

ARTICLE: POUNDING A FINAL STAKE IN THE HEART OF THE INVIDIOUSLY DISCRIMINATORY "Pervasively Sectarian" TEST

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Text

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Introduction

An inquiry into an organization's religious views to determine if it 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. ¹

Judge Benton

Judge Benton's scolding in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, one of the highest profile Establishment Clause cases of the decade, was the direct result of the district court's deliberate (actually painstaking) dissection of the beliefs, philosophy, and practices of perhaps the world's most effective provider of rehabilitation services to prisoners. ² Indeed, through seven pages of an almost eighty-page opinion, the district court trolled through Prison Fellowship Ministries' mission statement, the Statement of Faith which all Prison Fellowship Ministries employees must sign, Prison Fellowship Ministries' nature as an [*60] "Evangelical Christian" para-church organization, and the characteristics of "Evangelical Christianity." ³ Although claiming to make "absolutely no value judgment" about Prison Fellowship Ministries' beliefs, Chief Judge Pratt thought these beliefs material to his First Amendment analysis, particularly to determine whether the State of Iowa

¹ [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406, 414 n.2 \(8th Cir. 2007\)](#) (quoting [Mitchell v. Helms, 530 U.S. 793, 828 \(2000\)](#) (plurality opinion)).

² [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 871-78 \(S.D. Iowa 2006\)](#), aff'd in part, rev'd in part, [509 F.3d 406 \(8th Cir. 2007\)](#).

³ [Id. at 871-78.](#)

"impermissibly sanctioned the evangelization of the inmates in its care into a particular form of the Christian faith" ⁴ which was at odds with other Christian faiths. ⁵ According to Chief Judge Pratt, Evangelical Christianity (of which he concluded Prison Fellowship Ministries is a part) is

suspicious, if not contemptuous, of Roman Catholic reliance on papal authority, Marian devotion, and the veneration of saints. The Prison Fellowship Ministries ... belief in the substitutionary and atoning death of Jesus, which reflects a legalistic understanding of the sacrifice of Jesus, likewise, is not shared by many Christians. The Prison Fellowship Ministries ... belief in the literal, bodily resurrection of Jesus is also not shared by many other, non-Evangelical Christians. Similarly, belief in an imminent, personal, and visible second coming of Jesus Christ, as held by Prison Fellowship Ministries ... , does not comport with the belief held by other non-Evangelical Christians that, if a second coming of Christ occurs, its nature is unknown, or is more spiritualized. ⁶

Chief Judge Pratt concluded that given these major doctrinal differences between Evangelical Christianity (and therefore Prison Fellowship Ministries) and other Christian groups, Prison Fellowship **[*61]** Ministries' program was not acceptable to inmates or state employees who considered themselves Christian but not Evangelical Christian. ⁷

Chief Judge Pratt's claimed authority for this odious incursion into a party's religious and philosophical beliefs was the "pervasively sectarian" test. Birthed in the 1970s, this invidiously discriminatory test demonstrates outright hostility to religion by denying public funds to any religious institution that takes its religious mission seriously and integrates faith and practice. ⁸ To determine whether an institution is "too religious" to obtain funding, a court must pry into the institution's character and beliefs to determine the level of its religiosity. ⁹ For these and other reasons, Justice Thomas scathingly attacked the pervasively sectarian test when he wrote for the plurality in *Mitchell v. Helms*. Justice Thomas stated that the test "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general" and further declared that the test required unacceptable "trolling through a person's or institution's religious beliefs" and required unconstitutional "discrimination in the distribution of public benefits based upon religious status or sincerity." ¹⁰

⁴ [Id. at 872 n.9.](#)

⁵ [Id. at 873-74.](#) Chief Judge Pratt stated that Evangelical Christianity downplays traditional Christian sacraments like baptism, the Eucharist, marriage, ordination, and similar to Pentecostal Christianity, Evangelical Christians emphasize "the actual experience of God in the believer's life." [Id. at 873.](#) According to Chief Judge Pratt, Evangelical Christians, unlike Roman Catholics, Greek Orthodox, and Lutherans, are non-liturgical, and embrace contemporary music and multi-media presentations. [Id. at 874.](#) Chief Judge Pratt apparently has missed the wonderful diversity currently occurring in the Roman Catholic, Greek Orthodox, and Lutheran churches.

⁶ [Id. at 874.](#) Regarding Chief Judge Pratt's assertion that Evangelical Christians, and therefore Prison Fellowship Ministries, are suspicious or contemptuous of Roman Catholics, he is apparently unaware of the role played by Prison Fellowship Ministries' founder, Charles Colson, in seeking common ground and doctrinal reconciliation with his Roman Catholic brothers and sisters in an effort called Evangelicals & Catholics Together. See *Evangelicals & Catholics Together: The Christian Mission in the Third Millennium*, First Things, May 1994, at 15-22.

⁷ [Prison Fellowship Ministries, 432 F. Supp. 2d at 874 n.11.](#)

⁸ See [Mitchell v. Helms, 530 U.S. 793, 827-28 \(2000\)](#) (plurality opinion).

⁹ See [Prison Fellowship Ministries, 432 F. Supp. 2d at 918](#) ("To answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements." (internal quotation marks omitted) (quoting [Roemer v. Bd. of Pub. Works, 426 U.S. 736, 758 \(1976\)](#) (plurality opinion))).

¹⁰ [Mitchell, 530 U.S. at 828](#) (plurality opinion).

