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Constitutional Law - Establishment Clause - The Movement towards Neutrality as the Single Criteria for Determining the Constitutionality of School Aid under the Establishment Clause

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CONSTITUTIONAL LAW—ESTABLISHMENT CLAUSE THE MOVEMENT TOWARDS NEUTRALITY AS THE SINGLE CRITERIA FOR DETERMINING THE CONSTITUTIONALITY OF SCHOOL AID UNDER THE ESTABLISHMENT CLAUSE

Mitchell v. Helms, 120 S. Ct. 2530 (2000)

I. FACTS

Taxpayers Mary L. Helms, Marie L. Schneider, and Esperanza Tizol filed a class action suit to stop the use of tax dollars that aid religious schools.[1] Marie Schneider, a life-long, committed member of the Roman Catholic Church, objected to the government providing benefits to her parish school.[2] She believed government aid had a chilling effect on the religious mission of schools run by her church.[3] The case's namesake, Mary Helms, was a public school activist, former school board member, and mother of a high school student.[4] Esperanza Tizol was a mother of two children who attended public school.[5] They brought suit against the Louisiana State Board of Education and the Jefferson Parish School District alleging that Chapter 2 of the Educational Consolidation and Improvement Act (ECIA) violated the Establishment Clause of the First Amendment.[6]

Chapter 2 of the Education Consolidation and Improvement Act grants federal education funds to state governments.[7] The states direct the funds to local school districts, which then give the money to local schools.[8] Both private and public schools are eligible for Chapter 2 aid.[9] The number of students enrolled in a school determines the amount of aid it should receive.[10] Chapter 2 aid may be used "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference

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1. Brief for Respondents at 21a, Mitchell v. Helms, 120 S. Ct. 2530 (2000) (No. 98-1648).

2. *Id.* Marie Schneider was a mother of six and had been a member of the Catholic Church for about 36 years. *Id.* She sent her children to several different Catholic schools. *Id.* She was also extremely active in educational issues, serving on various school related committees, and serving as president of the local PTA. *Id.*

3. *Id.*

4. *Id.* at 21a-22a.

5. *Id.* at 21a.

6. Mitchell v. Helms, 120 S. Ct. 2530, 2536-37 (2000).

7. 20 U.S.C. §§ 7301-7312, 7351-7373, 7331-7332 (1994 & Supp. V 1999). Prior to 1994, Chapter 2 was codified at 20 U.S.C. §§ 2911-7296 (1988). *Mitchell*, 120 S. Ct. at 2537 n.1. Congress changed the types of material and equipment available under Chapter 2. *Id.* at 2538 n.2. The Court did not discuss the effects of the changes because the record closed in 1989. *Id.*

8. *Id.* at 2537.

9. 20 U.S.C. §§ 7312(a), 7372(a)(1).

10. *Id.* § 7372(a)(1).

materials, computer software and hardware for instructional use, and other curricular materials."[11]

Chapter 2 imposes restrictions on the use of funds by private schools.[12] First, the "services, materials, and equipment" that a private school seeks to acquire under Chapter 2 must be "secular, neutral, and nonideological" in nature.[13] Second, a private school may not gain title to the Chapter 2 materials.[14] The local school districts remain in control of the materials and lend them to private schools.[15]

Specifically at issue in *Mitchell v. Helms*[16] was the Chapter 2 program as applied in Jefferson Parish, Louisiana.[17] Jefferson Parish, on the average, used about thirty percent of its Chapter 2 funds to purchase educational materials for the over forty private schools in its jurisdiction.[18] The overwhelming majority of private schools in Jefferson Parish are religiously affiliated.[19]

In 1990, a federal district court, on a summary judgment motion, found Chapter 2 to be unconstitutional.[20] Chief Judge Heebe concluded that the program had the effect of advancing religion because it gave aid to religious schools that were "pervasively sectarian."[21]

However, seven years later, after Chief Judge Heebe retired, Chief Judge Livaudais reversed former Chief Judge Heebe while ruling on post judgment motions.[22] Judge Livaudais justified the reversal by citing recent developments in Establishment Clause jurisprudence.[23]

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11. *Id.* § 7351(b)(2).
12. *Id.* § 7372(a)(1).
13. *Id.*
14. *Id.* § 7372(c)(1).
15. *Id.*
16. 120 S. Ct. 2530 (2000).
17. *Id.* at 2536-37. Jefferson Parish is an area of suburban New Orleans, with a population of approximately 500,000 people. *See* Key to the City, *at* http://www.usacitiesonline.com (last visited Jan. 23, 2001).
18. *Mitchell*, 120 S. Ct. at 2538. In 1986-1987, Jefferson Parish spent 44% of the money budgeted for private schools on library and media material and 48% on instructional equipment. *Id.* The equipment and material purchased included library books, computers, computer software, slide projectors, overhead projectors, television sets, tape recorders, VCRs, projection screens, lab equipment, maps, globes, filmstrips, slides, and cassette recordings. *Id.* at 2537-38.
19. *Id.* Of the 46 private schools participating in the Jefferson Parish Chapter 2 program, 34 were Roman Catholic; seven were otherwise religiously affiliated; and five were not religiously affiliated. *Id.*
20. Helms v. Cody, 856 F. Supp. 1102, 1121 (E.D. La. 1994).
21. *Id.* at 1164. "Pervasively sectarian" schools are defined as institutions with an overriding religious mission. *Mitchell*, 120 S. Ct. at 2582.
22. Helms v. Cody, No. 85-5533, 1997 WL 35283, at *16 (E.D. La. Jan. 28, 1997).
23. *Id.* (citing Walker v. San Francisco Unified Sch. Dist., 46 F.3d 1449 (9th Cir. 1995)). In *Walker*, the court held that the loan of neutral, secular equipment and material did not have the effect of advancing or inhibiting religion. 46 F.3d at 1465.

The Fifth Circuit heard the appeal.[24] The court was faced with the predicament of interpreting the Supreme Court's conflicting rulings in *Meek v. Pittenger*[25] and *Wolman v. Walters*[26] on the one hand, and *Agostini v. Felton*[27] on the other.[28] The court determined that *Agostini* only rejected the premise in *Meek* that "all governmental aid that directly assists the educational function of religious schools is invalid."[29]

The court stated that *Agostini* did not address the distinction between textbooks and other educational equipment.[30] *Agostini* only determined that substantial aid to the educational function of a school does not necessarily aid the overall religious mission of a school.[31] *Agostini* only instructs that the presumption of unconstitutionality regarding the issuance of education materials to religious schools should not be applied to state-paid teachers on religious school premises.[32]

The Fifth Circuit then concluded that *Meek* and *Wolman* were still the controlling precedents.[33] Applying *Meek* and *Wolman*, the court held that Chapter 2 was unconstitutional as applied in Jefferson Parish.[34] The court issued a decree halting the lending of instructional and educational equipment to religious schools.[35] The Supreme Court granted certiorari,[36] and the Court *held* that Chapter 2 was constitutional as applied in Jefferson Parish.[37]

II. LEGAL BACKGROUND

The First Amendment to the United States Constitution declares that "Congress shall make no law respecting the establishment of religion

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24. Helms v. Picard, 151 F.3d 347 (5th Cir. 1998).

25. 421 U.S. 349 (1975) (holding that a state program that loaned instructional equipment to private religious schools violated the Establishment Clause because the equipment could be diverted for religious purposes).

26. 433 U.S. 229 (1977) (holding an Ohio statute that allowed religious schools to use public money to buy instructional equipment and material unconstitutional).

