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Increasingly Anachronistic Case against School Vouchers

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THE INCREASINGLY ANACHRONISTIC CASE AGAINST SCHOOL VOUCHERS

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My father spent the last ten weeks of his life in St. Peter's Hospital in Albany, New York. Neither he nor his family had directly selected this hospital; rather, he was there as a result of his physician's admitting privileges. A small Crucifix hung on the wall of every room in which he received treatment. Catholic priests, as well as clergy from other denominations, frequently dropped into rooms at St. Peter's to see if patients needed prayers or other words of comfort. My father was Jewish, and he had not led a religiously observant life, but his childhood experience had brought him close to Catholic clergy.[1] In my presence (and, to my knowledge, throughout his stay), he welcomed the prayers of the priests he encountered at St. Peter's. My father was Medicare-eligible, and the United States eventually paid a very substantial sum to the hospital for the medical care he received in the concluding period of his life.

No Religion Clause scholar or advocate of whom I am aware would argue that government payment to St. Peter's Hospital for the cost of medical service for my father's benefit violated the Establishment Clause. Yet, this expenditure obviously contributed to the financial well-being of a sectarian institution. My father's Medicare eligibility permitted him to utilize, without charge to him, the services of that institution, and those services were rendered in a sectarian religious environment. Indeed, his vulnerability at that moment made him unusually susceptible to the religious influences in that setting, although he was in no way compelled to respond to those stimuli.

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1. At the age of four, my father was misdiagnosed as having an incurable illness, and his impoverished Jewish parents sent him to a charity hospital run by an order of the Catholic Church. He spent the ages of four through seven in that hospital and was attended to each day by Catholic nuns. For the rest of his life, despite continuing Jewish family ties, he displayed little attachment to Judaism, but reacted with energy and enthusiasm whenever he encountered members of Catholic religious orders.

Why are these arrangements uncontroversially accepted in the community of Religion Clause scholars, while comparable arrangements involving elementary and secondary school students produce so much controversy? Why do many of our citizens think that school vouchers and medical vouchers are so different in their constitutional significance?

Impressionability alone cannot sustain the distinction; at the end of life, and in all times of grave illness, hospital patients may be quite as impressionable as young students. Either medical vouchers are constitutionally questionable when they may be used at sectarian hospitals, or the constitutional case against school vouchers cannot effectively be sustained.[2] After years of wrestling with the question, I have come to the conclusion that the constitutional case against school vouchers is extremely weak; indeed, in this article, I question the force of the constitutional case against direct state aid to sectarian elementary and secondary schools. The arguments against vouchers—usually characterized as indirect aid to sectarian schools because families are an intervening force between the state and these schools—and the arguments against direct aid rest on precedents and policies whose contemporary relevance has dwindled dramatically.

The anti-voucher case essentially rests on three legs, each of which is analyzed in separate parts of this essay. The first, discussed in Part I, emphasizes the difference between forbidden, direct aid and permissible, indirect aid by government to religious institutions,[3] and suggests that voucher arrangements are really direct aid in disguise. The second leg, probed in Part II, rests primarily on the asserted non-neutrality of voucher arrangements; that is, it rests on the argument that voucher programs favor religion. The third, building upon the first two, goes to the heart of the matter—it purports to explain precisely why direct aid by the government to religious institutions, performing functions of secular value, is forbidden even if that aid is part of a religion-neutral program. The core argument against direct aid, evaluated critically in Part III, stands upon the case law from *Everson v. Board of Education*[4] to *Lemon v. Kurtzman*[5] and their progeny in the 1970s, and rests heavily upon these twentieth-century deci-

2. The Wisconsin Supreme Court recently arrived at this conclusion in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert denied* 119 S. Ct. 466 (1998).

3. *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (indirect assistance to sectarian schools, by way of state income tax deduction for tuition and other expenses, does not violate the Establishment Clause).

4. 330 U.S. 1 (1947).

5. 403 U.S. 602 (1971).

sions' account of the Virginia version of Establishment Clause history.

I. THE DISTINCTION BETWEEN DIRECT AND INDIRECT AID

Ever since the Supreme Court's decision in *Mueller v. Allen*,[6] upholding state income tax deductions for school expenses typically associated with private, sectarian schools, the distinction between direct and indirect aid has been crucial to the voucher battle. Direct aid, presumptively forbidden, involves a transfer of funds from the government treasury to the coffers of religious institutions without passing through the hands of any citizen-intermediaries. If a state or local government were simply to make an unrestricted cash distribution of $X per enrolled pupil to each accredited school within its jurisdiction, the payments to sectarian schools made under such a program would constitute violations of current Establishment Clause principles. In particular, such aid would be held to either (a) impermissibly advance the school's religious mission, or (b) impermissibly involve the state's agents in monitoring to be sure that no such state-supported religious advancement occurred.[7] If, on the other hand, state or local government makes available to families with children a benefit which may be deployed by the family in favor of a religious institution, *Mueller* suggests that such an arrangement would not violate the Clause. Family-directed aid, even if it has its source in state largesse, benefits religion as the result of private rather than government choice.[8]

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6. 463 U.S. 388 (1983).

7. *See Lemon*, 403 U.S. at 616; *see also* Wolman v. Walter, 433 U.S. 229 (1977) (use of public monies for purchases of instructional materials and equipment for nonpublic schools unconstitutional); Meek v. Pittenger, 421 U.S. 349 (1975) (statute authorizing loan of materials to nonpublic schools violates Establishment Clause). None of these cases involved unrestricted cash grants to parochial schools; all of them assumed that such grants would present clear violations of the Establishment Clause.

8. The leading case to the contrary—upon which voucher opponents heavily rely—is *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), a 5-4 decision in which New York's tax credits, rather than deductions, for parochial school tuition, were held to violate the Establishment Clause, based primarily on the argument that the tax credits were equivalent to tuition grants to a class narrowly defined and dominated by parents of parochial school students. There is real doubt as to whether *Nyquist* would be decided the same way today; the Wisconsin Supreme Court in *Jackson v. Benson* distinguished the New York program invalidated in *Nyquist* on the ground that the Milwaukee program was designed to expand school choices for children in public schools, and therefore did not aid children already in private schools when the program commenced. *See* 578 N.W.2d 602, 614 (Wis. 1998), *cert denied*, 114 S. Ct. 466 (1998).