This Article in Part I traces the rise and fall of the pervasively sectarian test from its creation in the 1970s through Justice Thomas's attack in *Mitchell v. Helms*, and highlights the ever-shifting standards and lack of clarity in this area of First Amendment jurisprudence. Part II focuses on the post-*Mitchell* confusion in the lower courts due to the Court's shifting standards and lack of clarity. Part III examines the executive branch's approach to the test as demonstrated in the Faith-Based and Community Initiative. Finally, Part IV considers the best hope to both eliminate the confusion in the lower courts and correct the flaws in the executive branch's approach, by following the Tenth Circuit's recent analysis in *Colorado Christian University v. Weaver* and driving the stake of neutrality through the heart of the invidiously discriminatory pervasively sectarian test.¹¹

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I. The Rise and Fall of the "Pervasively Sectarian" Test

The pervasively sectarian test arose out of the 1971 case of *Lemon v. Kurtzman*.¹² In *Lemon*, Chief Justice Burger noted that contrary to Thomas Jefferson's misleading wall of separation metaphor, total separation between church and state is simply impossible, since some relationship is inevitable (the Chief Justice cited fire inspections, compulsory school attendance laws, and building and zoning regulations as examples of contact between church and state).¹³ This inevitability of relationship, however, did not permit an evenhanded distribution of funds between religious and secular institutions, even if these funds were collected in part from supporters of the religious organizations, and even if the religious organizations performed a public function, thereby relieving the state of some of its responsibilities.¹⁴ Rather, according to Chief Justice Burger, the courts must "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."¹⁵ To determine the constitutionality of a relationship between the state and a religious institution, the Court created the three-part *Lemon* test.¹⁶ "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [third], the statute must not foster an excessive government entanglement with religion."¹⁷

Regarding the character and purposes of the Roman Catholic schools benefited by the Rhode Island program at issue, the Chief Justice examined the proximity between the churches and the religious schools, the religious symbols in the school buildings, the time spent daily in direct religious instruction, the clerical nature of [*63] the teachers (two-thirds of the teachers in the parochial schools were nuns), the "atmosphere" of the school, and the governance of the school.¹⁸ Regarding the type of aid at issue (the Rhode Island statute directly supplemented the

¹¹ [Colo. Christian Univ. v. Weaver, 534 F.3d 1245 \(10th Cir. 2008\)](#).

¹² See [Lemon v. Kurtzman, 403 U.S. 602, 612-13 \(1971\)](#); see also [Tilton v. Richardson, 403 U.S. 672 \(1971\)](#) (applying similar analysis).

¹³ See [Lemon, 403 U.S. at 614](#); see also Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Comm. of the Danbury Baptist Ass'n, in State of Conn. (Jan. 1, 1802), reprinted in Thomas Jefferson, *Writings* 510, 510 (Merrill D. Peterson ed., 1984).

¹⁴ See [Lemon, 403 U.S. at 615](#).

¹⁵ *Id.*

¹⁶ [Id. at 612-13](#). The *Lemon* test was later slimmed down to a two-prong test when the Court folded the third prong into the second prong analysis. See [Aguilar v. Felton, 473 U.S. 402, 412 \(1985\)](#).

¹⁷ [Lemon, 403 U.S. at 612-13](#) (citation omitted) (internal quotation marks omitted) (quoting [Walz v. Tax Comm'n, 397 U.S. 664, 674 \(1970\)](#)).

¹⁸ [Id. at 615-18](#).

salaries of teachers of secular subjects in non-public schools), Chief Justice Burger doubted whether direct payments could ever be permitted, since the teachers were members of a particular faith, employed by a religious organization, subject to the discipline of religious authorities, and worked in a system devoted to raising children in a particular faith. ¹⁹ Without trying to accuse the parochial school teachers of bad faith, the Court found that the programs in question failed the "excessive entanglement" prong and the Chief Justice stated that the Court

simply recognized that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. ²⁰

The Lemon Court's level of suspicion and resulting examination of the "religiosity" of the recipients of public funds created the environment which spawned the pervasively sectarian test and allowed it to loom over Establishment Clause jurisprudence for the next three decades.

The phrase "pervasively sectarian" first appeared two years later in the U.S. Supreme Court case of *Hunt v. McNair*, ²¹ which involved the constitutionality of a state statute authorizing the issuance of revenue bonds for use in the construction of facilities at public and private colleges and universities. ²² Justice Powell, writing for the [*64] majority, first acknowledged that the Supreme Court has consistently rejected an interpretation of the Establishment Clause that prohibits funding of "any program which in some manner aids an institution with a religious affiliation." ²³ To repeat his point, Justice Powell stated that "the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." ²⁴ Having acknowledged the constitutional propriety of public aid to some religious programs, Justice Powell reversed course and purposely discriminated against organizations that take their religion too seriously by prohibiting governmental funding of "institutions in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." ²⁵ That is, the government would violate the Establishment Clause (more

¹⁹ See [id. at 607, 618-19](#).

²⁰ [Id. at 618-19](#) (alteration in original).

²¹ [Hunt v. McNair, 413 U.S. 734 \(1973\)](#). The statute prohibited the issuance of bonds for sectarian facilities or places of worship. [Id. at 736-37](#). When the state authorized bonds to refinance construction debt and to complete a dining hall at the Baptist College at Charleston (now Charleston Southern University), the plaintiff sued alleging the bond issuance violated the Establishment Clause. [Id. at 735-40](#).

²² [Id. at 735-40](#)

²³ [Id. at 742-43](#) (citing [Tilton v. Richardson, 403 U.S. 672 \(1971\)](#); [Walz v. Tax Comm'n, 397 U.S. 664 \(1970\)](#); [Bradfield v. Roberts, 175 U.S. 291 \(1899\)](#)).

²⁴ [Id. at 743](#).

