools; the same is true in *Ball*. This risk of entanglement is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here. As this Court has recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government. In States such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools. Aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." Although the Court's opinion does not discuss it at length, the potential for such divisiveness is a strong additional reason for holding that the Title I and Grand Rapids programs are invalid on entanglement grounds.

The Title I program at issue in this case also would be invalid under the "effects" prong. As has been discussed thoroughly in *Ball*, with respect to the Grand Rapids programs, the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require. This is not the type of "indirect and incidental effect beneficial to [the] religious institutions" that we suggested in *Nyquist* would survive Establishment Clause scrutiny. Rather, by directly assuming part of the parochial schools' education function, the effect of the Title I aid is "inevitably . . . to subsidize and advance the religious mission of [the] sectarian schools," even though the program provides that only secular subjects will be taught. Because of the predominantly religious nature of the schools, the substantial aid provided by Title I "inescapably results in the direct and substantial advancement of religious activity."

I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs. Our decisions require governments extending aid to parochial schools to tread an extremely narrow line between being certain that the "principal or primary effect" of the aid is not to advance religion, and avoiding excessive entanglement. Nonetheless, the Court has never foreclosed the possibility that some types of aid to parochial

schools could be valid. Our cases have upheld evenhanded secular assistance to both parochial and public school children in some areas. I do not read the Court's opinion as precluding these types of indirect aid to parochial schools. The constitutional defect in the Title I program is that it provides a direct financial subsidy to be administered in significant part by public school teachers within parochial schools -- resulting in both the advancement of religion and forbidden entanglement.

CHIEF JUSTICE BURGER, dissenting.

Under the guise of protecting Americans from the evils of an Established Church, today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I. I share JUSTICE WHITE's concern that the Court's obsession with the criteria identified in *Lemon* v. *Kurtzman* has led to results that are "contrary to the long-range interests of the country." As I wrote in *Wallace* v. *Jaffree*, 472 U.S. 38, 89 (1985) (dissenting opinion), "our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion." Federal programs designed to prevent children from growing up without being able to read effectively are not remotely steps in that direction. It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks, transportation to and from school, and school nursing services.

On the merits of this case, I dissent for the reasons stated in my separate opinion in *Meek* v. *Pittenger*. We have frequently recognized that some interaction between church and state is unavoidable, and that an attempt to eliminate all contact between the two would be both futile and undesirable. The Court today fails to demonstrate how the interaction occasioned by the program at issue presents any threat to the values underlying the Establishment Clause.

JUSTICE REHNQUIST, dissenting.

In this case the Court takes advantage of the "Catch-22" paradox of its own creation, whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement. The Court today strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins as to Parts II and III, dissenting.

Today the Court affirms the holding of the Court of Appeals that public school teachers can offer remedial instruction to disadvantaged students who attend religious schools "only if such instruction [is] afforded at a neutral site off the premises of the religious school." This holding rests on the theory, enunciated in the Court's opinion in *Meek* v. *Pittenger*, that public school teachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state. Even if this theory were valid in the abstract, it cannot validly be applied to New York

City's 19-year-old Title I program. The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion, and thereby demonstrates the flaws of a test that condemns benign cooperation between church and state. I would uphold Congress' efforts to afford remedial instruction to disadvantaged schoolchildren in both public and parochial schools.

I

According to the Court, the New York City Title I program is defective not because it fails the third part of the *Lemon* test: the Title I program allegedly fosters excessive government entanglement with religion. I disagree with the Court's analysis of entanglement, and I question the utility of entanglement as a separate Establishment Clause standard in most cases. Before discussing entanglement, however, it is worthwhile to explore the purpose and effect of the New York City Title I program.

The purpose of Title I is to provide special educational assistance to disadvantaged children who would not otherwise receive it. No party in this Court contends that the purpose of the statute or of the New York City Title I program is to advance or endorse religion.

The Court's discussion of the effect of the New York City program is perfunctory. One need not delve too deeply in the record to understand why the Court does not belabor the effect of the Title I program. The abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York City. As the District Court found: In 19 years there has never been a single incident in which a Title I instructor "subtly or overtly" attempted to "indoctrinate the students in particular religious tenets at public expense."