Accordingly, all voucher plans involve some version of the mechanics of indirection. For example, in the Milwaukee program recently upheld by the Wisconsin Supreme Court,[9] checks to cover voucher payments are made payable to the parent-custodians of the students, but are physically transmitted to the school in which the voucher student is enrolled.[10] The custodian never gets possession of the check; upon enrollment of the student, the custodian simply endorses the check over to the school, which does have possession. Unsurprisingly, this arrangement, which effectively involves the joint consent of school and custodian to effectuate a transfer from state to school, has provoked argument over whether the transfer should be characterized as direct (and therefore forbidden) or indirect (and therefore permissible).

The Wisconsin Supreme Court rather quickly and easily disposed of the argument that "these precautionary provisions . . . amount[ed] to some type of 'sham' to funnel public funds to sectarian private schools."[11] The court emphasized the crucial question was "not to ascertain the path upon which public funds travel . . . but rather to determine who ultimately chooses that path . . . . [N]ot one cent flows from the State to a sectarian private school . . . except as a result of the necessary and intervening choices of individual parents."[12] Accordingly, the court concluded, the program cannot be reasonably viewed as an endorsement of religion.[13]

However convincing the direct-indirect distinction may be,[14] few members of the Supreme Court have ever been persuaded by

9. *See Jackson*, 578 N.W.2d at 602.

10. *See id.* at 609, 618.

11. *Id.* at 618.

12. *Id.*

13. *Id.*

14. As a matter of constitutional policy, there is definitely more to be said for the indirect-direct distinction than the narrow, precedent-oriented approach of the Wisconsin Supreme Court. Direct aid to religious institutions presents dangers less forcefully present than aid controlled by individual choice. First, direct aid tends to favor large religious organizations, with an existing structure of schools, over smaller and more decentralized sects. Second, direct aid is far more likely than its indirect counterpart to be "captured" by the institution's capital expenditure plans; when direct aid fuels capital spending, the likelihood of increased institutional dependence on the state grows. Third, aid funneled through individuals is more likely to produce dynamics of change. Certainly, in a generalized system in which vouchers are made available to all, new schools (sectarian and otherwise) are more likely over time to come into being. When parents can vote the state's money with their children's feet, pre-existing systems of religious education have no political advantage over the long term.

it. The *Mueller v. Allen*[15] Court was divided 5-4, and the dissenters (Justices Brennan, Marshall, Blackmun, and Stevens) opposed both direct and indirect aid to sectarian elementary and secondary schools.[16] A number of other Justices, including Chief Justice Rehnquist, have seemed approving of most forms of both direct and indirect aid.[17] At the time of *Mueller*, Justices Powell and Stewart, and Chief Justice Burger were the only members of the Court who found the distinction dispositive. On today's Court, there is reason to believe that four Justices (Stevens, Souter, Breyer, and Ginsburg) strenuously oppose direct aid, and have their doubts about indirect aid,[18] that Justices Scalia and Thomas,[19] and Chief Justice Rehnquist would permit many forms of both direct and indirect aid, and that only Justices O'Connor and Kennedy might be tempted to draw lines on this basis. Whatever the merits of this way of looking at these issues, few Justices (albeit those with swing votes) have ever believed that this was the key to the problem.

In the end, the argument about "directness" of voucher aid, frequently characterized in terms of form and substance (*i.e.*, the vouchers are "really" direct aid even though they have some of the form of indirect aid), cannot be resolved on its own terms.[20] This is so because the direct-indirect distinction is completely insensitive to the degree of state constraint on private choice. When the state pays its employees a wage, they can spend the money for any lawful purpose, including for the advancement of religion. In such circumstances, the state cannot be held responsible for any religious benefit arising from the unfettered spend-

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15. 463 U.S. 388 (1983).

16. *Id.* at 404 (Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ., dissenting).

17. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 91-107 (1985) (Rehnquist, J., dissenting); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 813 (1973) (White, J., dissenting); Lemon v. Kurtzman, 403 U.S. 602, 660 (1971) (White, J., dissenting).

18. *See, e.g.*, Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 863 (1995) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.).

19. *Id.* at 852 (Thomas, J., concurring). Justice Scalia has repeatedly expressed his disagreement with *Lemon*. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring in judgment); Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting).

20. The voucher debate would not be the first in which distinctions concerning directness and indirectness proved constitutionally unhelpful. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (rejecting approach of direct vs. indirect consequences in measuring the reach of the federal Commerce power).

ing choices of its employees. By contrast, when the state constrains the benefit in certain ways—for example, a state income tax deduction for all charitable contributions—the probability and forseeability of a boost to religion are markedly increased. Contemporary voucher programs tend to constrain yet further, limiting parents to the mix of participating schools, in which sectarian institutions will be heavily represented, at least in the short run. Even with a private choice mechanism, this sectarian predominance among school choices presents a pressing question about the constitutionality of school vouchers.

II. THE SEARCH FOR NEUTRALITY

As suggested at the end of Part I, aid to religious institutions is on safer constitutional footing when it is folded into a larger, more inclusive category of beneficiaries.[21] Aid to religious institutions alone, even if channeled through individuals, carries the strong appearance of government intent to advance the cause of religion qua religion. Aid to a more general group of private hospitals, post-secondary schools, or family service agencies, even if these classifications include religious enterprises, is much more readily viewed as government support for a social purpose independent of religion. This way of considering the problem is revealing; it suggests that government objectives, rather than policy consequences, are constitutionally controlling. Even in a religion-neutral scheme with a broad beneficiary class, tax exemptions, government subsidies, and government services will put religious institutions in a better position than they would be in the absence of such government largesse.

