LAW & RELIGION

CHAPTER VI: ESTABLISHMENT CLAUSE: GOVERNMENT FINANCING OF RELIGIOUS EDUCATION

Introduction

One category of Establishment Clause case law involves government provision of financial assistance to parochial schools or their students. Three of the early cases in Chapter I fall into this category: *Everson*, *Allen,* and *Lemon*. In the decades 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 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 funding 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. That changed with *Mueller v. Allen*, 463 U.S. 388 (1983). *Mueller* upheld a state tax deduction available to parents for school-related expenses, including tuition, whether a child attended public school or private school and whether the private school was secular or religious. Although not all the Court's decisions after *Mueller* upheld programs that funded parochial schools, either directly or indirectly, 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. *Agostini v. Felton*, which overruled *Aguilar v. Felton*, is one such decision.

1. 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 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." The District Court denied the Rule 60(b) motion because *Aguilar*'s demise had "not yet occurred." The Court of Appeals for the Second Circuit affirmed. We now reverse.

II.

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.

1.

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption in *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.*, 509 U.S. 1 (1993), we examined whether the IDEA [Individuals with Disabilities Education Act] 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*, 474 U.S. 481 (1986), 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."

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. 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." 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 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. 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.

The Court today relies solely on *Zobrest* to support its contention that we have "abandoned the presumption erected in *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." The signer could 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 ignores the careful distinction drawn in *Zobrest* and insists that a 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 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.

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 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.

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 and provided guidance services. Instead of providing a service the school would not otherwise furnish, the Title I services necessarily relieved a religious school of "an expense that it otherwise would have assumed," and freed its funds for other, and sectarian uses.

Finally, instead of aid that comes to the religious school indirectly in the sense that its

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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* on this very point noting 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."

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 JUSTICES STEVENS, SOUTER, and 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. 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.

2. ZELMAN v. SIMMONS-HARRIS
536 U.S. 639 (2002)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families

enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court placed the entire Cleveland school district under state control. The district had failed to meet any of the 18 state standards for minimal acceptable performance. Students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

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

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

The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Any public school located in a school district adjacent to the covered district may also participate. Adjacent public schools are eligible to receive a $2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. All participating schools, whether public or private, are required to accept students in accordance with rules 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 available scholarships exceed the number of low-income children who participate. Where tuition aid is spent depends solely upon where parents choose to enroll their child. If parents choose a private school, checks are payable to parents who endorse the checks over to the school.

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

students receive 75% of that amount.

The program has been in operation within the Cleveland City School District since the 1996-1997 school year. In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. In the 1998-1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999-2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren. That undertaking includes programs governing community and magnet schools. Community schools are funded under state law but are run by their own school boards. These schools enjoy academic independence to hire teachers and to determine their 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 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 [a group of Ohio taxpayers] filed this action in United States District Court, 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 granted certiorari and now reverse.

The Establishment Clause prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. *Agostini* v. *Felton,* 521 U.S. 203, 222-23 (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 v. Allen* (1983); *Witters v. Washington Dept. of Servs. for Blind* (1986); *Zobrest v. Catalina Foothills School Dist.* (1993). 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 the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children." This, we said, ensured that "'no imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools. That the program was one of true private choice was sufficient for the program to survive scrutiny under the Establishment Clause.

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

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

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

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

schools. Because the program ensured that parents were the ones to select a religious school for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.

Mueller, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. It is precisely for these reasons that we have never found a program of true private choice to offend the Establishment Clause.

We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. The Ohio program is neutral in all respects toward religion. It is part of a general undertaking by the State to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families.

There are no "financial incentives" that "skew" the program toward religious schools. Such incentives "[are] not present where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." The program 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 enroll their children in a private school (religious or nonreligious) must copay a portion of the tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they dispel the claim that the program "creates financial incentives for parents to choose a sectarian school."

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

in failed schools, not as an endorsement of religious schooling in general.

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

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

This point is aptly illustrated here. The 96% figure discounts entirely (1) the more than 1,900 Cleveland children enrolled in community schools, (2) the more than 13,000 children enrolled in magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999-2000 school year drops the percentage enrolled in religious schools from 96% to under 20%.

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

JUSTICE O'CONNOR, concurring.

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

I.

