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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion/Establishment

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Mitchell v. Helms, 530 U.S. 793 (2000)

Mary Helms was the parent of a child who attended school in Jefferson Parish, Louisiana. In 1981, Congress passed the Educational Improvement and Consolidation Act. Chapter 2 of that measure provided federal funding "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." All public and non-profit private schools were eligible for this benefit, including religious schools. In 1985, Helms and other parents brought suit against the United States Department of Education and the Louisiana Public School System, claiming that government money spent under this statute was unconstitutionally supporting religious schools. Guy Mitchell and other parents of children attending religious schools in Jefferson Parish were permitted to join the case and assert the constitutionality of the federal program. After a fifteen-year odyssey through the federal court system, the Court of Appeals for the Fifth Circuit declared Chapter 2 unconstitutional. Mitchell appealed to the Supreme Court of the United States.

Numerous interest groups filed amicus briefs. The National Education Association (NEA), an organization of public school employees, insisted that Chapter 2 unconstitutionally diverted public funds for religious use. The NEA brief asserted,

> *Religious activities are in fact impermissibly subsidized when government aid goes to schools in which the secular and sectarian components of the educational program are inextricably intertwined, or when government provides facially-neutral instructional materials or equipment that readily can be shifted from the secular to sectarian component of the program.*

Thirteen states lauded Chapter 2 as a constitutionally desirable educational reform. The brief for those states asserted,

> *When carried out in accordance with its statutory mandates, this funding constitutes non-discriminatory governmental support that enhances educational opportunities across the board for millions of American children, regardless of creed or affiliation of schools. Such neutral pursuit of legitimate secular objectives comports with the Religion Clauses, and should be held constitutional.*

The Court by a 6–3 vote sustained Chapter 2. A 5–4 judicial majority insisted that federal programs had to have safeguards that prevented federal funds from being diverted to religious purposes. A 7–2 majority insisted that no such safeguards existed in this case. Nevertheless, the result was that Chapter 2 was deemed constitutional. In Supreme Court decisions, only the vote on the result matters. Four justices declared the program constitutional because they believed religious schools could constitutionally divert federal funds to religious purposes. Two justices (O'Connor and Breyer) declared the program constitutional because they believed that sufficient safeguards existed to prevent diversion. Is this the correct way to aggregate judicial votes? Would voting on issues be a better means to make decisions?[1] What arguments do each of the opinions make about divertibility? Which do you believe are best?

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[1] For a discussion of these and related issues, see Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* (Ann Arbor, MI: University of Michigan Press, 2000).

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

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In *Agostini v. Felton* (1997) we brought some clarity to our case law, by overruling two anomalous precedents (one in whole, the other in part) and by consolidating some of our previously disparate considerations under a revised test. Whereas in *Lemon v. Kurtzman* (1973) we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, . . . in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. . . . We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect. . . . We then set out revised criteria for determining the effect of a statute:

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

. . . [I]n determining that effect, we will consider only the first two *Agostini* criteria, since neither respondents nor the Fifth Circuit has questioned the District Court's holding . . . that Chapter 2 does not create an excessive entanglement. Considering Chapter 2 in light of our more recent case law, we conclude that it neither results in religious indoctrination by the government nor defines its recipients by reference to religion. . . .

As we indicated in *Agostini*, and have indicated elsewhere, the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action. . . .

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

As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so "only as a result of the genuinely independent and private choices of individuals." . . . For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. . . .

. . .

Agostini's second primary criterion . . . requires a court to consider whether an aid program "define[s] its recipients by reference to religion." . . .

The cases on which *Agostini* relied for this rule, and *Agostini* itself, make clear the close relationship between this rule, incentives, and private choice. For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly "independent." . . .

We hasten to add, what should be obvious from the rule itself, that simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates, under *Agostini*'s second criterion, an "incentive" for parents to choose such an education for their children. For *any* aid will have some such effect. . . .

. . .