That the consequential advancement of religious institutions is not constitutionally fatal in and of itself creates several puzzles. First, it leaves unexplained why direct aid to sectarian elementary and secondary schools should be forbidden when that aid falls within a larger, neutral category of aid to all schools. Second, and closely related to the first, it leaves unasked a crucial question about the meaning of neutrality. The conception of neutrality upon which the pro-aid position depends is formal; so long as the category of beneficiary institutions is drawn to include nonreligious and religious institutions, formal neutrality is satisfied. Critics of this approach, however, focus upon the substantive distribution achieved in fact by such programs; if the great bulk of beneficiaries are religious institutions, the critics believe we

21. Virtually all of the Justices seem to subscribe to this theme. *See, e.g.*, Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994); *Rosenberger*, 515 U.S. at 819; Bowen v. Kendrick, 487 U.S. 589 (1988).

should pierce the veil of formality and view the program as substantively nonneutral and therefore forbidden.[22]

As some scholars have emphasized, constitutional neutrality might be understood in very different terms than those presented by a debate about the formal description of the beneficiary category. One alternative approach emphasizes the behavioral incentives created by state policy; its advocates argue that neutrality should entail that the state not create incentives for or against religious choice.[23] The combination of compulsory education and free public schools creates powerful incentives to parents to select a secular option.[24] An incentive-focused theory of neutrality suggests that aid to sectarian schools is constitutionally required, and at the very least, constitutionally permitted.

A third, quite contrary approach to neutrality proceeds by redescribing the baseline from which neutrality is calculated. Voucher opponents argue that the provision of free secular education, long established by custom and practice in the United States, should be viewed as the baseline condition, departures from which are seen as nonneutral. On this view, vouchers can be seen as creating new, impermissible incentives to choose religious education instead of the secular, baseline alternative.[25]

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22. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 404 (1983) (Marshall, J., dissenting).

23. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Towards Religion*, 39 DEPAUL L. REV. 993 (1990). For an unusual and provocative slice through the question of neutrality, see Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991).

24. If extended to fields beyond those in which participation is compelled, the incentive neutrality theory has radical consequences. To thus extend the theory's premises is to require state financing of the religious variant of every enterprise of which there is a free or lower-than-market cost option provided by government. Universities, mental hospitals, cemeteries, family service organizations, and many more enterprises have public sector and religious parallels. To go down this road is to burden government with multiple financing obligations, or to drive the government entirely out of various enterprises. A commitment to incentive neutrality thus might foster an odd and dramatic transformation from a state of affairs in which government could not aid religious institutions to one in which the obligation to avoid disincentives to religious choice proves so overwhelming as to usher in the night watchman state.

25. *See* Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 72-73 (1993). A different approach to the problem is offered in Kathleen Sullivan, *Parades, Public Squares, and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243 (1996). Professor Sullivan argues that elementary and secondary education are forms of government speech (even if privately delivered) because of compulsory attendance and state regulation of curriculum. From this premise, she

Because the substantial majority of participating schools in the Milwaukee system are sectarian schools,[26] the operation of the Milwaukee voucher system can be characterized as creating incentives to choose sectarian education over its secular counterparts, public or private.

Notice the difficulties of this latter argument for the nonneutrality of vouchers. Its measuring stick is laid against departures from free secular education. But why should existing institutions of this sort establish a state of affairs used to measure neutrality? The current system of property tax exemptions for charitable uses includes religious uses; if the current system did not, would we think that a system of tax exemptions for secular charity was constitutionally neutral toward religion? Or would we see what would seem plain—that is, that our existing structures sharply preferred the nonreligious to the religious? To put it differently, in such a world, the baseline would be pro-secular nonneutrality, and every attempt to equalize the benefits between religious and secular institutions would be viewed as a nonneutral favoring of religion.[27]

Moreover, if free secular education is to be accepted as the baseline, the question remains as to how to characterize the change of affairs implemented by a voucher system like Milwaukee's. In static terms, the current profile of private schools eligible to participate in the voucher program suggests that some voucher students are being moved toward religion; roughly three-quarters of the participating schools are sectarian.[28] Two additional elements of the story, however, need to be factored

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concludes that government need not and may not finance religious education at the elementary and secondary level. For a comprehensive general statement of the view that secularity enjoys a constitutionally privileged position, see Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992). For a sharp rejoinder to Professor Sullivan, see Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 133 (1992) ("To permit religious choices only at the cost of forfeiting an equal share in public goods is not freedom of religion.").

26. Of the 122 private schools eligible to participate in the Milwaukee program, eighty-nine are sectarian. *See* Jackson v. Benson, 578 N.W.2d 602, 619 n.17 (Wis. 1998). Nevertheless, the court in *Jackson* held the system as a whole to be neutral, because voucher-eligible students had a choice among sectarian voucher schools, nonsectarian voucher schools, and free public schools in Milwaukee. *See id.* at 617-19.

27. The United States Supreme Court's recent decisions in *Lamb's Chapel* and *Rosenberger* plainly reject this proposition in favor of its exact opposite—that is, the exclusion of religious perspectives from certain government subsidies is forbidden by the Constitution. *See Rosenberger*, 515 U.S. at 828-37; *Lamb's Chapel*, 508 U.S. at 393-95.

28. *See Jackson*, 578 N.W.2d at 619.

into the analysis. First, the possibility of dynamic change over time in the composition of participating schools may move the incentive effects back toward neutral. As the quantity and quality of secular private schools increase, the religious incentives in the scheme decrease; put differently, otherwise identical voucher programs will be more or less religiously neutral, depending upon the mix of available schools.[29]

Second, the incentive effects will differ depending upon the extent to which parents desire their children to participate in the program of religious instruction at a given sectarian school. The Milwaukee program forbids participating schools from requiring religious studies or activities by voucher students.[30] On the Milwaukee facts, the religious incentives (as compared to the educational incentives) to choose sectarian schools may be very weak, nonexistent, or even slightly negative, and the religious consequences may be slender indeed.[31]

In the end, arguments about neutrality are unsatisfying and unresolvable. Voucher proponents believe that free public schools represent non-neutral favoring of irreligion, and voucher opponents believe that vouchers nonneutrally favor religion. Both may be right, but only because they view the problem from their own, contested vantage point. What is undeniable, however, is that the current structure of Religion Clause law, which leads to the lingering constitutional doubts about vouchers, is asymmetrical. On the "rights side"—that is, with respect to issues

29. When aid is indirect, current law precludes this mix from affecting the constitutional outcome. *See* Mueller v. Allen, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

30. *See Jackson*, 578 N.W.2d at 609.