These cases are different from prior indirect aid cases in part because a significant portion of

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

Even these numbers do not paint a complete picture. At most $8.2 million of public funds flowed to religious schools under the voucher program in 1999-2000. The State spent over $1 million more on students in community schools than on students in religious private schools because per-pupil aid to community schools is more than double the per-pupil aid to private schools under the voucher program. Moreover, the amount spent on religious private schools is minor compared to the $114.8 million spent on students in the Cleveland magnet schools.

II.

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

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

III.

There is little question in my mind that the voucher program is neutral as between religious schools and nonreligious schools. JUSTICE SOUTER rejects the Court's notion of neutrality, proposing that the neutrality of a program should be gauged by its effects. In particular, a

"neutrality test . . . [should] focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction." JUSTICE SOUTER doubts that the Cleveland program is neutral under this view. He surmises that the cap on tuition that voucher schools may charge low-income students encourages these students to attend religious rather than nonreligious private schools. But JUSTICE SOUTER's notion of neutrality is inconsistent with our case law. As we put it in *Agostini*, government aid must be "available to both religious and secular beneficiaries on a nondiscriminatory basis."

I do not agree that the nonreligious schools have failed to provide Cleveland parents reasonable alternatives to religious schools in the voucher program. For nonreligious schools to qualify as genuine options for parents, they need only be adequate substitutes for religious schools in the eyes of parents. The District Court record demonstrates that nonreligious schools were able to compete effectively with Catholic and other religious schools in the Cleveland voucher program. The best evidence of this is that many parents with vouchers selected nonreligious private schools over religious alternatives and an even larger number of parents send their children to community and magnet schools rather than seeking vouchers at all. Moreover, there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program, let alone a community or magnet school.

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

I find the Court's answer to the question whether parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools persuasive. In looking at the voucher program, all the choices available to potential beneficiaries should be considered. Considering all the educational options available to parents whose children are eligible for vouchers, including community and magnet schools, the Court finds that parents in the Cleveland schools have an array of nonreligious options.

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

I am persuaded that the Cleveland voucher program affords parents of eligible children

genuine nonreligious options and is consistent with the Establishment Clause.

JUSTICE THOMAS, concurring.

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

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

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 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. In the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion] -- on a neutral basis -- than the Federal Government." *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring). Thus, while the Federal Government may "make no law respecting an establishment of religion," the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment 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 in dealing with matters of religion and education can be easily appreciated in this context. Respondents advocate using the Fourteenth Amendment to handcuff the State's ability to experiment with education. But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment. Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform that allows voluntary participation of private and religious schools in

educating poor urban children otherwise condemned to failing public schools. The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children.

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

Ten States have enacted some form of publicly funded private school choice as one means of raising the quality of education provided to underprivileged urban children. These programs address the root of the problem with failing urban public schools that disproportionately affect minority students. School choice programs that involve religious schools appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause. Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disserves those in the greatest need. As Frederick Douglass poignantly noted "no greater benefit can be bestowed upon a long benighted people, than giving to them, as we are here earnestly this day endeavoring to do, the means of an education."

JUSTICE STEVENS, dissenting.

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

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

Second, the wide range of choices that have been made available to students *within the public*

school system has no bearing on the question whether the State may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education. The fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at state expense does, however, support the claim that the law is one "respecting an establishment of religion."

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

For the reasons stated by JUSTICE SOUTER and JUSTICE BREYER, I am convinced that the Court's decision is profoundly misguided. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.

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

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

The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson* v. *Board of Ed. of Ewing,* 330 U.S. 1 (1947). 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."

Today, however, the majority holds that the Establishment Clause is not offended by Ohio's Pilot Project Scholarship Program, under which students may be eligible to receive as much as $2,250 in the form of tuition vouchers transferable to religious schools. In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension.

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

I.

The majority's statements of Establishment Clause doctrine cannot be appreciated without some historical perspective on the Court's announced limitations on government aid to religious education, and its repeated repudiation of limits previously set. Viewed with the necessary generality, the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

II.

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

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). Neutrality in this sense refers, of course, to evenhandedness in setting eligibility as between potential religious and secular recipients of public money. In order to apply the neutrality test, then, it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction. Here, one would ask whether the voucher provisions were written in a way that skewed the scheme toward benefiting religious schools.

This, however, is not what the majority asks. The majority looks not to the provisions for tuition vouchers, but to every provision for educational opportunity. The 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.