New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes. They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students. The only type of impermissible effect that arguably could carry over from the *Grand Rapids* decision to this litigation, then, is the effect of subsidizing "the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." That effect is tenuous, however, in light of the statutory directive that Title I funds may be used only to provide services that otherwise would not be available to the participating students. The Secretary of Education has vigorously enforced the requirement that Title I funds supplement rather than supplant the services of local education agencies.

Even if we were to assume that Title I remedial classes in New York City may have duplicated to some extent instruction parochial schools would have offered in the absence of Title I, the Court's delineation of this third type of effect proscribed by the Establishment Clause would be seriously flawed. Our Establishment Clause decisions have not barred remedial assistance to parochial school children, but rather remedial assistance *on the premises of the parochial school*. Under *Wolman* v. *Walter*, the classes prohibited by the Court today would have survived Establishment Clause scrutiny if they had been offered in a neutral setting off the property of the private school. Yet it is difficult to understand why a remedial reading class offered on parochial school premises is any more likely to supplant the secular course offerings

of the parochial school than the same class offered in a portable classroom next to the school.

II

Recognizing the weakness of any claim of an improper purpose or effect, the Court today relies entirely on the entanglement prong of *Lemon* to invalidate the New York City program. This analysis of entanglement, I acknowledge, finds support in some of this Court's precedents. In *Meek* v. *Pittenger*, the Court asserted that it could not rely "on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." Because "a teacher remains a teacher," the Court stated, there remains a risk that teachers will intertwine religious doctrine with secular instruction. The continuing state surveillance necessary to prevent this from occurring would produce undue entanglement of church and state. The Court's opinion in *Meek* further asserted that public instruction on parochial school premises creates a serious risk of divisive political conflict. *Meek*'s analysis of entanglement was reaffirmed in *Wolman*.

I would accord these decisions the appropriate deference commanded by the doctrine of *stare decisis* if I could discern logical support for their analysis. But experience has demonstrated that the analysis in the *Meek* opinion is flawed. At the time *Meek* was decided, thoughtful dissents pointed out the absence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness. Experience has given greater force to the arguments of the dissenting opinions in *Meek*. It is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school. *Meek* is correct in asserting that a teacher of remedial reading "remains a teacher," but surely it is significant that the teacher involved is a professional, full-time public school employee who is unaccustomed to bringing religion into the classroom. Given that not a single incident of religious indoctrination has been identified as occurring in the thousands of classes offered in Grand Rapids and New York City over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated.

Just as the risk that public school teachers in parochial classrooms will inculcate religion has been exaggerated, so has the degree of supervision required to manage that risk. In this respect the New York City Title I program is instructive. Public officials have prepared careful instructions warning public school teachers of their exclusively secular mission. Under the rules, Title I teachers are not accountable to parochial or private school officials; they have sole responsibility for selecting the students who participate in their class, must administer their own tests for determining eligibility, cannot engage in team teaching or cooperative activities with parochial school teachers, must make sure that all materials and equipment they use are not otherwise used by the parochial school, and must not participate in religious activities in the schools or introduce any religious matter into their teaching. To ensure compliance with the rules, a field supervisor and a program coordinator, who are full-time public school employees, make unannounced visits to each teacher's classroom at least once a month.

The Court concludes that this degree of supervision of public school employees by other public school employees constitutes excessive entanglement of church and state. I cannot agree.

The supervision that occurs in New York City's Title I program does not differ significantly from the supervision any public school teacher receives, regardless of the location of the classroom. Even if I remained confident of the usefulness of entanglement as an Establishment Clause test, I would conclude that New York City's efforts to prevent religious indoctrination in Title I classes have been adequate and have not caused excessive institutional entanglement.

The Court's reliance on the potential for political divisiveness as evidence of undue entanglement is also unpersuasive. There is little record support for the proposition that New York City's admirable Title I program has ignited any controversy other than this litigation.

I adhere to the doubts about the entanglement test. My reservations about the entanglement test have come to encompass its institutional aspects as well. Many of the inconsistencies in our Establishment Clause decisions can be ascribed to our insistence that parochial aid programs with a valid purpose and effect may still be invalid by virtue of undue entanglement. For example, we permit a State to pay for bus transportation to a parochial school, but preclude States from providing buses for parochial school field trips. To a great extent, the anomalous results in our Establishment Clause cases are "attributable to [the] 'entanglement' prong."

Pervasive institutional involvement of church and state may remain relevant in deciding the *effect* of a statute, but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute. If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion.