31. A report on the Milwaukee program asserts that almost three-quarters of the participants have been African-American. *See LaFollette Public Affairs Report*, (visited Mar. 3, 1999) <http://www.lafollette.wisc.edu/outreach/pubs/fifthyear/report.htm>. Nationwide, one-quarter of Catholic school students are non-white (African-American, Hispanic-American, Asian-American) and one-half of these are non-Catholic. *See* David Baker & Cornelius Riordan, *The "Eliting" of the Common American Catholic School and the National Education Crisis*, PHI DELTA KAPPAN, Sept. 1998, at 16. Most of the Hispanic students in Catholic schools are Catholic; most of the African-American students in Catholic schools are not. *See* JOHN J. CONVEY, CATHOLIC SCHOOLS MAKE A DIFFERENCE: 25 YEARS OF RESEARCH 42 (1992); *see also* ANTHONY S. BRYK ET AL., CATHOLIC SCHOOLS AND THE COMMON GOOD 69 (1993); Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1387-88 n.119 (1981). To the extent that the Milwaukee program funneled Protestant African-Americans to Catholic schools, the religious disincentives may have outweighed the religious incentives for family choice of a particular school.

of leaving families free to choose among market alternatives for educating their children, the existing legal framework is scrupulously neutral between religious and nonreligious schools. If one can afford sectarian school, one can find and buy that option, and the state may not eliminate it.[32] On the "benefits side," however—that is, the body of Establishment Clause principles governing the distribution of state largesse—the current law favors secular institutions by its restrictiveness on state assistance to religious institutions performing comparable functions.

Moreover, this asymmetry has over time been narrowed almost entirely to the field of elementary and secondary education. The state may give grants to church programs for educating adolescents on matters of sexuality and pregnancy, so long as the programs are not religiously oriented.[33] The state may provide grants to colleges and universities, so long as they are not "pervasively sectarian," for secular educational purposes,[34] and the state may help finance buildings on the campuses of religiously affiliated colleges, so long as the school promises not to use these buildings for sectarian purposes.[35] Most recently and stunningly, the Supreme Court has held that state universities that finance journals of student opinion must include journals with a religious perspective.[36] Tuition vouchers at the college and university level have existed for years, and these programs routinely include sectarian schools.[37]

To put it more starkly, the area of financing elementary and secondary education is a constitutional anomaly, and growing more so with each Supreme Court term. The Supreme Court's recent ruling in *Agostini v. Felton*,[38] overruling its decade-old deci-

32. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

33. *See* Bowen v. Kendrick, 487 U.S. 589 (1988).

34. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 755 (1976). *Roemer* played a prominent part in the Fourth Circuit's recent decision to remand a lower court ruling, upholding a grant denial, for further findings on the issue of whether a particular college is "pervasively sectarian," a finding which will disqualify a post-secondary school from state assistance. *See* Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998).

35. *See, e.g.*, Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

36. *See Rosenberger*, 515 U.S. at 819.

37. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986). New York State has for many years operated its Regents Scholarship program, which provides tuition vouchers to New York residents attending in-state colleges and universities, including religiously affiliated ones. *See* N.Y. EDUC. LAW §§ 601, 605a (McKinney 1998).

38. 521 U.S. 203 (1997) (overruling *Aguilar* and declaring the permissibility of providing remedial education delivered by public employees on site at sectarian schools). For a critique of *Agostini* and an attempt to

sion in *Aguilar v. Felton*,[39] has only exacerbated the confusion in the field, as any follower of lower court decisions on aid to sectarian schools can confirm.[40] Are there arguments from earlier precedent, or from original constitutional history, that may help explain this difference in treatment between these financing questions and others, which on the surface seem indistinguishable?

III. THE CRUMBLING ARGUMENT FROM PRECEDENT—*EVERSON*, *LEMON*, AND THEIR PROGENY

All of the doctrinal machinery, discussed above, that focuses on neutrality and indirectness of aid is driven by the strictures contained in the line of Supreme Court decisions from *Everson* (1948) to *Lemon v. Kurtzman* (1971) and their progeny from the 1970s. These cases, all of which but *Everson* involve direct aid to elementary and secondary schools, reflect state attempts to aid an overwhelmingly Catholic set of private schools.[41] Justice Jackson's dissenting opinion in *Everson*,[42] and Chief Justice Burger's opinion for the Court in *Lemon*,[43] are open and conspicuous tracts about the pervasive religious indoctrination thought to accompany the system of Catholic education. The principles generated by these two cases rest entirely upon judicial perceptions of the utter inseparability of religion from education in the settings of such schools. Catholic education is held out by Justice Jackson as the engine that fuels intergenerational transmission of the faith, and Chief Justice Burger similarly emphasizes the

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rehabilitate a strong version of the no-aid principle, see Gary Mozer, Note, *The Crumbling Wall Between Church and State:* Agostini v. Felton, *Aid to Parochial Schools, and the Establishment Clause in the Twenty-First Century*, 31 CONN. L. REV. 337 (1998).

39. 473 U.S. 402 (1985) (holding that the provision of remedial education by public employees on site at sectarian schools violates the Establishment Clause).

40. For good illustrations of the difficulties lower courts have had in applying the conflicting welter of Supreme Court decisions in this area, see *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998); *Walker v. San Francisco Unified School District*, 46 F.3d 1449 (1995); see also *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998). In each of these three cases, the courts of appeals struggled with questions arising from the Supreme Court's inconsistent precedents and recent but incomplete movement in the direction of the permissibility of aid.

41. The transportation assistance to families of schoolchildren, at issue in *Everson v. Board of Education*, 330 U.S. 1 (1947), was explicitly limited by local resolution to public school students and Catholic school students.

42. *See id.* at 18-28 (Jackson, J., dissenting).