Although some of our earlier cases . . . did emphasize the distinction between direct and indirect aid, the purpose of this distinction was merely to prevent "subsidization" of religion. . . . [O]ur more recent cases address this purpose not through the direct/indirect distinction but rather through the principle of private choice, as incorporated in the first *Agostini* criterion (*i.e.*, whether any indoctrination could be attributed to the government). If aid to schools, even "direct aid," is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any "support of religion" . . .

. . .

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

. . .

The issue is not divertibility of aid but rather whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school. . . .

. . .

A concern for divertibility, as opposed to improper content, is misplaced not only because it fails to explain why the sort of aid that we have allowed is permissible, but also because it is boundless–enveloping all aid, no matter how trivial–and thus has only the most attenuated (if any) link to any realistic concern for preventing an "establishment of religion." Presumably, for example, government-provided lecterns, chalk, crayons, pens, paper, and paintbrushes would have to be excluded from religious schools under respondents' proposed rule. But we fail to see how indoctrination by means of (*i.e.*, diversion of) such aid could be attributed to the government. . . .

One of the dissent's factors deserves special mention: whether a school that receives aid (or whose students receive aid) is pervasively sectarian. . . .

There are numerous reasons to formally dispense with this factor. First, its relevance in our precedents is in sharp decline. Although our case law has consistently mentioned it even in recent years, we have not struck down an aid program in reliance on this factor since 1985. . . .

Second, the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. . . . If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.

Third, the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. . . .

Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Although the dissent professes concern for "the implied exclusion of the less favored," the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." . . . .

. . . Chapter 2 aid "is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." . . . .

Chapter 2 also satisfies the first *Agostini* criterion. The program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof. . . .

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

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

. . .

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

. . .

I do not quarrel with the plurality's recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. . . . Nevertheless, we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid. . . .

. . .

I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause. . . . At least two of the decisions at the heart of today's case demonstrate that we have long been concerned that secular government aid not be diverted to the advancement of religion. In both *Agostini v. Felton* (1997) . . . and *Board of Ed. of Central*

School Dist. No. 1 v. *Allen* (1968), we rested our approval of the relevant programs in part on the fact that the aid had not been used to advance the religious missions of the recipient schools. . . .

The plurality bases its holding that actual diversion is permissible on *Witters* and *Zobrest*. . . . [W]e decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use. . . . This characteristic of both programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution. . . .

. . .

Respondents neither question the secular purpose of the Chapter 2 (Title II) program nor contend that it creates an excessive entanglement. . . . Accordingly, for purposes of deciding whether Chapter 2, as applied in Jefferson Parish, Louisiana, violates the Establishment Clause, we need ask only whether the program results in governmental indoctrination or defines its recipients by reference to religion.

Taking the second inquiry first, it is clear that Chapter 2 does not define aid recipients by reference to religion. . . . Under Chapter 2, the Secretary of Education allocates funds to the States based on each State's share of the Nation's school-age population. . . . The state educational agency (SEA) of each recipient State, in turn, must distribute the State's Chapter 2 funds to local educational agencies (LEA's) "according to the relative enrollments in public and private, nonprofit schools within the school districts of such agencies," adjusted to take into account those LEA's "which have the greatest numbers or percentages of children whose education imposes a higher than average cost per child." §7312(a). The LEA must then expend those funds on "innovative assistance programs" designed to improve student achievement. . . . As these statutory provisions make clear, Chapter 2 uses wholly neutral and secular criteria to allocate aid to students enrolled in religious and secular schools alike. As a result, it creates no financial incentive to undertake religious indoctrination.

. . .

The Chapter 2 program at issue here bears the same hallmarks of the New York City Title I program that we found important in *Agostini*. First, as explained above, Chapter 2 aid is distributed on the basis of neutral, secular criteria. The aid is available to assist students regardless of whether they attend public or private nonprofit religious schools. . . . [N]o Chapter 2 funds ever reach the coffers of a religious school. . . . Finally, the statute provides that all Chapter 2 materials and equipment must be "secular, neutral, and nonideological." . . .