27. 521 U.S. 203 (1997) (upholding a New York program that sent public school teachers into religious schools to teach remedial programs).

28. *Picard*, 151 F.3d at 356.

29. *Id.* at 373-74 (quoting Agostini v. Felton, 521 U.S. 203, 237 (1997)).

30. *Id.* at 373.

31. *Id.*

32. *Id.* at 374.

33. *Id.*

34. *Id.*

35. *Id.* The court specifically prohibited filmstrip projectors, overhead projectors, televisions, computers, printers, phonographs, slide projectors, and library books (even pre-screened books). *Id.* The lending of free textbooks was allowed. *Id.* A textbook was defined as "a book which a pupil is required to use as a text for a semester or more in a particular class he legally attends." *Id.* (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 239 n.1 (1968)).

36. Mitchell v. Helms, 527 U.S. 1002 (1999).

37. Mitchell v. Helms, 120 S. Ct. 2530, 2537 (2000).

. . . ." The Fourteenth Amendment has been interpreted to make the First Amendment's restrictions on government applicable to the states.[38]

A. SEPARATIONIST THEORY: STRICT INTERPRETATION OF THE ESTABLISHMENT CLAUSE

The Supreme Court's first major decision involving an Establishment Clause challenge occurred in 1947 with the case *Everson v. Board of Education*.[39] In *Everson*, the Court found that a program busing private school students was constitutional because it was a neutral, general program of social benefit provided to all students.[40] The Court analogized it to police and fire protection and stated that busing could not be denied to some children just because they attended private religious schools.[41]

The Court elaborated on the minimal boundaries as to what protection and guarantees the Establishment Clause provides.[42] According to the Court in *Everson*,

> [t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against the establishment of

38. The Fourteenth Amendment was made applicable to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

39. 330 U.S. 1 (1947). Before *Everson*, the Court only discussed the Establishment Clause in regard to religious schools indirectly, *see e.g.*, Vidal v. Philadelphia, 43 U.S. (2 How.) 127 (1844) (mem.); Quick Bear v. Leupp, 210 U.S. 50, 81 (1908), or evaluated aid to religious schools under different provisions of the Constitution, *see, e.g.*, Cochran v. La. State Bd. of Educ., 281 U.S. 370, 374-75 (1930).

40. 330 U.S. at 17.

41. *Id.* at 17-18.

42. *Id.* at 15.

religion by law was intended to erect 'a wall of separation between church and State.'[43]

The "wall of separation" metaphor referred to by Thomas Jefferson was often used to describe Supreme Court rulings after *Everson*.[44] The Supreme Court erected a "wall of separation" between church and state by strictly interpreting the Establishment Clause.[45] For thirty years after the *Everson* decision, the Court kept the wall "high and impregnable."[46]

B. THE *LEMON* TEST: MAINTAINING A WALL OF SEPARATION BETWEEN CHURCH AND STATE

1. *The* Lemon v. Kurtzman *Decision*

The Supreme Court has referred to the "three main evils against which the Establishment Clause was designed to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[47] In 1971, with the "three main evils" in mind, the Supreme Court developed a test to determine the constitutionality of a state law being challenged under the Establishment Clause in *Lemon v. Kurtzman*.[48] The *Lemon* test, as it has come to be known, has three conditions that must be satisfied in order for the law to be constitutional.[49] First, the law must have a secular purpose.[50] Second, the law's primary effect must be one that neither advances nor inhibits religion.[51] Finally, the law may not create an excessive entanglement between the government and religion.[52]

The Court applied this test in *Lemon* and found the two state laws being challenged unconstitutional.[53] A Rhode Island program that supplemented the salaries of teachers instructing secular subjects in non-

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43. *Id.* at 15-16.

44. Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 126 (2000).

45. *See, e.g.*, Sch. Dist. v. Schempp, 374 U.S. 203, 301 (1963) (striking down a state statute that required voluntary bible readings at the beginning of each school day); Engel v. Vitale, 370 U.S. 421 (1962) (holding that a nondenominational prayer written by school board administrators and recited daily in public school violated the Establishment Clause); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (invalidating a public school program that permitted religious instructors to enter public schools and instruct those students who had requested religious instruction).

46. *McCollum*, 333 U.S. at 212.

47. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

48. 403 U.S. 602 (1971).

49. *Id.* at 612-13.

50. *Id.* at 612 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

51. *Id.*

52. *Id.* at 613 (quoting *Walz*, 397 U.S. at 674).

53. *Id.* at 606-11.

public schools was found unconstitutional because the program operated to the benefit of the school's religious mission.[54] Furthermore, the Court stated that the potential for a teacher to indoctrinate students with religious messages was too great.[55] This potential danger created the excessive entanglement that caused the Court to find the program unconstitutional.[56]

Also in *Lemon*, a Pennsylvania program that reimbursed non-public schools for teachers' salaries and other materials used in the teaching of secular subjects was found unconstitutional.[57] In addition to the excessive entanglement created by reimbursing teachers, the Court found an additional constitutional violation because the state provided financial aid directly to religious schools.[58] The Court stated that direct aid to religious schools is always impermissible.[59]

2. *The Strict Application of the* Lemon *Test*

During the 1970s, the Supreme Court regularly struck down funding programs for religious schools.[60] The Court strictly applied the conditions set forth in the *Lemon* test.[61]

In *Meek v. Pittenger*, the Court held a Pennsylvania program was unconstitutional because it created an excessive entanglement between government and religion.[62] The program provided disadvantaged children in nonpublic schools with teachers, counselors, and instructional materials.[63] Public school employees provided their services on the premises of religious schools.[64] The Court ruled that the monitoring necessary to ensure against Establishment Clause violations created an excessive entanglement.[65]

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54. Lemon v. Kurtzman, 403 U.S. 602, 618-20 (1971).

55. *Id.*

56. *Id.* at 619.

57. *Id.* at 620.

58. *Id.* at 620-21.

59. *Id.* at 621-22. Direct aid is impermissible because money subsidies and grants by the government are almost always accompanied by various controls and government surveillance. *Id.* at 621. The Court was particularly concerned with the government's post-audit power to evaluate the financial records of religious organizations receiving direct aid. *Id.*

60. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (holding an Ohio program that loaned secular textbooks and standardized test scoring devices directly to nonpublic schools unconstitutional); Meek v. Pittenger, 421 U.S. 349 (1975) (holding a Pennsylvania program that loaned instructional material and equipment directly to nonpublic schools unconstitutional).

61. *See, e.g., Wolman*, 433 U.S. at 236; *Meek*, 421 U.S. at 365.

62. *Meek*, 421 U.S. at 370.

63. *Id.* at 352-53, 365. Instructional materials are defined as photographs, charts, sound recordings, films, or any other printed or published material of a similar nature. *Id.* at 355.

64. *Id.* at 352-53. Public school employees conducted counseling, testing, psychological services, speech and hearing therapy, as well as teaching and related services for gifted and remedial students. *Id.* at 353.