43. *See* Lemon v. Kurtzman, 403 U.S. 602, 606-25 (1971). *See also id.* at 625-42 (Douglas, J., concurring).

degree, pervasiveness, and missionary sweep of Catholic elementary and secondary education. These are inquiries into the sociology of a particular faith, and arguably prejudiced ones at that, masquerading as an inquiry into the meaning of the Constitution.

The Protestant paranoia fueled by waves of Catholic immigration to the U.S., beginning in the mid-nineteenth century, cannot form the basis of a stable constitutional principle,[44] and the stability of the principle has been undermined by the amelioration of those concerns. From the advent of publicly supported, compulsory education until very recently, aid to sectarian schools primarily meant aid to Catholic schools as an enterprise to rival publicly supported, essentially Protestant schools. But the anti-Catholic prejudice that drove this aspect of separationism has been progressively undermined in the last forty years. The election of John Kennedy was among the key ingredients of the change, as was the increased consciousness of prejudice that the civil rights movement provoked. The pronouncement of the church itself, in Vatican II's Declaration of Religious Freedom, in favor of religious liberty for all and church-state separation in the modern world, helped reassure non-Catholics that the church was no longer engaged in a campaign to dominate secular institutions.[45]

The suburbanization and upward mobility of American Catholics has also been a major contributing force;[46] as Catholics have left inner cities, the bastions of parish schools, they have become less inclined toward traditional participation in the Church, including educating their children in the prescribed sectarian way.[47] As a result of this migration, Catholic schools in the inner cities have been forced to become more ecumenical in their approach in order to attract enough students, a significant

44. The best documentation and analysis of this phenomenon will soon be forthcoming in my colleague Philip Hamburger's work on separation of church and state. *See also* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AMER. J. LEG. HIST. 38 (1992).

45. BRYK ET AL., *supra* note 31, at 49-50.

46. On suburbanization of Catholics, see Rosalind Rossi, *"Success-Failure Story" of Catholic Schools*, CHI. SUN-TIMES, (Jan. 21, 1997) at 12; Steve Berg, *Catholic Education; How Do Catholic Schools Do It?*, MINNEAPOLIS STAR TRIB., April 1, 1997 at 1A. On upward mobility, see Baker & Riordan, *supra* note 31, at 16. For a wider-angle lens on changes in Catholic schools over the period from 1960 to 1990, see BRYK ET AL., *supra* note 31.

47. *See* Baker & Riordan, *supra* note 31, at 16. *See also* BRYK ET AL., *supra* note 31, at 33 (Catholic school enrollment fell from a high of 5.5 million, or 12% of the school-age population, in 1965, to 2.5 million, or 5.4% of the school-age population, in 1990.).

number of whom are non-Catholic, to survive.[48] When *Lemon* was decided in 1971, less than three percent of the students in Catholic elementary and secondary schools were not of the Roman Catholic faith;[49] by the late 1990s, that percentage had quadrupled.[50]

Simultaneously, the rise of evangelical Protestant movements in America, the tendency among many American Jews to choose sectarian education, and the inclination among various immigrant groups to emphasize parochial education all have stimulated the creation of non-Catholic sectarian schools and a corresponding demand among non-Catholics for government policies supportive of religious education. At the time of *Lemon*, 65% of all private schools and 75% of all sectarian schools in the United States were Roman Catholic schools, and these schools contained 90% of all the pupils then enrolled in sectarian schools.[51] In *Lemon*, the Court tells us, "more than 96% of [the Pennsylvania students who would have benefitted from the aid program] attend church-related schools, and most of these schools are affiliated with the Roman Catholic church."[52] In *Earley v. DiCenso*,[53] a case from Rhode Island decided as a companion to *Lemon*, 95% of the pupils benefitted by the aid program attended Roman Catholic schools.[54] In *Wolman v. Walter*,[55] the parties stipulated that, in 1974-75, 691 of 720 nonpublic schools in the state were sectarian, and "more than 92% [of the nonpublic school enrollment] attended Catholic schools."[56]

By sharp contrast, in 1995-96, Catholic schools represented only 29.8% of the private elementary and secondary schools in

48. Non-Catholic enrollment in Catholic schools quintupled between 1970 (2.6%) and 1983 (14.3%). *See* BRYK ET AL., *supra* note 31, at 69. *See also* CONVEY, *supra* note 31, at 41; MARY JO METZLER, NATIONAL CATHOLIC EDUC. ASSOC., U.S. CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS, 1997-98, at 16 (1998). Laycock, *supra* note 31, at 1387-88 n.119.

49. *See* NATIONAL CATHOLIC EDUCATION ASSOCIATION, A STATISTICAL REPORT ON CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS FOR THE YEARS 1967-68 TO 1969-70, at 10.

50. The most recent survey by the National Catholic Education Association puts non-Catholic enrollment in Catholic schools at 13.6%. *See* METZLER, *supra* note 48, at 16.

51. *See* DIANE GERTLER & LINDA A. BARKER, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, STATISTICS OF NONPUBLIC ELEMENTARY SCHOOLS, 1970-71, at 5-10 (1973).

52. Lemon v. Kurtzman, 403 U.S. 602, 610 (1971).

53. 403 U.S. 602 (1971).

54. *Id.* at 608.

55. 433 U.S. 229 (1977).

56. *Id.* at 234.

the United States,[57] and their enrollment represented 50.1% of the students enrolled at such schools.[58] Because many students now enrolled at Catholic schools are non-Catholic,[59] non-Catholics probably now represent the majority of students enrolled in sectarian schools in the United States.