. . .

Respondents insist that there is a reasoned basis under the Establishment Clause for the distinction between textbooks and instructional materials and equipment. They claim that the presumption that religious schools will use instructional materials and equipment to inculcate religion is sound because such materials and equipment, unlike textbooks, are reasonably divertible to religious uses. . . .

I would reject respondents' proposed divertibility rule. . . .

. . .

. . . Stated simply, the theory does not provide a logical distinction between the lending of textbooks and the lending of instructional materials and equipment. An educator can use virtually any instructional tool, whether it has ascertainable content or not, to teach a religious message. In this respect, I agree with the plurality that "it is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message." . . .

. . .

. . . To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes. . . .

. . .

. . . [T]he Court's willingness to assume that religious-school instructors will inculcate religion has not caused us to presume also that such instructors will be unable to follow secular restrictions on the use of textbooks. I would similarly reject any such presumption regarding the use of instructional

materials and equipment. When a religious school receives textbooks or instructional materials and equipment lent with secular restrictions, the school's teachers need not refrain from teaching religion altogether. Rather, the instructors need only ensure that any such religious teaching is done without the instructional aids provided by the government. . . .

. . .

The plurality and Justice Souter direct the primary thrust of their arguments at the alleged inadequacy of the program's safeguards. Respondents, the plurality, and Justice Souter all appear to proceed from the premise that, so long as actual diversion presents a constitutional problem, the government must have a failsafe mechanism capable of detecting *any* instance of diversion. We rejected that very assumption, however, in *Agostini*. There, we explained that because we had "abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required." . . .

The safeguards employed by the program are constitutionally sufficient. At the federal level, the statute limits aid to "secular, neutral, and nonideological services, materials, and equipment." . . . At the state level, the Louisiana Department of Education (the relevant SEA for Louisiana) requires all nonpublic schools to submit signed assurances that they will use Chapter 2 aid only to supplement and not to supplant non-Federal funds, and that the instructional materials and equipment "will only be used for secular, neutral and nonideological purposes." . . .

. . .

The evidence proffered by respondents, and relied on by the plurality and Justice Souter, concerning actual diversion of Chapter 2 aid in Jefferson Parish is *de minimis*. . . . At most, it proves the possibility that, out of the more than 40 nonpublic schools in Jefferson Parish participating in Chapter 2, aid may have been diverted in one school's second-grade class and another school's theology department.

. . .

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

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

. . .

The establishment prohibition of government religious funding serves more than one end. It is meant to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes.

. . .

. . . There may be no aid supporting a sectarian school's religious exercise or the discharge of its religious mission, while aid of a secular character with no discernible benefit to such a sectarian objective is allowable. Because the religious and secular spheres largely overlap in the life of many such schools, the Court has tried to identify some facts likely to reveal the relative religious or secular intent or effect of the government benefits in particular circumstances. We have asked whether the government is acting neutrally in distributing its money, and about the form of the aid itself, its path from government to religious institution, its divertibility to religious nurture, its potential for reducing traditional expenditures of religious institutions, and its relative importance to the recipient, among other things.

. . .

At least three concerns have been expressed since the founding and run throughout our First Amendment jurisprudence. First, compelling an individual to support religion violates the fundamental principle of freedom of conscience. . . .

Second, government aid corrupts religion. . . . Madison argued that establishment of religion weakened the beliefs of adherents so favored, strengthened their opponents, and generated "pride and indolence in the Clergy; ignorance and servility in the laity; [and] in both, superstition, bigotry and persecution." . . .

Third, government establishment of religion is inextricably linked with conflict. . . .

. . .

After *Everson* and *Allen*, the state of the law applying the Establishment Clause to public expenditures producing some benefit to religious schools was this:

1. Government aid to religion is forbidden, and tax revenue may not be used to support a religious school or religious teaching.