65. *Id.* at 371-72. The monitoring, to which the Court referred, involved program administrators

The *Meek* Court also found the allocation of instructional material unconstitutional.[66] The Court stated that the direct loan of material benefited the religious nature of the schools because the supplies would likely be used to teach both secular and religious curricula.[67]

In *Wolman v. Walter*,[68] Ohio taxpayers brought suit to challenge the constitutionality of a statute that provided aid to nonpublic schools.[69] Applying the *Lemon* test,[70] the Court held that the loan of secular textbooks and the use of the public school's standardized test scoring service were constitutional.[71] The Court stated that this type of aid did not create an impermissible entanglement between church and state.[72] The Court reasoned that the loaning of textbooks and standardized test scoring devices did not create excessive entanglement because the religious school did not control the content or the result.[73] This prevented the textbooks and scoring devices from being used as part of religious teaching, and this restriction eliminated the need for the supervision that would result in excessive entanglement.[74]

Nevertheless, the Court also held that the purchase of materials and equipment for use in religious schools was unconstitutional.[75] The Court reasoned that materials and equipment have the inescapable effect of advancing religious education.[76] Material and equipment advance the religious purpose of schools because the very purpose of religious schools is to promote an integrated secular and religious education; the teaching process is devoted to the indoctrination of religious values and beliefs.[77] The religious mission is always inextricably intertwined with the secular educational mission.[78]

The Supreme Court relied on *Meek* and *Wolman* when deciding *Aguilar v. Felton*.[79] In *Aguilar*, New York taxpayers brought an injunctive action to stop the grant of federal funds used to finance a program that sent public school teachers into religious schools to teach remedial courses.[80] Aware of previous Supreme Court rulings, the school district

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ensuring that personnel remained strictly committed to nonideological teaching. *Id.* at 372.

66. *Id.* at 365.
67. *Id.* at 364-66.
68. 433 U.S. 229 (1977)
69. *Id.* at 232-33.
70. *Id.* at 236.
71. *Id.* at 238, 241.
72. *Id.* at 241.
73. *Id.* at 240.
74. *Id.* at 240-41.
75. *Id.* at 251.
76. *Id.* at 250.
77. *Id.* at 249-50.
78. *Id.* at 250.
79. 473 U.S. 402 (1985).
80. *Id.* at 406-07. The companion to this case is *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985).

implemented a system of monitoring that ensured the funds would not be used to advance religious purposes.[81] However, the Court stated that this system of monitoring inevitably results in excessive entanglement between the church and state.[82]

The Court reasoned that state surveillance inevitably results in excessive entanglement because when the state becomes enmeshed with matters of religious significance, the freedom of religion suffers, even when the government's purpose is secular.[83] The continued contacts between church and state that would be necessary to monitor teachers create a special entanglement concern because teachers cannot be examined only one time to determine their intent to teach personal religious beliefs.[84] The continued contacts that would be necessary to ensure teacher compliance would be enduring and excessive.[85]

C. THE LIBERALIZATION OF THE *LEMON* TEST

In the 1980s, the Supreme Court began to uphold government aid programs to religious schools.[86] In *Mueller v. Allen,*[87] a tax deduction for private school tuition was upheld under the *Lemon* test.[88] The Court stated that the legislature deserved great deference where tax deductions were concerned.[89] The tax deduction at issue in *Mueller* was ruled constitutional because it was available to all parents, regardless of whether their children attended a religious school.[90] The channeling of aid through individual parents reduced the Court's suspicion of Establishment Clause violations.[91] The Court reasoned that the Establishment Clause was not designed to protect against attenuated financial benefits controlled by the private choices of individual parents.[92]

The *Mueller* Court focused on the neutrality of the aid program instead of the actual effect of the aid.[93] The fact that most people who claimed the tax deduction used it for religious schools was not constitu-

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81. *Aguilar*, 473 U.S. at 409. Teachers were monitored by field personnel who would "attempt to pay at least one unannounced visit per month." *Id.* at 407. The field personnel reported to field supervisors who would also pay unannounced visits to Title I classes in religious schools. *Id.*

82. *Id.* at 409.

83. *Id.* at 409-10. The Court stated that the freedom of religious belief of those who are not devoted to the denomination receiving government aid suffers because the government is choosing to help one denomination over another. *Id.*

84. *Id.* at 410.

85. *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

86. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 409 (1983).

87. 463 U.S. 388 (1983).

88. *Id.* at 409.

89. *Id.* at 396.

90. *Id.* at 401-02.

91. *Id.* at 399.

92. *Id.* at 400.

93. *Id.* at 401.

tionally important because the law was facially neutral.[94] The Court stated that with private school tax deductions, "we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights."[95]

Witters v. Washington[96] confirmed the position that the Constitution does not place restrictions on religious schools receiving general aid that is provided for the benefit of all students.[97] A Washington State program provided grants to train and educate the blind.[98] An otherwise qualified college student planning to study religion was denied the aid because he attended a religious school.[99]

The Court validated the position that direct subsidies to religious schools were impermissible.[100] Direct subsidies are similar to cash supplements, which are impermissible because they have the inescapable effect of advancing the religious mission of a sectarian school.[101] The Court added that even aid to parents or students, such as the lending of textbooks, could be termed a direct subsidy and be found impermissible.[102] However, the Court held that the Washington program was constitutional.[103]

The Court relied on four facts in deciding the program was constitutional.[104] First, the aid went to the college only as a result of a student's genuinely independent and private choice to attend a religious school.[105] Second, the Washington program allocated aid neutrally, without regard to religion.[106] Third, the aid did not create an incentive to attend a

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94. *Id.* The Minnesota law at issue was facially neutral because it permitted taxpayers to deduct certain educational expenses without regard to religion. *Id.* at 391. The expenses that could be deducted from the computation of the taxpayer's gross income included tuition, textbooks, and transportation for dependents attending elementary or secondary school. *Id.* at 390 n.1.

95. *Id.* at 400 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970)). The "dangers" are that government involvement in religion has throughout history caused the collapse of many political systems. *Id.* at 399-400.

96. 474 U.S. 481 (1986).

97. *Id.* at 489; *see, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (stating that a general governmental program such as busing cannot be denied to children just because they attend a private religious school).

98. *Witters*, 474 U.S. at 483.

99. *Id.* at 483-84. Witters was "otherwise qualified" because he met the credentials for the program. *Id.* The credentials were (1) no vision or limited vision that constitutes or results in a substantial handicap to employment and (2) can reasonably be expected to benefit from vocational rehabilitation services in terms of employability. *Id.* at 483.

100. *Id.* at 487.

101. Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 394 (1985).

102. *Witters*, 474 U.S. at 487 (citing Wolman v. Walter, 433 U.S. 229, 248-51 (1977)).

103. *Id.* at 489.

104. *Id.* at 487-88.

105. *Id.* at 487.

106. *Id.*

religious school.[107] Finally, the program did not provide a significant amount of aid to religious schools.[108]

In *Bowen v. Kendrick*,[109] the court rejected an attack on a federal program that provided funding to public and nonpublic organizations for counseling services and research in the area of adolescent sexual relations.[110] Chief Justice Rehnquist, writing for the majority, stated that the Court had never held that religious institutions were barred from participating in government funded social welfare programs.[111] The case was significant because it marked the first time the Court explicitly stated that actual diversion—the use of government provided secular aid to fund religious purposes—was impermissible.[112]

In *Zobrest v. Catalina Foothills*,[113] the Court upheld a government program that provided an interpreter to a deaf student attending a religious school.[114] The Court relied on its previous decisions in *Mueller* and *Witters* as support for the decision and did not use the *Lemon* test.[115] The Court found the aid was available to all deaf students neutrally, without regard to the student's religion.[116] Also, the Court found it important that the aid did not create an incentive to attend a religious school.[117] The Court explained that there was not an incentive because the parents had the choice to place their child in either a secular environment or a pervasively religious environment.[118] The Court stated that the interpreter would not add or subtract from this environment.[119] Furthermore, the schools were not the primary beneficiaries of the aid, and thus the aid was constitutionally permissible.[120]