If the line of decisions from *Everson* to *Lemon* was driven substantially by the then-demographics of public and private education, coupled with anti-Catholic animus, what remains to justify principles forbidding direct aid to sectarian elementary and secondary schools? For me, the key to this inquiry lies in the Virginia history upon which Justices Black and Rutledge so famously and heavily relied in *Everson*. The historical episode that, according to the *Everson* Justices, crystallized the constitutional no-aid principle now embodied in the Establishment Clause, involved the 1784 proposal in Virginia for a "Bill Establishing a Provision for Teachers of the Christian Religion" (hereinafter "the Bill"). After the State of Virginia suspended the requirement of tithing to the formally established Anglican Church in 1777, the 1784 proposal was designed to broaden and reassert state authority to tax for the support of Christianity. The Bill provided:[60]

> Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers . . .;
>
> Be it therefore enacted . . . [T]hat for the support of Christian teachers . . . [a property tax] is hereby assessed . . . .
>
> . . . [and each taxpayer shall express to the tax collector] to what society of Christians [the taxpayer directs] the money to be paid . . . and [the tax collector shall pay to the appropriate representative] of each such society, the sum so stated to be due to that society . . . .
>
> And be it further enacted, That the money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their

57. *See* STEPHEN P. BROUGHAM AND LENORE A. COLACIELLO, NATIONAL CENTER FOR EDUCATION STATISTICS, PRIVATE SCHOOL UNIVERSE SURVEY, 1995-96, at 5 tbl.1 (1998) [hereinafter NATIONAL CTR. FOR EDUC. STATISTICS].

58. *See id.* at 8 tbl.4.

59. *See* sources cited *supra* note 48.

60. The Bill is included as part of the Appendix to Justice Rutledge's dissent in *Everson*. 330 U.S. at 72-74.

> denomination, or to providing places of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, . . . [who may dispose of the funds] in a manner which they shall think best calculated to promote their particular mode of worship.
>
> And be it enacted, That all sums [not earmarked for particular societies of Christians] shall be . . . disposed of . . . for the encouragement of seminaries of learning within the Counties whence such sums shall arise . . . .

Madison's famous Memorial and Remonstrance[61] vigorously advocated against the enactment of the Bill, and it was soon defeated. A key element in the Bill's failure, not apparent from its text or from the Memorial and Remonstrance, was its significance in the Virginia struggle to disestablish the Anglican Church. Viewed only on its face, however, the Bill had certain critical features which should be recalled in any attempt to generate first principles from the Virginia history.

First, and most obviously, the Bill was limited to support of the Christian religion. Even Chief Justice Rehnquist, writing in support of jettisoning the "wall of separation" metaphor, recognized that this feature of the Virginia history should be viewed as forever settling the proposition that the state may not enact sectarian preferences.[62]

Second, the tax proposed by the Bill was not designed to augment general revenues. Rather, the Bill included a tax earmarked for this particular purpose. Whether one was supporting a sect in which one was active or not, one's tax contribution was being segregated to particular sectarian use. This is a symbolically and psychologically important feature of the arrangement. If one were subject to the tax, one could not say (as modern taxpayers do) that one is supporting the government generally without necessarily approving of all of the government's programs. Rather, under an earmarked tax scheme, the feel of the arrangements is involuntary support of a religious sect, even if the taxpayer gets to designate which one. This aspect of the Virginia tax highlighted its establishmentarian character and clashed with theological presuppositions, shared by

61. The Memorial and Remonstrance is printed in the Appendix to the dissent of Justice Rutledge in *Everson*, 330 U.S. at 63-72.

62. *See* Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

Madison and others, that support for religion (not government) must be voluntary.[63]

Third, the Virginia scheme against which Madison protested was not aimed at supporting existing schools and their instructional personnel. Rather, the monies were to be spent by those in charge of religious communities for "provision of a Minister or Teacher of the Gospel of their denomination, or to providing places of divine worship."[64] The funds could thus be used to build churches, without any provision whatsoever for education of the young. To be sure, the scheme permitted taxpayers to designate their payments for "the encouragement of seminaries of learning within [their respective] Counties,"[65] but, despite this nod to Jeffersonian sentiment,[66] no such institutions existed at the time.[67] Taxpayers thus could devote their payments to religious sects or to a set of future institutions which might never come into being. As a consequence of the taxpayer choices for which there were the greatest and most immediate incentives, the Virginia assessment scheme would have directly and immediately aided sects and their clergy in their religious mission.

Fourth, the education expected in the arrangements that would have been subsidized by the Virginia Bill was rudimentary at best. The Bible would have been the text of central impor-

63. As Madison stated in the Memorial and Remonstrance: "We remonstrate against the said Bill, 1. Because we hold it for a fundamental and undeniable truth, that Religion or the duty which we owe to our Creator . . . can be directed only by reason and conviction, not by force or violence." 330 U.S. at 64 (quoting THE VIRGINIA DECLARATION OF RIGHTS art. XVI). In *Lemon v. Kurtzman*, 403 U.S. 602, 610 (1971), the Court remarked that the funds for the challenged aid to nonpublic schools, predominantly Catholic, were "originally derived from a new tax on horse and harness racing, but . . . now [are] financed by a portion of the state tax on cigarettes." This sort of "vice tax" may well have been designed to undercut claims that the scheme coerced involuntary support of religion, but the Court did not offer a view of the constitutional significance of the chosen taxing device.

64. 330 U.S. at 73. Quakers and Menonists were permitted to spend the funds "in a manner which they shall think best calculated to promote their particular mode of worship." *Id.*

65. *Id.* at 74.

66. *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 146-48 (William Peden ed., 1995) (proposing non-sectarian public schools in each Virginia county).

67. *See* WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 26 (1986). Although wealthy Virginians hired private tutors for their children, and other, middle-class Virginians of the 1780s purchased some basic educational instruction for their children, there were no publicly supported, free elementary or secondary schools at that time. *See* ROBERT E. BROWN & B. KATHERINE BROWN, VIRGINIA 1705-1786: DEMOCRACY OR ARISTOCRACY? 271-83 (1964).

tance, and the educational emphasis would have been primarily on religious virtue, and secondarily on basic reading, writing and arithmetic.[68] Put in today's terminology, the "secular value" of such an education would have been fairly small, and the religious value large by comparison.

Our educational and legal circumstances in the twentieth century are dramatically different, in ways that cast enormous doubt on any principle barring direct financial assistance, for secular educational purposes, to state-accredited sectarian schools. First, as *Brown v. Board of Education*[69] emphasized, the role of education in the twentieth century is vastly different from what it was in the eighteenth. Education is the road to individual mobility and society-wide progress on every front. If long-entrenched and customary segregation yielded to such changes, why shouldn't the long-imposed restrictions on aid to sectarian schools similarly respond? Under *Plessy v. Ferguson*,[70] racially separate was at least supposed to be equal; under *Everson* and *Lemon*, separate inevitably means unequal with respect to possibilities of state support.