²⁵ See [id.](#) Justice Powell leaned heavily on Chief Justice Burger's plurality opinion in *Tilton*, where the Chief Justice, reacting to a hypothetical college which "indoctrinates" students, left open the possibility that aid to such a school could be considered by the Court in the future. [Id.](#) (citing [Tilton, 403 U.S. at 676-77, 682, 686](#) (plurality opinion)). Prior to the hypothetical case, however, the Chief Justice had dismissed conclusively the appellants' argument that the government may not subsidize any activities of a college if the college has programs that teach religion:

Under this concept appellants' position depends on the validity of the proposition that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable. The argument that government grants would thus inevitably advance religion did not escape the notice of

specifically, the second prong of the Lemon test) if it funded a religious activity (whether voluntary or not) or if it funded an institution which integrates its faith and its mission. ²⁶ If an institution does not segregate its faith from its practice, then all funding is prohibited.

[*65] The implications of this judicially created test are profound. ²⁷ Not only is it virtually impossible to determine whether a religious institution is "secular enough" for public funding, but the test by its very nature invites a piercing examination into the institution's beliefs and practices. Indeed, in *Hunt*, Justice Powell closely scrutinized the plaintiff's evidence to determine whether the Baptist College at Charleston integrated faith and learning, before determining that the South Carolina statute was constitutional. ²⁸

Congress. It was carefully and thoughtfully debated, 109 Cong. Rec. 19474-19475, but was found unpersuasive. It was also considered by this Court in *Allen*. [*Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).] There the Court refused to assume that religiosity in parochial elementary and secondary schools necessarily permeates the secular education that they provide.

[Tilton](#), 403 U.S. at 680-81 (plurality opinion). This original position by the Chief Justice explains well why he subsequently dissented in many future cases on this issue.

²⁶ See [Hunt](#), 413 U.S. at 744-45 (concluding the Act at issue did not fund a religious activity, since it specifically prohibited funding to buildings used for religious purposes).

²⁷ Given the enormous tax and spending power by the federal and state governments, this newly created judicial test had huge implications for religious organizations and particularly religious schools which provide, at private expense, a function that the state considers vital for its future and the future of our society. What conduct must be changed to ensure that the religious schools receive a small morsel of public funding compared to the feasts provided public schools? Must the high school teachers, for instance, no longer open their classes with prayer? Must a math teacher in a religious middle school who teaches that God created the universe to be orderly, and that mathematics is evidence of this orderliness, no longer recognize God as the Creator? Must the faculty in the religious college's biology department who see the remarkable complexity of DNA and therefore rejoice in the Intelligent Designer who created it now yield to the current "scientific orthodoxy" of blind chance creating the orderly universe? May the sociology department faculty continue to dare teach that man's social nature is a reflection of the society experienced by the Trinity prior to the creation of the world? May anyone in the political science department teach that because man is a fallen creature, a purpose of government is to restrain and punish evil doers? May another professor in the political science department teach that because God made man in God's own image, that man has inherent dignity and certain inalienable rights, including the right to life, liberty, and property? May any school without loss of public funding act upon the wisdom of the Founders and teach religious principles to its students, thereby seeking to ensure a "solid foundation of public liberty and happiness"? Letter from Samuel Adams to John Trumbull (Oct. 16, 1778), in 4 *The Writings of Samuel Adams: 1778-1802*, at 74 (Harry Alonzo Cushing ed., 1908). Are all lectures by all professors, all texts used, and all practices of the college now fair game to the inquisition now available under the pervasively sectarian test? Does not this test, created by the Supreme Court to determine whether public funds have the primary effect of aiding religion, automatically entangle excessively church and state in violation of the third prong of the Lemon test? [Lemon v. Kurtzman](#), 403 U.S. 602, 612-13 (1971). One can hardly imagine anything more intrusive or more violative of the religious freedom of Americans about which the Founders were adamant.

²⁸ [Hunt](#), 413 U.S. at 743-45. Justice Powell noted that the South Carolina Baptist Convention elects members to the college's board, can amend the college charter, and must approve certain financial transactions. [Id.](#) at 743. In addition to these governance issues, Justice Powell reviewed the evidence to see if there was any religious qualification for the faculty or students, and whether the percentage of Baptist students in the college exceeded the local population. [Id.](#) at 743-44. In this regard, the Court concluded that the Baptist College was not "pervasively sectarian" since the percentage of Baptist students at the college was roughly equivalent to the percentage of Baptists in Charleston, no religious qualification was required of either faculty or students, and the governance issues were comparable to those in *Tilton*. *Id.* In *Tilton*, the Court ruled that a similar aid program was constitutional even though the schools at issue were "governed by Catholic religious organizations." [Tilton](#), 403 U.S. at 686, 689. Regardless of the holding, *Hunt* provided attorneys seeking to challenge public aid to religious institutions a "road map" for future discovery.

[*66] Demonstrating the complete lack of consensus in this area of constitutional law, Hunt's 6-3 majority would be the last majority opinion in a case using the pervasively sectarian test for the next six years.²⁹ In a badly fractured opinion,³⁰ the Court in *Meek v. Pittenger* considered the constitutionality of state loans of instructional equipment (e.g., laboratory equipment, charts, and maps) to non-public schools if these schools taught subjects mandated by the State Board of Education.³¹ In other words, for educating non-public students in secular subjects required by the State, and thereby relieving the State of its educational responsibility for these students, the State was willing to loan to the non-public schools (presumably using some of the tax proceeds of the parents who sent their children to the non-public schools) instructional materials which it similarly provided public schools.

The Court found that the cost of the instructional material loan program (just under \$ 12 million) raised divisiveness concerns, and moreover, the Court presumed that the material would not be limited to a secular purpose in a "pervasively sectarian" school³² (the map of **[*67]** the world might be used in a Bible class to show the students where ancient Palestine and Egypt are located). Because of this presumption created in *Meek*, the Court determined that state aid impermissibly advances religion if it flows to a "pervasively sectarian" institution, even if the aid is earmarked for secular purposes.³³

Justice Stewart in *Meek* did not engage in the intrusive inquisition that Justice Powell performed in *Hunt*. Rather, Justice Stewart and a majority of the Court were satisfied that 75% of the non-public schools receiving aid were church-related or religiously affiliated schools,³⁴ and that the "very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief."³⁵ Giving aid to a "pervasively sectarian" school is, therefore, a violation of the

²⁹ E.g., *Wolman v. Walter*, 433 U.S. 229 (1977) (containing seven separate opinions); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976) (containing four separate opinions: three Justices joined the plurality opinion, two Justices filed a concurring opinion, and four Justices filed two different dissenting opinions).