The Court distinguished *Meek* and *Grand Rapids School District v. Ball*,[121] from the facts in *Zobrest*.[122] First, the Court stated that sending an interpreter into a private school was not a direct subsidy of religious schools, but was instead a program designed to help handicapped

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107. *Id.* at 488.
108. *Id.*
109. 487 U.S. 589 (1988).
110. *Id.* at 593.
111. *Id.* at 609.
112. *Id.* at 621-22. The Court stated that it was important, for example, to determine whether conditions existed that would allow the use of funds for the construction of a building that would be used for religious activities. *Id.* at 646 (citing Hunt v. McNair, 413 U.S. 734, 744 (1973)).
113. 509 U.S. 1 (1993).
114. *Id.* at 14.
115. *Id.* at 21.
116. *Id.* at 10.
117. *Id.*
118. *Id.* at 13.
119. *Id.*
120. *Id.* at 13-14.
121. 473 U.S. 373 (1985).
122. *Zobrest*, 509 U.S. at 12.

individuals.[123] Second, the Court stated that interpreters, unlike teachers, were required to follow ethical guidelines and "transmit everything that is said in exactly the same way it was intended."[124]

In summary, the 1980s and 1990s demonstrated the Court's reluctance to strictly apply the *Lemon* test to Establishment Clause cases.[125] This reluctance, coupled with the Court's failure to directly overrule the *Lemon* test, created confusion among the lower courts as to when to apply the test and when not to apply it.[126]

D. OVERRULING *AGUILAR*: THE DISMANTLING OF THE WALL SEPARATING CHURCH FROM STATE

Agostini v. Felton arose directly out of the Supreme Court's ruling in *Aguilar v. Felton*.[127] The Court's ruling in *Aguilar* prevented the New York City School Board from sending public school teachers into religious school buildings to teach remedial courses.[128] After the ruling, New York schools began teaching remedial courses to religious school students in trailers located near the schools.[129] However, the cost of operating the trailers was prohibitive, so New York schools filed a motion for relief from the *Aguilar* judgment.[130]

The case once again found its way to the Supreme Court.[131] The Court reversed *Aguilar* and granted relief from its earlier judgment, citing significant changes in recent Establishment Clause jurisprudence.[132]

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123. *Id.*

124. *Id.* at 13.

125. Michaelle Greco Cacchillo, Note, Zobrest v. Catalina Foothills School District: *A Victory for Disabled Children, A Snub for the Lemon Test*, 25 LOY. U. CHI. L.J. 445, 461 (1994).

126. *Id.* at 477. Justice Scalia wrote as to the Court's invocation of the *Lemon* test:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . .
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> . . . .
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> The secret of the *Lemon* test's survival . . . is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

127. Agostini v. Felton, 521 U.S. 203, 214 (1997) (citing Aguilar v. Felton, 473 U.S. 402 (1985)).

128. *Id.* at 210-11.

129. *Id.* at 213.

130. *Id.* at 203.

131. *Id.* at 214.

132. *Id.* at 237. The doctrine of stare decisis "does not prevent [the Supreme Court] from overruling a previous decision when there has been a significant change in, or subsequent development of, our constitutional law." *Id.* at 236 (citing United States v. Gaudin, 515 U.S. 506, 521 (1995)).

The Court stated that the *Aguilar* opinion rested on four assumptions that were no longer controlling.[133]

The first invalid assumption was that public employees working in religious schools would introduce religion into their work.[134] This assumption was invalidated by the Court's ruling in *Zobrest*.[135] In *Zobrest*, the Court disavowed the notion that the Establishment Clause laid down an absolute bar on the placement of public employees in religious schools.[136] In absence of evidence to the contrary, the Court now assumed that a public employee would dutifully follow the ethical guidelines of his or her profession.[137]

The second invalid assumption was that public employees working in religious schools would create a "symbolic union of church and state."[138] This assumption was also invalidated by the Court's ruling in *Zobrest*.[139] The Court stated that a narrow reading of *Zobrest* would limit its holding to the idea that interpreters did not create a "symbolic union."[140] However, the Court stated there was no basis to confine *Zobrest* only to interpreters, because interpreters and teachers had the same opportunity to indoctrinate students with religion.[141]

The third invalid assumption was that "any and all public aid that directly aided the educational function of religious schools impermissibly financed religious indoctrination."[142] This assumption was undermined in *Witters*.[143] The Court stated that aid was constitutional if made available neutrally without regard to the school's religious nature.[144] The aid is considered neutral if it is made as a result of the genuinely independent and private choice of individuals.[145]

The final invalid assumption was that the monitoring required to ensure compliance with statutes would need to be so extensive that it would create an excessive entanglement between church and state.[146] The Court's rulings in *Zobrest* and *Bowen* undermined the final

133. *Id.* at 222.
134. *Id.*
135. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993).
136. *Agostini*, 521 U.S. at 203-04.
137. *Id.*
138. *Id.* at 222.
139. *Zobrest*, 509 U.S. at 12.
140. *Agostini*, 521 U.S. at 225.
141. *Id.*
142. *Id.* at 222.
143. *See id.* at 225 (citing *Witters v. Washington Department of Services For Blind*, 474 U.S. 481 (1986), and stating its holding that "the Establishment Clause did not bar a state from issuing a vocational tuition grant to a blind person who wished to attend a Christian college and become a pastor").
144. *Id.*
145. *Id.* at 226.
146. *Id.* at 222.

assumption.[147] After *Zobrest*, the Court no longer assumed that teachers will inculcate religion simply because they happen to be in a religious atmosphere.[148] Therefore, excessive monitoring is not necessary to ensure compliance.[149] Furthermore, the Court argued that systems of monitoring far more onerous than the one at issue in *Agostini* had been upheld.[150]

In *Agostini*, the Court redefined the criteria used to assess whether the aid had the impermissible effect of advancing or inhibiting religion.[151] The Court applied a three-factor test in order to determine whether a government program had that effect.[152] Initially, the Court looked to see if the government program resulted in governmental indoctrination.[153] The Court then investigated whether the program defined its recipients by reference to religion.[154] Finally, the Court determined whether the program created an excessive entanglement between church and state.[155]

In conclusion, *Agostini* reaffirmed the general principles used to evaluate aid under the Establishment Clause, even though the assumptions were undermined.[156] The Court still examined whether the government acted with the purpose of inhibiting or advancing religion.[157] The Court further examined whether the aid has the effect of advancing or inhibiting religion.[158] However, the Court did redefine the criteria used to determine whether government aid had the effect of advancing or inhibiting religion.[159]

The question of whether this redefinition was limited to situations that involved public school employees on religious school property was left unresolved.[160] The uncertainty that lingered as a result of the Court's failure to decide the bounds of *Agostini* was settled in *Mitchell*.[161]

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147. *Id.* at 234.
148. *Id.*
149. *Id.*
150. *Id.* The Court cited *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988), as an example of a more onerous monitoring system that was upheld by the Court. *Agostini*, 521 U.S. at 234.
151. *Id.*
152. *Id.* at 230-32.
153. *Id.* at 230.
154. *Id.* at 231.
155. *Id.* at 232.
156. *Id.* at 222. The Court modified the *Lemon* test by examining only the purpose and effect of a program. Mitchell v. Helms, 120 S. Ct. 2530, 2540 (2000). However, the Court still considers excessive entanglement under the effect prong of the test. *Agostini*, 521 U.S. at 222.
157. *Id.* at 222-23.
158. *Id.*
159. *See id.* at 234 (laying out the three factors used to apply the effects test).
160. Helms v. Picard, 151 F.3d 347, 374 (5th Cir. 1998).
161. *See generally* Mitchell v. Helms, 120 S. Ct. 2530 (2000).