III

Today's ruling does not spell the end of the Title I program for disadvantaged children. The only disadvantaged children who lose under the Court's holding are those in cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school. For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory.

7. 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 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 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."

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. 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 the record shows, vocational assistance provided under the program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided 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 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. On the contrary, aid recipients have full opportunity to expend aid on wholly secular education. 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." 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 aid ultimately flowing to the Inland Empire School of the Bible as resulting from *state* action subsidizing religion. Nor does the circumstance that petitioner has chosen to use neutrally available state aid to help pay for religious education confer any message of state endorsement of religion. Thus, while *amici* supporting respondent are correct that aid to a religious institution unrestricted in its uses, if attributable to the State, is "prohibited under the Establishment Clause" because it may subsidize religious functions, that observation is not apposite to this case. On the facts 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 record in order to consider [other] arguments. We decline petitioner's invitation to leapfrog consideration

[1] We decline to address the "entanglement" issue. As a prudential matter, it would be inappropriate for us to address that question without the benefit of a decision on the issue below.

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.

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. 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 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. The decision rested principally on two 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 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

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

[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 channeled by individual parents and not by the State, making the tax deduction permissible under the "primary effect" test of *Lemon*.

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.* 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 religious school, with a religious career as his goal. This falls precisely within the clear language of the state constitutional prohibition. 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. On October 2, 1989, the U.S. Supreme Court refused to review the decision of the Supreme Court of Washington.

8. 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, pursuant to the Individuals with Disabilities Education Act. We hold that the Establishment Clause does not bar the school district from providing the requested interpreter.

James Zobrest attended 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." The Court of Appeals affirmed. We now reverse.

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

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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.

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 benefitted.'" 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. 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. 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 a teacher or guidance counselor. The Establishment Clause lays down no absolute bar to placing a public employee in a sectarian school. Such a flat rule would exalt form over substance.[2] Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret material presented to the class. Ethical guidelines require interpreters to "transmit everything that is said in exactly the same way it was intended." James' parents have chosen to place him in a pervasively sectarian environment. The sign-language interpreter will neither add to nor subtract from that environment, and hence 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.

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[2] Respondent admits that there would be no problem under the Establishment Clause if IDEA funds went directly to James' parents, who hired the interpreter. ("Then the interpreter would be the student's employee, not the School District's, and governmental involvement would end with the disbursement of funds").

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

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. Petitioner requested the State to supply him with a sign-language interpreter at Salpointe High School. Salpointe is a "pervasively religious" institution where "secular education and advancement of religious values or beliefs are inextricably intertwined." Salpointe's overriding "objective" 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. Salpointe's teachers must sign a Faculty Employment Agreement which requires them to promote the relationship among the religious, the academic, and the extracurricular.

At Salpointe, where the secular and the sectarian are "inextricably intertwined," governmental assistance to the educational function of the school necessarily entails 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, *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 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. And an orthodox Jewish yeshiva might forbid all but kosher food upon its premises. To require public employees to obey such rules would 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.

9. 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 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 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 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, an LEA, applied for Title I funds in 1966 and has grappled ever since with how to provide services to private school students. 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. Employees would be told that (i) they were 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 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 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, 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 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 injunction entered by the District Court on remand. Petitioners argued that relief was proper under Rule 60(b)(5) 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*, 502 U.S. 367 (1992), we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief can show "a significant change either in factual conditions or in law."

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. 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.'" 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 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.

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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* because 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 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. 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.

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 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 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 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 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 require us to conclude that this program also cannot 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*. This change in law entitles petitioners to relief under Rule 60(b)(5). 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.

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 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.

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. 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, 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 their instruction, with a resulting need for monitoring and the certainty of entanglement. What was so remarkable was that the schemes assumed a teaching responsibility indistinguishable from the responsibility of the schools themselves. The obligation of 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.

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. 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. 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. 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.

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 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

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 and the circumscribed role of the signer. On this point, 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. *Ball* held only that when teachers employed

by public schools are placed in religious schools to provide instruction 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 union and implies approval of the sectarian aim.

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.[1] 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

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[1] 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").

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).

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.

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.

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.

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. 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.