2. Government provision of such paradigms of universally general welfare benefits as police and fire protection does not count as aid to religion.

3. Whether a law's benefit is sufficiently close to universally general welfare paradigms to be classified with them, as distinct from religious aid, is a function of the purpose and effect of the challenged law in all its particularity. The judgment is not reducible to the application of any formula. . . .

4. 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." . . .

. . .

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

. . . .

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

Two types of school aid recipients have raised special concern. First, we have recognized the fact that the overriding religious mission of certain schools, those sometimes called "pervasively sectarian," is not confined to a discrete element of the curriculum. . . . As religious teaching cannot be separated from secular education in such schools or by such teachers, we have concluded that direct government subsidies to such schools are prohibited because they will inevitably and impermissibly support religious indoctrination. . . .

Second, we have expressed special concern about aid to primary and secondary religious schools. On the one hand, we have understood how the youth of the students in such schools makes them highly susceptible to religious indoctrination. . . . On the other, we have recognized that the religious element in the education offered in most sectarian primary and secondary schools is far more intertwined with the secular than in university teaching, where the natural and academic skepticism of most older students may separate the two. . . . Thus, government benefits accruing to these pervasively religious

primary and secondary schools raise special dangers of diversion into support for the religious indoctrination of children and the involvement of government in religious training and practice.

We have also evaluated the portent of support to an organization's religious mission that may be inherent in the method by which aid is granted, finding pertinence in at least two characteristics of distribution. First, we have asked whether aid is direct or indirect, observing distinctions between government schemes with individual beneficiaries and those whose beneficiaries in the first instance might be religious schools. . . .

Second, we have distinguished between indirect aid that reaches religious schools only incidentally as a result of numerous individual choices and aid that is in reality directed to religious schools by the government or in practical terms selected by religious schools themselves. . . .

In addition to the character of the school to which the benefit accrues, and its path from government to school, a number of features of the aid itself have figured in the classifications we have made. First, we have barred aid with actual religious content, which would obviously run afoul of the ban on the government's participation in religion. . . .

Second, we have long held government aid invalid when circumstances would allow its diversion to religious education. The risk of diversion is obviously high when aid in the form of government funds makes its way into the coffers of religious organizations, and so from the start we have understood the Constitution to bar outright money grants of aid to religion. . . .

. . .

Third, our cases have recognized the distinction, adopted by statute in the Chapter 2 legislation, between aid that merely supplements and aid that supplants expenditures for offerings at religious schools, the latter being barred. Although we have never adopted the position that any benefit that flows to a religious school is impermissible because it frees up resources for the school to engage in religious indoctrination, from our first decision holding it permissible to provide textbooks for religious schools we have repeatedly explained the unconstitutionality of aid that supplants an item of the school's traditional expense. . . .

Finally, we have recognized what is obvious (however imprecise), in holding "substantial" amounts of aid to be unconstitutional whether or not a plaintiff can show that it supplants a specific item of expense a religious school would have borne. . . .

This stretch of doctrinal history leaves one point clear beyond peradventure: together with James Madison we have consistently understood the Establishment Clause to impose a substantive prohibition against public aid to religion and, hence, to the religious mission of sectarian schools. Evenhandedness neutrality is one, nondispositive pointer toward an intent and (to a lesser degree) probable effect on the permissible side of the line between forbidden aid and general public welfare benefit. Other pointers are facts about the religious mission and education level of benefited schools and their pupils, the pathway by which a benefit travels from public treasury to educational effect, the form and content of the aid, its adaptability to religious ends, and its effects on school budgets. The object of all enquiries into such matters is the same whatever the particular circumstances: is the benefit intended to aid in providing the religious element of the education and is it likely to do so?

. . .