III. ANALYSIS

Mitchell was decided by a four-justice plurality, which held that the Jefferson Parish Chapter 2 program did not violate the Establishment Clause because it neither resulted in religious indoctrination by the government nor did it define its recipients by reference to religion.[162] Justice Thomas wrote the plurality opinion, which was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy.[163] Justice O'Connor, joined by Justice Breyer, wrote a separate opinion concurring in the judgment.[164] Justice O'Connor emphasized the diversion factor.[165] Justice Souter wrote the dissenting opinion, which was joined by Justice Stevens and Justice Ginsburg.[166] Justice Souter criticized the plurality for reducing the test of constitutionality to mere evenhanded neutrality.[167]

A. THE PLURALITY

The Supreme Court explicitly overruled *Meek* and *Wolman* in this decision.[168] The Court stated that the revised *Lemon* test developed in *Agostini* is the precedent the courts should now follow.[169] However, the first part of the test was not applied because Chapter 2's secular purpose was not challenged.[170] Therefore, the Court only addressed whether Chapter 2 had the effect of advancing or inhibiting religion.[171]

When addressing whether Chapter 2 had the effect of advancing or inhibiting religion, the Court considered two factors from the *Agostini* effect test.[172] The first *Agostini* factor is whether the aid program defines the eligible recipients without regard to religion.[173] Under this analysis the Court will consider the aid constitutional if it is provided to a religious school "only as a result of the genuinely independent

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162. *Id.* at 2555.
163. *Id.* at 2536.
164. *Id.* at 2556.
165. *Id.* at 2558.
166. *Id.* at 2572.
167. *Id.* at 2573.
168. *Id.* at 2555. Justices O'Connor and Breyer joined the plurality in overruling *Meek* and *Wolman*. *Mitchell*, 120 S. Ct. at 2556.
169. *Id.* at 2540. The revised *Lemon* test considered two factors in its inquiry: (1) whether the government acted with the purpose of inhibiting or advancing religion; and (2) whether the aid had the effect of advancing or inhibiting religion. *Id.*; *see also* Agostini v. Felton, 521 U.S. 203, 222-23 (1997).
170. *Mitchell*, 120 S. Ct. at 2540.
171. *Id.*
172. *Id.* at 2540-41. The Court did not consider whether the program created an excessive entanglement because neither the respondents nor the Fifth Circuit addressed the issue in previous litigation. *Id.* at 2540.
173. *Id.*

and private choices of individuals."[174] The second factor is whether the system of aid allocation has the effect of advancing or inhibiting religion by creating an incentive for a school to commence religious indoctrination.[175]

Applying the first factor of the *Agostini* effect test, the Court found that Chapter 2 did not have the effect of advancing or inhibiting religion because the program did not define its recipients by reference to religion.[176] The Court stated that the aid in Jefferson Parish was "allocated on the basis of neutral, secular criteria that neither favors nor disfavors religion."[177] The Court declared that in the case of Chapter 2 aid, the parent and child, not the government, decided which school received the aid.[178]

The Court stated that "[i]f aid to schools . . . is neutrally available and, before reaching or benefiting any religious school, [it] first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'"[179] In other words, the Constitution does not require the aid to actually pass through the hands of individual citizens.[180] In the case of Chapter 2 aid, any money that a religious school received was the "result of genuinely independent and private choices of individuals."[181] The Court stated Chapter 2 was analogous to the government issuing a paycheck to one of its employees knowing that the employee would use the money to fund a religious institution.[182]

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174. *Id.* at 2541 (quoting *Agostini*, 521 U.S. at 226).

175. *Id.*

176. *Id.* at 2540.

177. *Id.* at 2552. Chapter 2 of the Education Consolidation and Improvement Act (ECIA) grants federal education funds to state governments. 20 U.S.C. §§ 7301-7312, 7332, 7352-7373, 7331, 7351 (1994 & Supp. V 1999). The states direct the funds to local school districts, which then give the money to local schools. *Id.* §§ 7311, 7312(a). Both private and public schools are eligible for Chapter 2 aid. *Id.* § 7312(a). The number of students enrolled in a school determines the amount of aid it should receive. *Id.* § 7312(b). Chapter 2 aid may be used "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials." *Id.* § 7351(b)(2).

178. *Mitchell*, 120 S. Ct. at 2541. The Court stated that it was not significant that individual students do not apply for the aid or use the material and equipment after it was provided to the school. *Id.* at 2545. The respondents argued that the Chapter 2 program was unconstitutional because it awarded the aid directly to the schools instead of the students. *Id.* at 2544. The respondents argued that direct aid to religious schools was always impermissible. *Id.*

179. *Id.*

180. *Id.* at 2545.

181. *Id.* (citing Agostini v. Felton, 571 U.S. 203, 226 (1997) (quoting Witters v. Washington, 474 U.S. 481, 487 (1985))).

182. *Id.* While the Court stated the terms "direct" and "indirect" were arbitrary, it noted the "special Establishment Clause dangers" when money is given to religious schools directly instead of indirectly. *Id.* at 2546. The Court did not elaborate on this issue other than stating its "refusal to allow a 'special' case to create a rule for all cases." *Id.* at 2546-47.

Furthermore, the Louisiana Chapter 2 aid provided to schools did not have impermissible content.[183] Jefferson Parish enforced the statutory requirement that the aid was "secular, neutral, and non-ideological."[184] Jefferson Parish used most of the Chapter 2 aid to purchase computers, software, and library books.[185] The Court stated that computers did not have preexisting content and therefore could not be impermissible.[186] The Court further stated that the monitoring system prevented impermissible content from entering the library books.[187]

Applying the second factor of the *Agostini* effect inquiry, the Court found that the Jefferson Parish program did not result in governmental indoctrination of religion.[188] The Court noted that the Jefferson Parish School District awarded aid on a neutral basis without regard to a school's religious affiliation, because the aid was available to both religious and non-religious schools on an equal basis.[189] The equitable distribution of aid to both religious and non-religious schools did not create an incentive to attend a religiously affiliated school.[190]

One possible problem the Court found with Jefferson Parish's Chapter 2 program was that the procedural safeguards were inadequate to prevent actual diversion.[191] The safeguards included: "(1) signed assurances that Chapter 2 aid will only be used for secular, neutral, and non-ideological purposes, (2) monitoring visits, and (3) the requirement that equipment be labeled as belonging to Chapter 2."[192] The Court argued that these safeguards might guard against improper content, but they were ineffective in preventing diversion.[193]

However, even without procedural safeguards, the Court stated that evidence that the Chapter 2 material could be diverted for religious use

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183. *Id.* at 2552.

184. *Id.*

185. *Id.* at 2553.

186. *Id.* The respondents did not contend that the software purchased had an impermissible content. *Id.* Consequently, the respondent's impermissible content argument rested on the fact that the equipment could be diverted for use in religious classes. *Id.*

187. *Id.* at 2555. A coordinator for the Chapter 2 program in Jefferson Parrish pre-screened the book requests of private schools to determine whether the books contained impermissible material. *Id.*

188. *Id.* at 2553.