10. MITCHELL v. HELMS
530 U.S. 793 (2000)

(Professor's Note: Justice Thomas' opinion is a plurality opinion speaking for four members of the Court and does not represent the view of a majority of the Court. Justice O'Connor's concurring opinion, joined by Justice Breyer, departs in significant ways from the reasoning of Justice Thomas and would decide the case on narrower grounds. Since the vote of at least one more Justice is necessary to form a majority, her views represent the holding of the Court to be followed by lower courts.)

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 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 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 that we considered in *Agostini* v. *Felton*. 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. Chapter 2 provides aid "for the acquisition and use of instructional and educational materials, including library services and 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 dictates that "Congress shall make no law respecting an establishment of religion." In the over 50 years since *Everson*, we have 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 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. To put the point differently, if the government, 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 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." We have viewed as significant whether the "private choices of individual parents" 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.

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

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[1] The majority opinion also noted that only a small portion of the aid would go to religious education, but five Members of the Court thought this point irrelevant.

and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion."

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 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.

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, 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 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 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.

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*

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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 deciding *Witters* differently simply if the State had sent the tuition check directly to whichever school Witters chose to attend.

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 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.

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 -- 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 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 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 describe the school of any religious sect, but the Court eliminated this possibility when 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. 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. 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 provid[es] 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 SEA and the LEA have 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 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 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* 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 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 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 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 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. To put the point differently, if the government, 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 programs in part on the fact that the aid had not been used to advance the religious missions of the recipient schools. Our focus on the lack of such evidence would have been 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 factual premise missing from this case. 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 private-choice programs in *Witters* and *Zobrest*. When the government provides aid directly to the student, 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. 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 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 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 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 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, *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 divertibility is an important consideration.

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 secular restrictions placed on the government assistance. I therefore would not presume that the Chapter 2 aid will 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 is insufficient to affect the constitutional inquiry.

The safeguards employed by the program are constitutionally sufficient. At the federal level, 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." At the state level, 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 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 sufficient to find that the program does not have the impermissible effect of advancing religion. For the same reasons, "this program cannot 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 principle of no aid to religious mission remains the governing understanding of the Establishment Clause as applied to public benefits 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 Court's decisions demonstrate its repeated attempts to isolate considerations relevant in classifying benefits as between those that do not discernibly support 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. 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.

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 marked off from the religious function." *Allen* similarly focused on the fact that the textbooks lent out were "secular" 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 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.

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."

In the days when "neutral" was used in *Everson*'s sense of equipoise, 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 under the recent use of "neutrality" to refer to generality or evenhandedness of distribution. This kind of neutrality is relevant in judging whether a benefit scheme 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 along with other characteristics of aid, its administration, its recipients, or its potential that have been emphasized over the years as indicators of 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, 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.

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."

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 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 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. 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, even the thin record before us reveals that actual diversion occurred.

The aid 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 inherent in the forms of Chapter 2 aid was enhanced by the structure of the program in Jefferson Parish. Requests for specific items came 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 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 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 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. 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 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. 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 software for use on this network.

The plurality readily recognizes that the aid in question here was divertible and that 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.

11. 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 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 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. 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 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 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 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 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 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 July 1999, respondents filed this action seeking to enjoin the program on the ground that it violated the Establishment Clause. The District Court granted summary judgment for respondents. The Court of Appeals affirmed the judgment, finding that the program had the "primary effect" of advancing religion in violation of the Establishment Clause. We 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. 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 that public funds were made available to religious schools "only as a result of numerous, private choices of 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 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 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. 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 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 parents were the ones to select a religious school, 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 is reasonably attributable to the individual recipient, not to the government. It is 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, and thus constitutional. The Ohio program is neutral 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. 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." 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 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 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 "perception that the State is endorsing religious beliefs." But we have repeatedly recognized that no reasonable observer would think a neutral program, where state aid reaches religious schools as a result of the independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. Any objective observer familiar with

the history 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 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, 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, only one of which is a religious school.

Respondents and JUSTICE SOUTER claim that 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. This argument 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 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 different from the program here. *Nyquist* involved a program that gave 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 is the question now before us, and it has since been answered, in *Mueller*, *Witters*, and *Zobrest*. To the extent the scope of *Nyquist* has remained an open question in light of these 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 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, 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 $7,097 per pupil. Even if one assumes 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 funds flowed to religious schools under the voucher program in 1999-2000. The State spent over $1 million more on students in community schools than on students in religious schools. Moreover, the amount spent on religious private schools is minor compared to the $114.8 million spent on students in magnet schools.