Second, as described above, the mix of sectarian schools in America bears absolutely no resemblance to the world of colonial Virginia, in which nothing resembling an elementary or secondary educational institution of today ever appeared. According to the most recent survey by the U.S. Department of Education,[71] sectarian schools now represent a wonderfully pluralistic assortment of religious affiliations. Although Catholic schools still represent a plurality, at slightly under 30%,[72] that percentage has dropped dramatically since the time of *Lemon*, when Catholic schools represented 75% of religiously affiliated schools.[73] Sectarian schools are now operated in substantial numbers by a wide variety of Protestant Christians, by Greek Orthodox, Islamic, and Jewish communities, and by many others.[74] This mix suggests that government aid to sectarian schools will not produce the

68. *See* MILLER, *supra* note 67, at 27-29 (explaining that religious virtue was the objective of the assessment bill); BROWN & BROWN, note 67, at 277-78 (describing the practical emphasis of education for most children in eighteenth-century Virginia).

69. 347 U.S. 483 (1954).

70. 163 U.S. 537 (1896).

71. *See* NATIONAL CTR. FOR EDUC. STATISTICS, *supra* note 57 *passim.*

72. *See id.* at 6 tbl.2.

73. In 1970-71, of the 14,270 religiously affiliated elementary and secondary schools, 10,770 were affiliated with the Roman Catholic Church. *See* GERTLER & BARKER, *supra* note 51, at 6 tbl.C.

74. *See* NATIONAL CTR. FOR EDUC. STATISTICS, *supra* note 57, at 6 tbl.2.

Protestant versus Catholic political divisions that so worried prior generations.[75]

Third, no contemporary proposal for school vouchers or direct subsidies to private schools would be likely to rely on earmarked taxes. Rather, the state would inevitably rely upon a portion of some more generally available source of revenue. As a consequence, taxpayers would not have the experience proposed for eighteenth-century Virginians of designating tax payments to a particular sect. Instead, today's taxpayers would make their payments and understand, as is always and everywhere the case, that some appropriated monies would be spent on purposes and projects with which some do not agree.

Fourth, contemporary regimes of education are inevitably characterized by processes and standards of government accreditation. Unlike the situation in early America, all states have compulsory education laws, and accreditation is the key to school survival; attendance at unaccredited schools will not satisfy those laws. Accordingly, government will retain control over the activities of sectarian schools. Voucher programs and any direct state financing will only serve to increase the demand for, and the likelihood of, such regulation.

The battle over state support for religion in late eighteenth-century Virginia makes a great story, but it has little to do with education in the United States in the next millennium. If a state were once again to expend monies for the support of the clergy and places of divine worship, such a measure would be clearly prohibited by the Establishment Clause. But the maintenance of such a prohibition on contemporary attempts at widening the choices available to parents of schoolchildren, through mechanisms of public finance, cannot be sustained for much longer.

IV. ISSUES FOR THE FUTURE.

In the Supreme Court, the pressures in the direction of undoing the regime of *Lemon* are unmistakable, though the steps have been incremental and the judicial arguments for rejecting *Lemon* have not been tied to the Virginia history and the distance we have come from it. But the key decisions moving away from the no-aid principle have frequently involved 5-4 splits,[76] and

75. For the argument that contemporary voucher programs will continue to produce an unhealthy dynamic of religious interest groups interacting with government officials, see Marci Hamilton, *Vouchers, The Establishment Clause, and Power*, 31 CONN. L. REV. (forthcoming 1999).

76. *See* Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995). *Rosenberger* involved in-kind aid

have provoked passionate dissents.[77] So there is no promise, much less a guarantee, that the constitutional restrictions on direct funding of elementary and secondary education conducted by religious institutions are about to disappear. The recent denial of *certiorari* in the Milwaukee voucher case has only highlighted this uncertainty.[78]

Two key constitutional issues remain in the effort to remove the barriers to public funding of sectarian schools. The first, arising on the Establishment Clause side, involves the need for an adequate conception of severability of religious and secular components of sectarian education. The central premises in the regime of *Lemon* are (1) that elementary and secondary sectarian schools are pervasively religious, (2) that the minors being educated in them are highly vulnerable to indoctrination, and (3) that aid to such schools will inevitably advance the faith. And to some extent it will. But it will simultaneously advance the secular goals these schools achieve and upon which their accreditation depends.

Should the inevitably religious component of much of sectarian education serve to disqualify such schools from direct state assistance? *Lemon*'s presumptions that it should, that state aid must therefore be monitored to ensure that the state pays for no religious instruction, and that such monitoring itself presents the constitutional problem of "excessive entanglement,"[79] lies at the heart of the current prohibition on direct aid. Several recent decisions, however, have begun to undermine rather directly some of these premises. In *Zobrest v. Catalina Foothills School District*,[80] the Supreme Court ruled that the Establishment Clause presents no bar to the provision of a state-provided hearing interpreter to a hearing-disabled boy in a pervasively sectarian Catho-

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to students publishing a religious journal, but did not involve aid to a religious institution. *See Rosenberger*, 515 U.S. at 822-27. *Agostini* involved aid to a religious institution, but the aid was in the form of public employees teaching secular subjects. *See Agostini*, 521 U.S. at 209-13.

77. *Agostini*, 521 U.S. at 209 (Souter, J., dissenting); *Rosenberger*, 515 U.S. at 863 (Souter, J., dissenting).

78. *See* Jackson v. Benson, 578 N.W. 2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998). The lower courts, clinging to the ancient regime on these matters, appear not to be ready to predict and pioneer a breakthrough. *See* Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998). Indeed, the Supreme Court in *Agostini* essentially ordered the lower courts not to anticipate yet unrealized changes in Establishment Clause law. 521 U.S. at 541.

79. Scholars have often and appropriately mocked this feature of the doctrine. *See, e.g.*, John Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 87-89.