³⁰ *Meek v. Pittenger*, 421 U.S. 349 (1975). In *Meek*, four separate opinions were written. The plurality opinion was written by Justice Stewart, who was joined by Justices Blackmun and Powell. *Id.* at 351. Opinions concurring in part and dissenting in part were written by Justice Brennan (joined by Justices Douglas and Marshall), Justice Rehnquist (joined by Justice White), and Chief Justice Burger. *Id.* at 373, 385, 387.

³¹ *Id.* at 351-56 (plurality opinion).

³² See *id.* at 365 & n.15. Justice Stewart thought the annual appropriation process for programs providing aid to non-public schools could be divisive, particularly with growing costs and population. *Id.* Justice Brennan, in an opinion joined by Justices Douglas and Marshall, similarly argued that "partisans of parochial schools ... will inevitably champion this cause and promote political action to achieve their goals." *Id.* at 374 (Brennan, J., concurring in part and dissenting in part) (quoting *Lemon*, 403 U.S. at 622). This political movement would cause divisiveness by forcing candidates to declare whether or not they support aid to non-public schools and will lead to voters splitting along religious lines instead of political lines. *Id.* This argument lacks credibility. Justices Brennan, Douglas, Marshall, and Stewart essentially state that the taxpayers who educate their children at their own expense and who, upon threat of imprisonment, fines, or loss of real property, also support public schools, should forgo their First Amendment right to petition the government and seek relief from the religious discrimination they suffer. Moreover, this concern for divisiveness rings hollow for these members of the Warren Court who joined or wrote opinions which divided the country over issues such as the rights of criminal defendants, cases involving religion in the public schools (overturning over a century of tradition), and, of course, privacy and abortion rights. See, for example, *Roe v. Wade*, 410 U.S. 113 (1973), in which Justices Brennan, Douglas, Marshall, and Stewart joined the majority opinion which overturned the laws protecting unborn children in many states, thereby triggering national divisiveness and thirty-five years of marches and protests in Washington, D.C., on this issue.

³³ *Meek*, 421 U.S. at 365-66 (plurality opinion).

³⁴ *Id.* at 364.

³⁵ *Id.* at 366.

Establishment Clause, since the secular education in the school is "inextricably intertwined" with the school's religious mission, which is "the only reason for the school['s] existence." ³⁶

Meek, with its presumption that bars any aid to "pervasively sectarian" institutions because aid even for unquestionably secular activities allows the institution's intertwined religious mission to flourish, was a high water mark for strict separationists - the metaphoric wall was high, wide, and topped with barbed wire. Meek was not, however, the most intrusive into the character and nature of the non-public schools. This "highlight" of intrusiveness would not occur for another decade, but its rise may not have been possible without the renewed inquisition by Justice Blackmun in *Roemer v. Board of Public Works*. ³⁷

Roemer, a case similar to *Tilton* and *Hunt* in that it involved a state program aiding colleges and universities, was Justice [*68] Blackmun's opportunity to slay the pervasively sectarian test, if he chose to do so. ³⁸ Before making his mark on Establishment Clause jurisprudence, he assessed the situation by reviewing the previously established law. He noted, for instance, that religious institutions are just as eligible as other institutions to participate in religiously neutral programs. ³⁹ He added that religious institutions certainly can receive public funds for performing secular services, ⁴⁰ and that state action which has an incidental effect on furthering religious activity was acceptable. ⁴¹ Justice Blackmun concluded:

The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends... . The Court never has held that religious activities must be discriminated against in this way.

Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity. ⁴²

³⁶ *Id.* (quoting [Lemon v. Kurtzman, 403 U.S. 602, 657 \(1971\)](#) (Brennan, J., concurring)). This absolute bar, incidentally, is inconsistent with the Court's holding in the case. Justice Stewart with five other members of the Court held that the textbook loan program enacted by Pennsylvania was indistinguishable from the textbook loan program found constitutional in [Board of Education v. Allen, 392 U.S. 236 \(1968\)](#), and therefore was constitutional. [Meek, 421 U.S. at 359](#) (plurality opinion); [id. at 396](#) (Rehnquist, J., concurring in part and dissenting in part). Most of the money appropriated by the legislature in this case, however, was for programs other than the textbook program. [id. at 365](#) & n.15 (plurality opinion).

³⁷ [Roemer v. Bd. of Pub. Works, 426 U.S. 736, 738, 755-59 \(1976\)](#) (plurality opinion).

³⁸ [id. at 739](#). Maryland's Sellinger fund permitted aid to colleges and universities as long as they did not award "primarily theological or seminary degrees," and did not put the funds to any sectarian use. [id. at 741-42](#). In *Roemer*, the plaintiffs challenged the award of funds to five non-public colleges (four Catholic colleges and one Methodist college). [id. at 744](#). The *Roemer* Court was badly fractured, with a three Justice plurality (Chief Justice Burger and Justice Powell joined Justice Blackmun's opinion), [Roemer, 426 U.S. at 739](#) (plurality opinion); a two Justice concurrence (Justice Rehnquist joined Justice White's concurrence), [id. at 767](#) (White, J., concurring in the judgment); and three separate dissents (Justice Marshall again joined Justice Brennan's opinion, while Justice Stewart and Justice Stevens wrote separate dissents), [id. at 770](#) (Brennan, J., dissenting); [id. at 773](#) (Stewart, J., dissenting); [id. at 775](#) (Stevens, J., dissenting).