189. *Id.* at 2552-53. "Private schools receive[d] . . . materials and equipment based on the per capita number of students at each school." *Id.* (quoting Walker v. San Francisco Unified Sch. Dist., 46 F.3d 1449, 1464 (9th Cir. 1995)). Allocation to private schools must be equal to the expenditures for programs in public schools. 20 U.S.C. § 7372(a)(1) & (b) (1994).

190. *Mitchell*, 120 S. Ct. at 2553.

191. *Id.* at 2553-54.

192. *Id.* The Court stated that monitoring was highly unlikely to prevent diversion. *Id.* Jefferson Parish only inspected each private school once a year for two hours, and it warned the school of each upcoming visit. *Id.* at 2554 n.15. The Court also placed little trust in the adequacy of labeling to prevent diversion. *Id.* at 2554. The Court also stated that labeling associated the government with any religious use of the equipment. *Id.* at 2554 n.16.

193. *Id.* at 2553 n.14.

was not relevant to the constitutional analysis.[194] The Court argued that if the aid was suitable for use in public schools because of its non-religious content, and eligibility for the aid was determined by constitutionally permissible means, then the use of that aid to indoctrinate cannot be attributed to the government.[195] Indoctrination not attributable to the government was not of constitutional concern.[196] The Court stated that divertibility should not be the focus of the constitutional analysis, but rather the focus should be on the neutral content of the aid.[197]

The Court further noted that the respondents' evidence of isolated statutory violations that occurred fifteen years ago was not constitutionally relevant.[198] The respondents had pointed to a past incident where the Chapter 2 program allowed some religious books to be loaned to religious schools.[199] The respondents pointed to this incident to show that the procedural safeguards were insufficient.[200] However, the Court pointed out that the situation was discovered and remedied by the proper authorities, thus proving that the safeguards worked.[201]

In summary, the plurality extended the *Agostini* effect test to all Establishment Clause cases.[202] In doing so, the plurality created a test for constitutionality based on a single factor of neutrality.[203] Although the plurality examined two factors when determining whether government aid had the effect of advancing or inhibiting religion, it essentially used the same test of neutrality for both questions.[204]

B. JUSTICE O'CONNOR'S CONCURRENCE IN JUDGMENT

Justice O'Connor, joined by Justice Breyer, agreed with the plurality that *Agostini* was the controlling case, and that *Meek* and *Wolman* should be overruled to the extent that they were inconsistent with the *Mitchell* opinion.[205] However, Justice O'Connor was disturbed by the plurality's emphasis on neutrality as the criteria for upholding school aid pro-

194. *Id.*

195. *Id.* at 2547 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 245 (1968)).

196. *Id.*

197. *Id.* at 2548. The Court stated that content-neutral aid can be generally defined as any aid suitable for use in a public school or in a private school. *Id.*

198. *Id.* at 2555.

199. *Id.* at 2554.

200. *Id.* at 2554.

201. *Id.* at 2555. The violations included the use of equipment in the theology department and the lending of library books that contained improper religious content. *Id.* at 2554 n.17.

202. *Id.* at 2540.

203. *Id.* at 2543.

204. *Id.* The Court stated that it looks to the same set of facts showing neutrality for the first factor (advancing or inhibiting religion) and the second factor (resulting in governmental indoctrination of religion) of the *Agostini* effect test. *Id.*

205. *Id.* at 2556 (O'Connor, J., concurring).

grams.[206] Justice O'Connor was also troubled by the plurality's lack of concern for divertibility.[207]

Justice O'Connor argued that the plurality's opinion reduced the test for constitutionality to a single factor of neutrality.[208] She agreed with the plurality that neutrality was important, but Justice O'Connor maintained that neutrality should not be the sole criteria for determining whether government aid violates the Establishment Clause.[209]

Furthermore, Justice O'Connor disagreed with the plurality's conclusion that actual diversion of governmental aid was constitutional.[210] According to Justice O'Connor, actual diversion is always impermissible.[211] She argued that aid is constitutional only if it is obtained as a result of "genuinely independent and private choices of aid recipients."[212] When the government provides assistance directly to the student, that student can choose to attend a religious school, yet retain control over whether the non-religious government aid will be applied toward the religious education.[213] In that situation, the use of aid to finance a religious activity is a true private choice.[214]

Justice O'Connor argued that there was a difference between a government aid program based on school enrollment and one based on true private choice.[215] A program based on enrollment can be perceived as an endorsement of the school's religious message.[216] However, a program based on true private choice could not be perceived as an endorsement because of the choice of the individual.[217] Justice O'Connor

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206. *Id.*

207. *Id.*

208. *Id.* at 2557. Justice O'Connor used a quote from Justice Thomas as evidence that the plurality changed the test for constitutionality to a single factor. *Id.* at 2556-57. Justice Thomas stated:

> If religious, irreligious, and areligious are all alike eligible for government aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.

Id.

209. *Id.* at 2557.

210. *Id.* at 2558. Actual diversion is the use of government provided aid for the advancement of religion. *Id.*

211. *Id.* (citing Bowen v. Kendrick, 487 U.S. 589, 620-21 (1988)). In *Bowen*, the Court declared a government aid program constitutional on its face, but remanded the case to determine whether aid had been used to support religious objectives. 487 U.S. at 621-22. The remand would have been unnecessary if actual diversion was irrelevant. *Mitchell*, 120 S. Ct. at 2558.

212. *Id.* (quoting Witters v. Washington, 474 U.S. 481, 487 (1986)).

213. *Id.* at 2559.

214. *Id.*

215. *Id.*

216. *Id.* Because the religious indoctrination was supported by government assistance, a reasonable observer would naturally perceive the aid program was government support of religion. *Id.*

217. *Id.*

stated that a program based on enrollment was analogous to a government program subsidizing churches based on membership.[218] She argued that subsidizing churches based on membership would be unconstitutional; therefore funding religious schools based on enrollment could be unconstitutional.[219]

Justice O'Connor agreed with the plurality that *Agostini* was the controlling precedent.[220] She applied the three criteria from *Agostini* to determine whether the Jefferson Parish program had the unconstitutional effect of advancing or inhibiting religion.[221] However, Justice O'Connor only considered whether the program resulted in government indoctrination, or defined its recipients by reference to religion, and the question whether it created an excessive entanglement was not challenged.[222]

Justice O'Connor found that Chapter 2, as applied in Jefferson Parish, was constitutional.[223] It was based upon neutral and secular criteria that allocated aid evenly to both religious and non-religious schools.[224] The program was found to be similar to the one upheld in *Agostini*.[225] The evidence of actual diversion was de minimis and did not have the effect of advancing religion.[226]

Justice O'Connor also argued that the *Meek* and *Wolman* assumption of unconstitutionality when religious schools used government funds to pay for materials and equipment was no longer controlling.[227] She found the fact that Chapter 2 materials and equipment, more than textbooks, were easily divertible to religious use was not a significant factor in the constitutional analysis.[228] Justice O'Connor noted that a determined instructor could use any tool to teach a religious message.[229] In order to establish a constitutional violation, actual use of Chapter 2 funds for religious use must be shown.[230] The assumption that religious

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218. *Id.* at 2560 (stating the special establishment clause dangers of direct money subsidies to religious organizations).

219. *Id.*

220. *Id.* at 2556.

221. *Id.* at 2560. The three *Agostini* criteria were: "(1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion." *Id.* (citing Agostini v. Felton, 521 U.S. 203, 234 (1997)).

222. *Id.* at 2560-61.

223. *Id.* at 2556.

224. *Id.* at 2561.

225. *Id.* at 2562.

226. *Id.* at 2571-72. The actual diversion included the use of equipment in the theology department and the lending of library books that contained improper religious content. *Id.*

227. *Id.* at 2563-65.