Although $8.2 million is no small sum, it pales in comparison to the amount 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 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.

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 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 perspective alarmist claims about implications of the Court's decision.

II

Nor does today's decision signal a major departure from this Court's Establishment Clause jurisprudence. The Court's opinion 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 has the primary effect of advancing or inhibiting religion, or, as I have put it, of "endorsing or disapproving religion." Courts are instructed to consider two factors: first, whether the program administers aid 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 aid. If the answer to either query is "no," the program should be struck down.

JUSTICE SOUTER portrays this as a departure from *Everson*. A fair reading of the holding in that case suggests 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 does not betray *Everson*.

III

There is little question in my mind that the Cleveland voucher program is neutral as between religious and nonreligious schools. JUSTICE SOUTER rejects the Court's notion of neutrality, proposing that neutrality 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 private voucher schools. But JUSTICE SOUTER's notion of neutrality is inconsistent with 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. The 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.

To support his hunch about the effect of the cap on tuition under the voucher program, JUSTICE SOUTER cites national data to suggest that Catholic schools have a cost advantage over other schools. Even if national statistics were relevant, JUSTICE SOUTER ignores evidence that 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.

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.

The more significant finding is that Cleveland parents who use vouchers to send their children to religious 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 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 program. Finally, as demonstrated, the 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. 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 evidence that parents and nonreligious schools view the voucher program and the community schools program as reasonable alternatives.

Considering all the options available to parents whose children are eligible for vouchers, including community and magnet schools, the Court finds that parents have an array of

nonreligious options. 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 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. 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.

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." 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 should be freer to experiment with involvement [in religion] -- on a neutral basis -- than the Federal Government." 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 and the federalism prerogatives of States.

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.

The wisdom of allowing States greater latitude can be easily appreciated in this context. Respondents advocate using the Fourteenth Amendment to handcuff the State's ability to experiment with education. Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform. The program does not force any individual to submit to religious indoctrination. 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 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). 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 results than their public counterparts. The State has a constitutional right to experiment with different programs to promote educational opportunity. That Ohio's program includes successful schools simply indicates that such reform can 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. 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. An individual's life prospects increase with each successfully completed phase of education. 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. 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. 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.

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. 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 and attend private schools that will provide them with a sectarian education. The fact that the vast majority of the voucher recipients who have rejected public education receive religious indoctrination at state expense does, however, support the claim that the law is one "respecting an establishment of religion." Third, the voluntary character of the private choice seems to me quite irrelevant to the question whether the government's choice to pay for religious indoctrination is constitutionally permissible.

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.

"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*, 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 repudiated this statement, let alone, overruled *Everson*.

Today, however, the majority holds that the Establishment Clause is not offended by Ohio's Program, under which students may receive as much as $2,250 in the form of tuition vouchers transferable to religious schools. In Cleveland the overwhelming proportion of 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.

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. My object here is not to give any nuanced exposition, but to set out the 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 nothing but 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. 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 skewed the scheme toward benefitting 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.

Why the majority does not simply accept the fact that the challenge here is to the 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 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. 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 that I think even a genuine choice is up to the task of the Establishment Clause when substantial state funds go to religious teaching; the discussion in Part III 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 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 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 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 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. 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, 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 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 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 *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.

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 indoctrination.

B

It is 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*, 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 for the support of any establishment.'" Madison's objection to three pence has 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 precepts of their faith.

The risk is already being realized. In Ohio, a condition of receiving 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 members of the patron faith. Nor is the antidiscrimination restriction limited to student admission policies: a participating religious school may 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 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 $4,814. 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 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 textbooks that parochial schools would use, how much more

is there reason to wonder when dependence will become great enough to give the State 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. 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. Nor will every taxpayer be content to fund the espousal of a wife's obligation of obedience to her husband, taught in 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 not only because the Free Exercise Clause protects them, 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 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. 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 because I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to this well-intentioned voucher program. By explaining the nature of the concern, I hope to demonstrate why "parental choice" cannot alleviate the constitutional problem.

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." 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 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. 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, 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 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. Catholics sought government support 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. The Court appreciated the religious diversity of American society. It realized that the status quo favored some religions at the expense of others. 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? 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 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. 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, 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 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 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 of current 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.

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*. 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.

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 their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may 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. 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 to avoid this kind of conflict, I respectfully dissent.