³⁹ [Roemer, 426 U.S. at 746](#) (plurality opinion).

⁴⁰ See [id. at 746-47](#). Justice Blackmun noted that denying a religious person the opportunity to perform secular services with public payment would discriminate against religion. [id. at 746 n.13](#).

⁴¹ [id. at 747](#).

⁴² *Id.*

This language appears, of course, to undermine directly the presumption in *Meek* that all aid to pervasively sectarian institutions is barred because such aid for secular activity allows its religious mission to flourish also.⁴³ Yet, having made this important concession (which proved very temporary), Justice Blackmun then renewed the Court's focus on the character and nature of the various religious [*69] institutions receiving aid. The first step in this renewed focus was to reexamine the factors which previous cases had cited in determining whether an institution was pervasively sectarian. This review, rather than demonstrating the consistency of the law, only enhanced its confusion.⁴⁴

Having provided this review and remarking that "the slate we write on is anything but clean,"⁴⁵ Justice Blackmun then launched with vigor into an intrusive analysis of whether the four Catholic colleges at issue were, in fact, too religious to warrant public funds by reviewing the following facts considered by the district court: whether any religious college had a formal affiliation with a church; received funds from a church; provided reports to the church; had church representatives on the college governing boards; employed church chaplains; held religious exercises on campus; encouraged spiritual development on campus as at least a "secondary objective" of the college by providing opportunities for religious exercise; had mandatory religious or theology courses taught by ordained clerics; had academic freedom in non-theology courses; opened classes with prayer; had religious symbols in the classrooms; hired faculty without regard to religion in non-theological courses; and whether a majority of students were from a particular denomination.⁴⁶ Based on a review of these criteria, and consistent with the district court, Justice [*70] Blackmun ruled that these colleges were not "pervasively sectarian."⁴⁷ Justice Blackmun then inquired as to whether public funds were used to support "specifically religious activity."⁴⁸ Since the statute in question prohibited use of public funds for religious activity, a prohibition enforced by the State's Council for Higher Education, the Court was satisfied that the funds were not used for religious purposes.⁴⁹

⁴³ Perhaps Justice Blackmun was trying to distinguish between those institutions that do not apply their faith to their practice (we can call them the "sectarians") and those who do apply their faith to practice (we can call them the "pervasively sectarians"). If this is the distinction Justice Blackmun and the Court sought to make, it certainly is unclear.

⁴⁴ [Roemer, 426 U.S. at 748-54](#) (plurality opinion). Professor (and now Tenth Circuit Judge) Michael W. McConnell made the following poignant observation about the status of religion clause jurisprudence:

With [religion clause] doctrine in such chaos, the Warren and Burger Courts were free to reach almost any result in almost any case. Thus, as of today, it is constitutional for a state to hire a Presbyterian minister to lead the legislature in daily prayers, but unconstitutional for a state to set aside a moment of silence in the schools for children to pray if they want to. It is unconstitutional for a state to require employers to accommodate their employees' work schedules to their Sabbath observances, but constitutionally mandatory for a state to require employers to pay workers compensation when the resulting inconsistency between work and Sabbath leads to discharge. It is constitutional for the government to give money to religiously-affiliated organizations to teach adolescents about proper sexual behavior, but not to teach them science or history. It is constitutional for the government to provide religious school pupils with books, but not with maps; with bus rides to religious schools, but not from school to a museum on a field trip; with cash to pay for state-mandated standardized tests, but not to pay for safety-related maintenance. It is a mess.

Michael W. McConnell, *Religious Freedom at a Crossroads*, [59 U. Chi. L. Rev. 115, 119-20 \(1992\)](#) (footnotes omitted).

⁴⁵ [Roemer, 426 U.S. at 754](#) (plurality opinion).

⁴⁶ [Id. at 755-58](#).

⁴⁷ [Id. at 758-59](#). Justice Blackmun stated that one must "paint a general picture of the institution," and in this instance, the general picture with respect to the four Catholic colleges was similar to the colleges in *Tilton* and *Hunt*. *Id.* at 758.

⁴⁸ [Id. at 759](#).

⁴⁹ [Id. at 759-60](#).

The next case in this area, *Wolman v. Walter*, demonstrated again the lack of clarity and cohesion in this area of jurisprudence. In *Wolman*, the Court considered the constitutionality of an evenhanded distribution of textbooks, testing and scoring, diagnostic services, therapeutic services, instructional material and equipment, as well as field trips to all of Ohio's school children, including those attending religious schools.⁵⁰ The Court split badly on these issues and, through a combination of different Justices, upheld Ohio's provision to non-public schools of textbooks, testing and scoring, diagnostic services, and therapeutic services, but ruled unconstitutional the provision of instructional material and equipment (it could be diverted to religious use)⁵¹ and field trips (a teacher accompanying the religious school students on the field trip could promote religion).⁵² Similar to *Meek*, **[*71]** the Court gave little attention to the sectarian character of the schools in *Wolman*.⁵³

Six long years (and three major cases) after *Hunt*, the Court finally achieved another majority opinion (only barely) in *Committee for Public Education & Religious Liberty v. Regan*.⁵⁴ Again evidencing the continued judicial turmoil in this area, Justice White⁵⁵ now had his chance to drive a stake through the heart of the pervasively sectarian

⁵⁰ [Wolman v. Walter, 433 U.S. 229, 232-35 \(1977\)](#) (plurality opinion), overruled by [Mitchell v. Helms, 530 U.S. 793 \(2000\)](#). The Court again was badly fractured in this case, with Justice Blackmun writing the plurality opinion joined by Justices Powell and Stewart. *Id.* at 231. Chief Justice Burger, Justice Rehnquist (joined by Justice White), Justice Brennan, Justice Marshall, Justice Powell, and Justice Stevens each wrote separate opinions concurring in part and dissenting in part. [Id. at 255](#) (Burger, C.J., dissenting in part); *id.* (Rehnquist, J., concurring in part and dissenting in part); *id.* (Brennan, J., concurring in part and dissenting in part); [id. at 256](#) (Marshall, J., concurring in part and dissenting in part); [id. at 262](#) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part); [id. at 264](#) (Stevens, J., concurring in part and dissenting in part).