[T]he plurality apparently assumes as a fact that equal amounts of aid to religious and nonreligious schools will have exclusively secular and equal effects, on both external perception and on incentives to attend different schools. . . . But there is no reason to believe that this will be the case; the effects of same-terms aid may not be confined to the secular sphere at all. This is the reason that we have long recognized that unrestricted aid to religious schools will support religious teaching in addition to secular education, a fact that would be true no matter what the supposedly secular purpose of the law might be.

[T]the plurality assumes that per capita distribution rules safeguard the same principles as independent, private choices. But that is clearly not so. We approved university scholarships in *Witters* because we found them close to giving a government employee a paycheck and allowing him to spend it as he chose, but a per capita aid program is a far cry from awarding scholarships to individuals, one of whom makes an independent private choice. Not the least of the significant differences between per

capita aid and aid individually determined and directed is the right and genuine opportunity of the recipient to choose not to give the aid. . . .

. . .

The aid that the government provided was highly susceptible to unconstitutional use. . . . Although library books, like textbooks, have fixed content, religious teachers can assign secular library books for religious critique, and books for libraries may be religious, as any divinity school library would demonstrate. The sheer number and variety of books that could be and were ordered gave ample opportunity for such diversion.

The concern with divertibility thus predicated is underscored by the fact that the religious schools in question here covered the primary and secondary grades, the grades in which the sectarian nature of instruction is characteristically the most pervasive . . . and in which pupils are the least critical of the schools' religious objectives. . . . No one, indeed, disputes the trial judge's findings, based on a detailed record, that the Roman Catholic schools, which made up the majority of the private schools participating, were pervasively sectarian, that their common objective and mission was to engage in religious education, and that their teachers taught religiously, making them precisely the kind of primary and secondary religious schools that raise the most serious Establishment Clause concerns. . . .

Providing such governmental aid without effective safeguards against future diversion itself offends the Establishment Clause. . . .

But the record here goes beyond risk, to instances of actual diversion. What one would expect from such paltry efforts at monitoring and enforcement naturally resulted, and the record strongly suggests that other, undocumented diversions probably occurred as well. First, the record shows actual diversion in the library book program. . . . Although only limited evidence exists, it contrasts starkly with the records of the numerous textbook programs that we have repeatedly upheld, where there was no evidence of any actual diversion.

. . .

The plurality would break with the law. The majority misapplies it. That misapplication is, however, the only consolation in the case, which reaches an erroneous result but does not stage a doctrinal coup. But there is no mistaking the abandonment of doctrine that would occur if the plurality were to become a majority. It is beyond question that the plurality's notion of evenhandedness neutrality as a practical guarantee of the validity of aid to sectarian schools would be the end of the principle of no aid to the schools' religious mission. And if that were not so obvious it would become so after reflecting on the plurality's thoughts about diversion and about giving attention to the pervasiveness of a school's sectarian teaching.

. . . .

And if this were not enough to prove that no aid in religious school aid is dead under the plurality's First Amendment, the point is nailed down in the plurality's attack on the legitimacy of considering a school's pervasively sectarian character when judging whether aid to the school is likely to aid its religious mission. . . . The relevance of this consideration is simply a matter of common sense: where religious indoctrination pervades school activities of children and adolescents, it takes great care to be able to aid the school without supporting the doctrinal effort. This is obvious. The plurality nonetheless condemns any enquiry into the pervasiveness of doctrinal content as a remnant of anti-Catholic bigotry (as if evangelical Protestant schools and Orthodox Jewish yeshivas were never pervasively sectarian), and it equates a refusal to aid religious schools with hostility to religion (as if aid to religious teaching were not opposed in this very case by at least one religious respondent and numerous religious *amici curiae* in a tradition claiming descent from Roger Williams). My concern with these arguments goes not so much to their details as it does to the fact that the plurality's choice to employ imputations of bigotry and irreligion as terms in the Court's debate makes one point clear: that in rejecting the principle of no aid to a school's religious mission the plurality is attacking the most fundamental assumption underlying the Establishment Clause, that government can in fact operate with neutrality in its relation to religion. I believe that it can, and so respectfully dissent.