228. *Id.* at 2564.

229. *Id.* at 2565-66.

230. *Id.* at 2567.

schoolteachers can abide by restrictions on the use of textbooks should be extended to Chapter 2 material and equipment.[231]

C. JUSTICE SOUTER'S DISSENT

Justice Souter, joined by Justices Stevens and Ginsburg, dissented, arguing that the "First Amendment's Establishment Clause prohibits Congress . . . from making any law respecting the establishment of religion."[232] Thus, Justice Souter stated that "it bars the use of public funds for religious aid."[233]

Justice Souter stated that there was no single test to determine constitutionality.[234] "Particular factual circumstances control, and the answer is a matter of judgment."[235] Justice Souter listed seven factors that should be used to analyze the constitutionality of aid: (1) neutrality in distribution, (2) neutrality in form, (3) its path from government to religious institution, (4) divertibility to religious nurture, (5) potential for reducing traditional expenditures of religious institutions, (6) its relative importance to the recipient, and (7) the catch-all factor "other things."[236]

Justice Souter criticized the plurality for reducing the test for constitutionality to a single factor.[237] In *Everson* and *Allen*, the Court used the term "neutral" to refer to the government's position between "aiding and handicapping" religion.[238] Justice Souter stated:

> Government must maintain neutrality as to religion, "neutrality" being a conclusory label for the required position of government as neither aiding religion nor impeding religious exercise by believers. "Neutrality" was not the name of any test to identify permissible action, and in particular, was not synonymous with evenhandedness in conferring benefit on the secular as well as the religious.[239]

Justice Souter recognized that in *Lemon*, the Court began to use "neutrality" to describe a benefit that was non-religious.[240] Neutrality again took on a different definition in the 1980s when the Court began

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231. *Id.* at 2568.
232. *Id.* at 2572 (Souter, J., dissenting).
233. *Id.*
234. *Id.* at 2573.
235. *Id.*
236. *Id.* Justice Souter based these factors on criteria that were used to decide previous cases involving government aid to religious schools. *Id.*
237. *Id.*
238. *Id.* at 2578.
239. *Id.* at 2577.
240. *Id.* at 2579.

to use the word to describe evenhandedness in the method of allocating aid to religious and non-religious beneficiaries.[241] Justice Souter acknowledged the change in definitions, but he considered neutrality as only one of the many factors that must be analyzed.[242]

Justice Souter argued that evenhanded neutrality alone is not a sufficient test for constitutionality under the Establishment Clause.[243] Justice Souter wrote:

> If we look no further than evenhandedness, and fail to ask what activities the aid might support, or in fact did support, religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts, and religious missions would thrive on public money.[244]

Justice Souter pointed to three main lines of inquiry that have emerged in addition to neutrality.[245] First, the Court has examined whether the school was pervasively religion, and whether it was a primary or secondary school, because these categories of schools raise special Establishment Clause concerns.[246] Second, the Court has inquired into the directness of the aid distribution and distribution as a result of genuinely independent choices of individual parents.[247] Third, the Court has evaluated other relevant characteristics of aid that it has found important such as: "its religious content; its cash form; its divertibility or actual[ ] diversion to religious [use]; its supplantation of traditional items of religious school expense; and its substantiality."[248]

Pervasively sectarian schools are defined as institutions with an overriding religious mission.[249] The teaching of religion in such schools is the focus of the instructor.[250] Religious teaching at such schools cannot be separated from education.[251] Therefore, government aid to these schools is impermissible because it will inevitably support religious indoctrination.[252]

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241. *Id.*
242. *Id.* at 2581.
243. *Id.*
244. *Id.* at 2581-82.
245. *Id.* at 2582.
246. *Id.*
247. *Id.*
248. *Id.* Justice Souter did not cite cases to support these characteristics, but he did state the characteristics are found in previous Court rulings. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at 2583.
252. *Id.*

Aid to primary and secondary schools also raises heightened suspicion under Establishment Clause analysis.[253] The age and maturity level of students in K-12 make "them highly susceptible to religious indoctrination."[254] The Court recognized that older students are more likely to be skeptical of instructors, and they are more able to separate religious from non-religious beliefs.[255] Also, religiously affiliated universities, as opposed to primary and secondary schools, allow a great deal of academic freedom and seek to evoke critical responses from students.[256]

Justice Souter stated that the Court has also examined whether the government aid is direct or indirect.[257] Direct aid raises a greater risk of "run[ning] afoul of the ban on government's participation in religion."[258] Direct aid is dangerous because of the government's history of granting aid to institutions conditioned upon the grantee submitting to various comprehensive measures of control and surveillance.[259] The measures of control and surveillance that would be necessary in order to monitor direct aid to religious institutions would create an intimate and enduring association between church and state.[260]

Furthermore, Justice Souter stated that the Court examines the characteristics of the aid in its determination of constitutionality.[261] First, the Court has always barred aid with actual religious content.[262] Second, "aid is invalid when circumstances would allow its diversion to religious [use]."[263] Money grants have always been unconstitutional because they are so easily diverted.[264] Supplies have also been suspect of being divertible.[265]

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253. *Id.* at 2582.

254. *Id.* at 2583 (citing Lemon v. Kurtzman, 403 U.S. 602, 616 (1971)).

255. *Id.*

256. *Id.* (citing Tilton v. Richardson, 403 U.S. 672, 686 (1971)).

257. *Id.* at 2584.

258. *Id.* Justice Souter stated that aid directed at religious schools by the government has never been constitutional. *Id.* Indirect aid that a religious school receives as a result of "genuinely independent and private choices of aid recipients" is constitutional. *Id.* (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

259. Lemon v. Kurtzman, 403 U.S. 602, 621 (1971). The *Lemon* Court was particularly concerned with the government's power to inspect the financial records of religious schools. *Id.*

260. *Id.* at 621-22.

261. *Mitchell*, 120 S. Ct. at 2582.

262. *Id.* at 2584; *see, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (noting that the State of New Jersey cannot contribute funds to a sectarian institution).

263. *Mitchell*, 120 S. Ct. at 2585; *see, e.g., Everson*, 330 U.S. at 16 (stating that there can be no support of activities, whatever they may be called, if those activities adopt a form that teaches or practices religion).

264. *Mitchell*, 120 S. Ct. at 2585; *see e.g., Everson*, 330 U.S. at 5 (pointing out that New Jersey's statute reimburses parents for their children's bus fares; it doesn't give the parents money before the fares are paid).

265. *Mitchell*, 120 S. Ct. at 2586; *see, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236, 244-45 (1968) (worrying that school authorities will have trouble distinguishing between secular and religious textbooks).