⁵¹ [Id. at 238, 240-44, 248, 251](#) (plurality opinion). Justice Blackmun quoted the portion of Justice Stewart's opinion in *Meek* in which he stated that "substantial aid to the educational function of ... schools [that integrate their faith and learning] ... necessarily results in aid to the sectarian school enterprise as a whole." [Id. at 250](#) (quoting [Meek v. Pittenger, 421 U.S. 349, 366 \(1975\)](#), overruled by [Mitchell, 530 U.S. 793](#)). The denial of aid on this basis, however, certainly is inconsistent with granting the other aid (textbooks, testing and scoring, diagnostic services, and therapeutic services) in this case.

⁵² [Id. at 253-55](#). The district court had found the field trips to be constitutionally permissible on the basis of *Everson*, which upheld the provision of bus transportation taking non-public students to school. [Wolman v. Essex, 417 F. Supp. 1113, 1124-25 \(S.D. Ohio 1976\)](#), *aff'd* in part, *rev'd* in part, [433 U.S. 229](#), overruled by [Mitchell, 530 U.S. 793](#). The district court's decision is far more defensible than Justice Blackmun's, since taking children to a non-public school where religious education and services are upheld is much "worse" than having a teacher accompany non-public school children to a secular forum.

⁵³ Unlike *Roemer's* dissection of the schools' character and nature, Justice Blackmun and the other Justices determined that the following adequately described a pervasively sectarian institution: an elementary or high school operated under the general supervision of the bishop, in which most (but not all) principals and less than one-third of the teachers are from a religious order, where many rooms and hallways have religious symbols, where the state-mandated five hours of secular subjects are supplemented with one-half hour of religious instruction, where non-Catholic students enjoy the freedom not to attend religion classes or religious exercises, where no teacher is required to teach religious doctrine in the secular subjects, and where pupils are admitted and teachers hired without regard to race, color, creed, or national origin. [Wolman, 433 U.S. at 234-35](#) (plurality opinion), overruled by [Mitchell, 530 U.S. 793](#). This obvious description of a typical Roman Catholic elementary or high school demonstrates the foul discrimination in this area.

⁵⁴ [Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 648 \(1980\)](#). The majority opinion of Justice White was joined by the Chief Justice and Justices Stewart, Powell, and Rehnquist. *Id.* Justice Blackmun filed a dissenting opinion joined by Justices Marshall and Brennan, *id.* at 662 (Blackmun, J., dissenting), while Justice Stevens wrote a second dissenting opinion, [id. at 671](#) (Stevens, J., dissenting).

⁵⁵ Justice White had dissented in every previous case involving the pervasively sectarian test. His dissent in *New York v. Cathedral Academy* was brief and powerful:

Because the Court continues to misconstrue the First Amendment in a manner that discriminates against religion and is contrary to the fundamental educational needs of the country, I dissent here as I have in *Lemon v. Kurtzman*, *Committee for Public Education v. Nyquist*, *Levitt v. Committee for Public Education*, *Meek v. Pittenger*, and *Wolman v. Walter*.

test. Justice White struck a blow, but not a fatal blow, when the Court, by a 5-4 majority with Justice Stewart joining the majority, upheld the New York program of direct cash reimbursements of the actual costs of the religious schools (as audited by the state) for the preparation and grading of state-mandated tests.⁵⁶

[*72] Justice Blackmun's dissent essentially accused the majority in *Regan* of venturing beyond the Court's previous Establishment Clause boundaries, and into the dark realm of "state assistance to sectarian schools."⁵⁷ Unlike the Ohio statute in *Wolman*, which paid for employees of testing organizations to provide and score state-mandated tests, the New York statute at issue in *Regan* provided direct cash payments by the State to religious schools.⁵⁸ This direct financial aid to a religious school contradicted one of the central premises of the pervasively sectarian test, as determined in *Meek* and reaffirmed in *Wolman*, "that direct aid to the educational function of religious schools necessarily advances the sectarian enterprise as a whole."⁵⁹ The *Regan* majority, therefore, by ruling constitutional direct payments from the State of New York to the religious schools, completely undermined the requirement in *Meek*, and reaffirmed in *Wolman*, "that substantial direct financial aid to a religious school, even though ostensibly for secular purposes, runs the great risk of furthering the religious mission of the school as a whole because that religious mission so pervades the functioning of the school."⁶⁰ Noting that this substantial and direct aid to a religious school directly contradicted the pervasively sectarian test as enunciated in *Hunt*, *Nyquist*, *Meek*, and *Wolman*,⁶¹ Justice Blackmun's observation called into question whether the pervasively sectarian test remained good **[*73]** law. Because the *Regan* Court did not expressly overrule the test, however, it would rise from its grave again.

The next major case dealing with public aid to religious institutions was *Mueller v. Allen*, which involved a Minnesota statute permitting state taxpayers to deduct expenses incurred in providing "tuition, textbooks and transportation" for their children to attend elementary or secondary schools.⁶² Writing for yet another 5-4 Court,⁶³ Justice

[*New York v. Cathedral Acad.*, 434 U.S. 125, 134-35 \(1977\)](#) (White, J., dissenting) (citations omitted).