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 ignores the reason for having a private choice enquiry in the first place. Cases since *Mueller* have found private choice relevant under a rule that aid to religious schools can be permissible so long as it first passes through the hands of students or parents. The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

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

That is, in fact, just the kind of rhetorical argument that the majority accepts in these cases. If the choice of 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. If the majority wishes to claim that choice is a criterion, it must define choice in a way that can function as a criterion with a practical capacity to screen something out.

If, contrary to the majority, we ask the right question about genuine choice to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher program, 46 of them are religious; 96.6% of all voucher recipients go to religious schools. Unfortunately

for the majority position, there is no explanation for this that suggests the religious direction results simply from free choices by parents.

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

III.

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

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. The Court has found the gross amount unhelpful for Establishment Clause analysis when the aid afforded a benefit solely to one individual, however substantial as to him, but only an incidental benefit to the religious school at which the individual chose to spend the State's money. The majority's reliance on the observations of five Members of the Court in *Witters* as to the irrelevance of substantiality of aid in that case is therefore beside the point in the matter before us, which involves considerable sums of public funds systematically distributed through thousands of students attending religious schools.

The Cleveland voucher program has cost Ohio taxpayers $33 million since its implementation in 1996. 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 majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.

It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme. The first being respect for freedom of conscience. Jefferson described it as the idea that no one "shall be compelled to . . . support any religious worship, place, or ministry whatsoever," and Madison thought it violated by any "'authority which can force a citizen to contribute three pence of his property for the support of any establishment.'" Madison's objection to three pence has 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. Even "the favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation."

The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not "discriminate on the basis of religion," which means the school may not give admission preferences to children who are members of the patron faith. Nor is the State's religious antidiscrimination restriction limited to admission policies: a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job. Indeed, a separate condition that "the school not teach hatred of any person or group on the basis of religion" could prohibit religions from teaching traditionally legitimate articles of faith 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. But given the figures already involved here, there is no question that religious schools in Ohio are on the way to becoming bigger businesses with budgets enhanced to fit their new stream of tax-raised income. The administrators of those same schools are also no doubt following the politics of a move in the Ohio State Senate to raise the current maximum value of a school voucher from $2,250 to the base amount of current state spending on each public school student ($4,814 for the 2001 fiscal year).

When government aid goes up, so does reliance on it; the only thing likely to go down is independence. If Justice Douglas in *Allen* was concerned with state agencies, influenced by powerful religious groups, choosing the textbooks that parochial schools would use, how much more is there reason to wonder when dependence will become great enough to give the State of Ohio an effective veto over basic decisions on the content of curriculums?

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 dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools. Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

If the divisiveness permitted by today's majority is to be avoided in the short term, it will be avoided only by action of the political branches at the state and national levels. Legislatures not

driven to desperation by the problems of public education may be able to see the threat in vouchers negotiable in sectarian schools. 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. I hope that a future Court will reconsider today's dramatic departure from basic Establishment Clause principle.

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

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

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

In part for this reason, the Court's 20th century Establishment Clause cases focused directly upon social conflict, potentially created when government becomes involved in religious education. In *Engel* v. *Vitale*, the Court held that the Establishment Clause forbids prayer in public elementary and secondary schools. It did so in part because it recognized the "anguish, hardship and bitter strife that could come when zealous religious groups struggle with one another to obtain the Government's stamp of approval." In *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), the Court held that the Establishment Clause forbids state funding, through salary supplements, of religious school teachers. It did so in part because of the "threat" that this funding would create religious "divisiveness" that would harm "the normal political process."

When it decided these 20th century Establishment Clause cases, the Court did not deny that an earlier American society might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools -- including the first public schools -- were Protestant in character.

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

These historical circumstances suggest that the Court, applying the Establishment Clause to 20th century American society, faced an interpretive dilemma that was in part practical. The Court appreciated the religious diversity of contemporary American society. It realized that the status quo favored some religions at the expense of others. And it understood the Establishment Clause to prohibit any such favoritism. Yet *how* did the Clause achieve that objective? Did it simply require the government to give each religion an equal chance to introduce religion into the primary schools? 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 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.

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

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

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

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

History suggests that *government funding* of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university.

Vouchers also differ in *degree.* 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.

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 too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. And it does little to ameliorate the entanglement problems or the related problems of social division. 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.

The Court 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. In a society composed of many different religious creeds, I fear that this departure from the Court's earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric. Because I believe the Establishment Clause was written in part to avoid this kind of conflict, I respectfully dissent.