Third, aid that supplants expenditures of a religious school's normal budget is barred.[266] A benefit that flows to a religious school can be impermissible when it frees up resources for the school to engage in religious indoctrination.[267] Finally, substantial amounts of aid are unconstitutional.[268] Allowing the government to give substantial amounts of aid to religious schools would frustrate the interest in separating religious functions from non-religious educational functions.[269] Religious schools integrate religious and secular education, thus giving those institutions substantial amounts of aid necessarily results in aid to the religious mission as a whole.[270]

Justice Souter stated that the plurality based its opinion on three mistaken assumptions, which "underscore its sharp break with the Framers' understanding of establishment, and this Court's consistent interpretive course."[271] First, the plurality based its impermissible effect analysis on whether an outside observer would attribute the aid as the government supporting religion.[272] Second, the plurality assumed an equal amount of aid would have an equal effect.[273] Justice Souter argued that aid would have an additional effect of supporting religious teaching in addition to non-religious teaching.[274] Third, the plurality assumed that aid based on enrollment "safeguard[ed] the same principals as independent, private choices."[275]

Justice Souter based his decision on the constitutionality of the Chapter 2 program as applied in Jefferson Parish on several factors.[276] First, the Jefferson Parish program allowed actual diversion to occur in the context of pervasively sectarian schools.[277] The equipment provided to religious schools was not the type for use by individual students.[278] Second, the divertibility inherent in the Chapter 2 program was enhanced by the Jefferson Parish scheme.[279] In Jefferson Parish, divertibility was

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266. *Mitchell*, 120 S. Ct. at 2588; *see, e.g.*, Cochran v. La. Bd. of Educ., 281 U.S. 370, 375 (1930) (reasoning that the school does not benefit from free textbooks provided to the children by the state).

267. *Mitchell*, 120 S. Ct. at 2588.

268. *Id.* at 2589; *see, e.g.*, Meek v. Pittenger, 421 U.S. 349, 366 (1975) (stating that substantial amounts of aid lead to "substantial advancement of religious activity").

269. *Meek*, 421 U.S. at 366.

270. *Id.*

271. *Mitchell*, 120 S. Ct. at 2591.

272. *Id.* at 2590.

273. *Id.* at 2591.

274. *Id.* Religious schools integrate religious and secular education; thus giving those institutions aid necessarily results in the advancement of the school's religious mission as a whole. *Id.*

275. *Id.*

276. *Id.* at 2591-97.

277. *Id.* at 2591. Most religious schools receiving aid in Jefferson Parish were primary and secondary Roman Catholic schools whose mission was to teach religion. *Id.* at 2592-93.

278. *Id.* at 2592.

279. *Id.* A "substantial risk" of future diversion is sufficient to invalidate an aid program. *Id.* at

enhanced because requests for Chapter 2 materials came from religious school officials and parents, and not secular officials.[280] Additionally, the inherent divertibility was enhanced because the precautionary features were "grossly inadequate" to halt Establishment Clause violations.[281] Finally, the sporadic monitoring program was ineffective.[282] Plus, no records of Chapter 2 materials were ever kept.[283] For all the above mentioned reasons, Justice Souter dissented and declared that he would find Chapter 2 as applied in Jefferson Parish unconstitutional.[284]

IV. IMPACT

Public schools have long been under fire for the poor results America's children have displayed in international testing comparisons.[285] These results have caused an increase over the last ten years in the number of children enrolling in private schools.[286] Private schools offer an alternative to parents who are dissatisfied with public schools. Many private schools happen to be religiously affiliated, and a private school's religious affiliation often raises First Amendment issues.[287] Many Americans believe education is the most important issue facing the country, and people do not want to see any children, whether in public or private school, fall behind.[288] Also, people welcome private schools as competition to public schools.[289]

The State of North Dakota has seventy-three private schools with 7,278 students.[290] North Dakota receives Chapter 2 funding and distributes material to private schools similar to the program in *Mitchell*.[291]

2594.

280. *Id.* at 2592

281. *Id.* at 2593. The Establishment Clause is violated when government aid is provided without effective safeguards. *Id.* at 2594.

282. *Id.* at 2593. The dissent pointed out that actual diversion occurred in the library book program. *Id.* at 2595.

283. *Id.* at 2594.

284. *Id.* at 2597.

285. *See generally* Charles A. Hershberg, *How Good Are Our Schools?*, LIFE MAG., Sept. 1, 1999, at 40. Only 34% of Americans believe schools are doing a good job of teaching children useful things. *Id.*

286. THOMAS D. SNYDER, DIGEST OF EDUCATION STATISTICS, 1998, U.S. DEP'T OF EDUC. 12 (1999), *microformed on* Doc. No. 1.310/2:426516 (U.S. Office of Educational Research and Improvement).

287. *Id.* at 71. Of the 27,686 private schools in the fall of 1995, 21,329 were religiously affiliated. *Id.*

288. *See* Alec Gallup, *The Gallup Organization, available at* http://www.gallup.com/poll/releases/pr001002.asp (last visited Oct. 4, 2000). A poll conducted October 2, 2000, showed that education was the issue of top concern to American voters. *Id.* Approximately 90% of Americans believe education is "very" or "extremely" important. *Id.*

289. SNYDER, *supra* note 286, at 29. In 1997, 44% of Americans believed that parents should send their children to private schools. *Id.*

290. EDUCATIONAL DIRECTORY OF NORTH DAKOTA 1999-2000, at B-3, *microformed on* Doc. No. L903.N9 A32 (N.D. Dep't of Pub. Instruction).

291. THE BIENNIAL REPORT 1999-2000, at 7-10, *microformed on* Doc. No. L186.B15 (N.D. Dep't of Pub. Instruction).

This decision allows the private schools to continue to receive Chapter 2 funding.[292] In fact, a footnote in a recent North Dakota Supreme Court case, decided shortly after the *Mitchell* decision, indicates that North Dakota may follow the single factor neutrality test.[293]

V. CONCLUSION

Nevertheless, the plurality decision in *Mitchell* is not binding per se on the circuits.[294] In the aftermath of *Mitchell*, courts have declined to observe the plurality's decision, opting instead to follow Justice O'Connor's concurring opinion.[295] The concurring and dissenting justices emphasize the diversion factor as well as the neutrality test.[296] The question remains whether the single factor neutrality test of the plurality will be able to stand the test of time.[297]

*Allen M. Brabender**

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292. *See generally* Mitchell v. Helms, 120 S. Ct. 2530 (2000).

293. State *ex rel.* Heitkamp v. Family Life Servs., Inc., 2000 ND 166, ¶ 37, 616 N.W.2d 826, 840 n.6. The North Dakota Supreme Court recognized the existence of the single factor neutrality test for determining the constitutionality of religious school aid. *Id. Family Life* did not deal with public school aid to religious schools; the case involved an appeal from a court judgment that renamed a director of the corporate board of a non-profit religious organization. *Id.* ¶ 3, 616 N.W.2d at 830.

294. *See* Horton v. California, 496 U.S. 128, 136 (1990) (stating that the Supreme Court's decision on the "plain view" doctrine in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), was not binding because the opinion was a four-justice plurality). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in judgements on the narrowest grounds." Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976).

295. *See, e.g.*, Simmons-Harris v. Zelman, 234 F.3d 945, 953 (6th Cir. 2000) (finding Justice O'Connor's concurring opinion in *Mitchell* to be controlling). In *Simmons*, the Sixth Circuit found an Ohio voucher program unconstitutional because it resulted in actual diversion of government aid to religious schools. *Id.*; *see, e.g.*, Steele v. Indus. Dev. Bd., 117 F. Supp. 2d 693, 705 (M.D. Tenn. 2000) (refusing to abandon the pervasively sectarian Establishment Clause tests).

296. *Mitchell*, 120 S. Ct. at 2556, 2582.

297. *Id.* Five out of the nine justices criticize the plurality's use of a single factor neutrality test. *Id.* The election of George W. Bush as the 43rd President of the United States may play an important role in the survival of the single factor neutrality test. Charles R. Hokanson Jr., WORLD & I, *Where Gore and Bush Stand on Education*, Sept. 1, 2000, at 34. President Bush supports programs that allow states to spend federal education money as they see fit. *Id.* His beliefs on private education may play a role if and when he appoints Supreme Court Justices. *Id.*

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