⁵⁶ [Regan](#), 444 U.S. at 648. Although *Regan* does not advance our study of the Court's inquisition into the nature and character of religious institutions, it does advance our understanding of the presumptions in the pervasively sectarian test. Recall that in *Meek*, Justice Stewart had opined that giving "substantial aid to the educational function of [schools that integrate their faith and learning] necessarily results in aid to the sectarian school as a whole" and therefore is unconstitutional. [Meek v. Pittenger](#), 421 U.S. 349, 366 (1975). Citing Justice Stewart's subsequent approval of aid for preparing and grading tests in *Wolman*, Justice White repudiated the proposition in *Meek* that "any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities." [Regan](#), 444 U.S. at 661.

⁵⁷ [Regan](#), 444 U.S. at 666 (Blackmun, J., dissenting). Justice Blackmun, who had written the plurality decisions in *Roemer* and *Wolman*, lamented in his *Regan* dissent that the Court took a "long step backwards" in Establishment Clause jurisprudence, and that the line separating permissible from impermissible state funding of parochial education was "wavering." [Id.](#) at 662, 63-64. Justice Blackmun noted that some members (principally Justices White and Rehnquist) saw little barrier to state legislatures providing aid to religious schools, while others (Justices Brennan, Marshall, and Stevens) "perceived a broad barrier and would rule against aid of almost any kind." [Id.](#) at 663-64. These two factions joined "Justices in the center on these issues to make order and a consensus out of the earlier decisions." [Id.](#) at 664. Yet those Justices who had invalidated state aid in *Lemon*, *Levitt*, *Meek*, and *Wolman* (Chief Justice Burger, Justice Powell, and Justice Stewart) now were validating the state aid in *Regan*, thereby casting doubt on the validity of the previous decisions. See *id.*

⁵⁸ [Id.](#) at 665-66.

⁵⁹ [Id.](#) at 666.

⁶⁰ [Id.](#) at 667-68.

⁶¹ *Id.*

⁶² [Mueller v. Allen](#), 463 U.S. 388, 390 & n.1 (1983).

Rehnquist once again applied the Lemon test and, in addressing the first prong ("secular purpose") of the test, hopefully laid to rest any question concerning the secular purpose of granting state aid to religious schools:

A State's decision to defray the cost of educational expenses incurred by parents - regardless of the type of schools their children attend - evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden - to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies.⁶⁴

[*74] With respect to the Lemon test's "primary effect" prong, the Court found it significant that the tax deduction was available to the parents of public and private school students alike.⁶⁵ This principle of neutrality,⁶⁶ the eligibility of all parents to use this tax deduction regardless of the type of school their children attended,⁶⁷ distinguished Mueller from *Committee for Public Education & Religious Liberty v. Nyquist*, which had provided tuition reimbursement to parents of children only attending private schools.⁶⁸

Even more importantly, the Court distinguished Mueller from previous cases by noting that the assistance flowed not from the state directly to the parochial schools, but rather indirectly through parents of children attending the schools.⁶⁹ Although acknowledging that this state assistance to parents had an economic effect similar to direct

⁶³ [Id. at 389-90](#). Chief Justice Burger and Justices White, Powell, and O'Connor joined Justice Rehnquist's opinion. *Id.* Justice Marshall dissented and was joined by Justices Brennan, Blackmun and Stevens. *Id.* at 404 (Marshall, J., dissenting).

⁶⁴ [Id. 394-95](#) (majority opinion). Justice Rehnquist continued, favorably quoting from Justice Powell's opinion in *Wolman*:

Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

[Id. at 395](#) (internal quotation marks omitted) (quoting [Wolman v. Walter, 433 U.S. 229, 262 \(1977\)](#) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part), overruled by [Mitchell v. Helms, 530 U.S. 793 \(2000\)](#)).

⁶⁵ [Id. at 396-97](#).

⁶⁶ [Everson v. Bd. of Educ., 330 U.S. 1, 18 \(1947\)](#). This principle of neutrality had its genesis in *Everson's* premise that the Establishment Clause prohibited favoritism of religion over nonreligion, but also could not be hostile to religion. *Id.* The real impetus behind the neutrality principle appearing in *Mueller v. Allen* was the 1981 case of [Widmar v. Vincent, 454 U.S. 263 \(1981\)](#), involving a public university's policy of excluding religious groups from the university's open forum for student groups based on Establishment Clause. *Id.* at 264-66. The Court decided on free speech grounds that a policy that excluded religious groups was unconstitutional because the policy violated content neutrality due to the ability of nonreligious student groups to meet on campus. [Id. at 277](#).

⁶⁷ See [Mueller, 463 U.S. at 390](#) & n.1, 395. Justice Marshall's dissent in *Mueller* challenged the effect of this neutrality adopted by the majority. [Id. at 404, 416-17](#) (Marshall, J., dissenting). Justice Marshall noted that parents of public school students rarely used the fullest extent of the Minnesota tax deduction at issue because public schools are free. [Id. at 405](#). The only group specifically benefited by this tax deduction was the parents who sent their children to private schools and therefore paid tuition. [Id. at 408](#). Of these private schools, 95% were religious schools. [Id. at 405](#). According to Justice Marshall, the effect of the tax deduction was to subsidize religious education in violation of the Establishment Clause. *Id.* at 404.