80. 509 U.S. 1 (1993).

lic school. That the interpreter would translate religion class and pre-school Mass—both required elements of education at that school—as well as secular subjects did not alter the result. A severability requirement in such a setting, limiting the interpreter to translating secular subjects only, would have effectively made it impossible for the student to attend a school with a serious religion program. Accordingly, the incidental benefit to his religious training did not serve to disqualify him from the service of the interpreter and its obvious secular value.

More dramatically, the decision in *Rosenberger* to forbid a state university from excluding a journal of opinion with a Christian perspective from a group of state-subsidized student journals bespeaks an even firmer determination to reject a requirement of severability for state-aided enterprises with both secular and religious components. That the students in *Rosenberger* used their magazine as a tool to proselytize did not render it any less a vehicle for teaching students how to read, write, think, and edit an intellectual journal.

The approach to severability suggested by *Zobrest* and *Rosenberger* may go a long way toward the undoing of *Lemon* and its premises. When state efforts that incidentally advance religion involve activities that can readily be separated into secular and religious components, the state should be limited to support for the secular only. State sponsorship of the Ten Commandments, for example, is unconstitutional because the first several Commandments are entirely religious in their content;[81] if a state wants to promote those Commandments that form the backdrop of our criminal law and a number of our ethical commitments, those in Exodus 20:13-16 should suffice.[82] By contrast, state celebration of the birthday of Martin Luther King, Jr. is acceptable constitutionally because his secular achievements deserve their

81. *See* Stone v. Graham, 449 U.S. 39 (1980) (holding that the state may not require the posting of the Ten Commandments in public school classrooms). As a recent essay points out, the precise number and content of the Commandments is a matter of religious dispute. *See* Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENT 471 (1998). No matter how you assemble and count them, however, Commandments relating to God's identity and priority, the prohibition on making or bowing to graven images, the prohibition on taking the Lord's name in vain, and the obligation to honor and keep holy the Sabbath Day (*see Exodus* 20:4-9) cannot be understood as advancing secular objectives.

82. "You shall not murder. You shall not commit adultery. You shall not steal. You shall not bear false witness against your neighbor." The requirement of parent honoring, *see Exodus* 20:12, and the prohibition on coveting, *see Exodus* 20:14, perhaps can be defended as advancing secular as well as religious purposes.

own special attention, and we cannot separate his religious sentiments or vocation from his life and accomplishments. A similar attitude towards state assistance to accredited sectarian schools would put an end to the regime of *Lemon* and its concerns with non-secular effects; it would no longer matter if mathematics teachers in sectarian schools advance the faith while simultaneously teaching their secular subject.[83] And because such teaching efforts would no longer require monitoring, *Lemon*'s concern for "excessive entanglement" would disappear.

The second key issue will arise on the free exercise side—to what extent will legislatures be free to impose, and accrediting and funding agencies to enforce, requirements of a secular curriculum and nondiscrimination in student admissions or the hiring and retention of school personnel? This has been the inevitable tradeoff ultimately facing sectarian schools, forestalled by *Lemon*'s interdiction of the possibility of state assistance. Once the public begins to finance religious education, the regulatory concerns about design of curriculum, admissions, policy, and employment decisions will surface with a vengeance. It is not the case that financing will authorize such regulation where accreditation did not; rather, state financing will inevitably lead to more pressure for secular control and secular policies.

In particular, sectarian schools which accept government funding may well be required to reduce or eliminate discrimination based on faith commitments in selecting students, and perhaps in selecting faculty as well. In turn, a policy of nondiscrimination among students may lead to state pressure on schools to make participation in religious instruction and experience voluntary rather than compulsory. That these conditions are reasonable from the state's perspective, and considerably diluting of the religious character of the education from the school's perspective, can hardly be denied. The current shape of free exercise law, permitting burdens on religion so long as they are cast in religion-neutral terms,[84] suggests that such conditions

83. The mathematics taught would have secular value, and could be state-financed to that extent. Professor Choper made precisely such a suggestion on the eve of *Lemon*. *See* Jesse Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 265-66 (1968) ("[G]overnmental financial aid may be extended directly or indirectly to support parochial schools . . . so long as such aid does not exceed the value of the secular educational service rendered by the school.").

84. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

may well be valid, although there is no shortage of plausible arguments to the contrary.[85]

The concern about regulatory control over religious schools of course is not limited to cases of direct aid. Voucher schemes already present such questions. The Milwaukee program, for example, forbade the schools from requiring religious instruction for voucher students.[86] Voucher schemes, however, permit tailoring of the conditions to the voucher students only; direct funding schemes would invite such conditions as umbrellas over the entire school enterprise. Such conditions, even when narrowly tailored to voucher students only, may discourage participation by some schools, but it should be obvious that conditions aimed only at publicly financed students will be more palatable and less intrusive than conditions that affect the school as a whole. For this reason, as well as reasons of lingering constitutional doubt, one should expect to see programs of aid to sectarian schools remain of the voucher type for a long time to come. What one should not similarly expect is perpetuation of insurmountable constitutional impediments to public financing of sectarian education.

85. A requirement that religious schools not discriminate on the basis of religion in choosing faculty and/or students has a profoundly different impact upon such schools than does the identical requirement imposed upon non-religious institutions. For sectarian schools, such a requirement impedes their ability to create a religious community and advance a theological as well as educational mission. Theological missions, however, are precisely what the state should not be purposefully subsidizing.

Section 702 of the Civil Rights Act of 1964, as amended, exempts religious institutions from the ban on religious discrimination in hiring, and the Supreme Court unanimously upheld this provision against Establishment Clause challenge in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). Whether such an exemption is required by the Free Exercise Clause or any other provision of the Constitution, however, especially after *Smith*, is of course another question. Moreover, leaving religious institutions free to so discriminate is one thing; subsidizing them financially while they continue to do so is quite another, because the discrimination may increase the religious value of the education at the expense of its secular value. The Milwaukee program prohibited participating voucher schools from engaging in any discrimination based on race, color, or national origin, and forbade compulsory religious activity for voucher students, but did not forbid religious selectivity by participating schools. *See Jackson*, 578 N.W.2d at 607-09.

86. *See Jackson*, 578 N.W.2d at 609.