⁶⁸ [Id. at 398](#) (majority opinion).

aid to the schools,⁷⁰ the Court also stated that the aid was "available only as a result of numerous private choices of individual parents of school-age children."⁷¹ Because of the private choices available here, no "imprimatur of state approval" could be deemed "conferred on any particular religion, or on religion generally."⁷²

[*75] Justice Marshall in his dissent claimed that this distinction between direct and indirect aid was illusory since the "controlling significance is not the form but the 'substantive impact' of the financial aid. "Insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions."⁷³ Quoting Meek and Wolman, Justice Marshall returned to the principle implicitly overruled in *Regan* that providing aid to the educational function of parochial schools resulted in aid to the religious enterprise as a whole, and therefore violated the Establishment Clause, since the purpose of religious schools is to integrate secular and religious education.⁷⁴

Justice Marshall's dissent is very much in line with the precedents establishing and furthering the pervasively sectarian test, and is contrary to *Regan*. The important point about *Mueller* is that Justice Marshall's opinion is a dissent in a case that has a majority opinion. Perhaps to bolster the rather fragile majority's decision to distinguish rather than overrule precedent (including the pervasively sectarian test), Justice Rehnquist, near the end of his opinion, repeated the primary rationale for the majority opinion in *Mueller*:

Private educational institutions, and parents paying for their children to attend these schools, make special contributions to the areas in which they operate... . If parents of children in private schools choose to take especial advantage of the relief provided by [the Minnesota tax deduction provision], it is no doubt due to the fact that they bear a particularly great financial burden in educating their children. More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits, discussed above, provided to the State **[*76]** and all taxpayers by parents sending their children to parochial schools.⁷⁵

The creation of the indirect funding paradigm based on parental choice, coupled with the very secular benefits of religious schools (educational alternatives, wholesome competition with public schools, and relief of tax burdens incidental to the operation of public schools), should have spelled the death of the pervasively sectarian test roughly a decade after its creation. Unfortunately, the Supreme Court in *Mueller* refused again to kill it, and therefore vampire-like it resurfaced two years later in a pair of cases which became the "high water mark" of those seeking to discriminate against parents of children attending religious schools.

⁶⁹ [Id. at 399](#).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* (quoting [Widmar v. Vincent, 454 U.S. 263, 274 \(1981\)](#)). Justice Rehnquist in *Mueller* created two distinctions, indirect funding (the private choice rationale) and the endorsement test, which bore much fruit in future cases. *Id.* See generally [Zelman v. Simmons-Harris, 536 U.S. 639 \(2002\)](#) (applying the private choice rationale to school voucher policy); [Aqostini v. Felton, 521 U.S. 203 \(1997\)](#) (using the endorsement test to reshape the Lemon test).

⁷³ [Mueller, 463 U.S. at 408](#) (Marshall, J., dissenting) (alteration in original) (citation omitted) (quoting [Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786, 793 \(1973\)](#)).

⁷⁴ [Id. at 406](#) (citing [Meek v. Pittenger, 421 U.S. 349, 366 \(1975\)](#), overruled by [Mitchell v. Helms, 530 U.S. 793 \(2000\)](#)). Justice Marshall argued that unrestricted aid, whether direct or indirect, has the inherent problem of not being "marked off from the religious function" of parochial schools. *Id.* (internal quotation marks omitted) (quoting [Nyquist, 413 U.S. at 782](#)). Therefore, it cannot be guaranteed that secular and religious educational functions are appropriately separated to ensure that public financial aid only supports secular education. [Id. at 406-07](#).

⁷⁵ [Id. at 401-02](#) (majority opinion) (citation omitted). Even Justice Marshall in his dissent noted that "promoting pluralism and diversity among the State's public and nonpublic schools" serves a secular purpose. [Id. at 405](#) (Marshall, J., dissenting).

The 5-4 majority in *Mueller* became a 4-5 minority when Justice Powell switched sides in *Aguilar v. Felton*.⁷⁶ *Aguilar* involved the nineteen-year-old New York practice of using federal funds to provide remedial education to children residing in economically depressed areas who were attending private schools.⁷⁷ New York did not pay the private schools directly to provide this service, but rather placed public school teachers in the private schools to provide guidance counseling and to teach remedial reading, remedial **[*77]** mathematics, reading skills, and English as a second language.⁷⁸ Each public school employee performing these services volunteered to work in the private schools and was directed to avoid any involvement with religious activities conducted in the private schools, which included keeping all religious materials out of their classrooms.⁷⁹ To insure strict compliance with these rules, supervisors attempted at least one unannounced visit to the schools per month.⁸⁰

Justice Brennan, in an opinion joined by Justices Marshall, Blackmun, and Stevens, unearthed the pervasively sectarian test and used it for the first time since *Wolman* to strike down a public program providing assistance to private school students. Quoting *Meek*, Justice Brennan noted that the instructional services provided were "important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."⁸¹ Distinguishing this case from *Roemer*, Justice Brennan cited the following facts to support his conclusion that the schools receiving aid from New York were pervasively sectarian: receipt of funds from and reporting to an affiliated church; required attendance at church religious exercises; beginning the school day or class with prayer; preferential admission to members of the sponsoring church; and for Catholic schools, the general supervision and control of the local parish.⁸²

Justice Brennan used the pervasively sectarian test not to justify a finding that the New York program primarily aided the advancement of religion (the second prong of the *Lemon* test), but rather to support a judicial finding that the program excessively entangled New York and the religious schools (the third prong of *Lemon*).⁸³ Justice

⁷⁶ [Aguilar v. Felton, 473 U.S. 402, 414 \(1985\)](#) (Powell, J., concurring), overruled by [Agostini v. Felton, 521 U.S. 203 \(1997\)](#). Justice Powell, who had joined the opinion by Justice Rehnquist in *Mueller*, wrote a concurring opinion in *Aguilar*. *Id.* Rather than limiting the scope of Justice Brennan's majority opinion in *Aguilar*, Justice Powell's concurrence was broader. See [id. at 414-19](#). That is, Justice Powell wrote his concurrence because he had "additional reasons why precedents of this Court require us to invalidate these two educational programs" [id. at 415](#). One such additional reason was political divisiveness. [id. at 416](#). This "additional reason" is surprising given the fact that two years earlier in *Mueller*, Justice Powell had joined an opinion which quoted the following portion of his opinion in *Wolman*:

At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes - or even of deep political division along religious lines - is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court.

[Mueller, 463 U.S. at 400](#) (citation omitted) (internal quotation marks omitted) (quoting [Wolman v. Walter, 433 U.S. 229, 263 \(1997\)](#) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part), overruled by [Mitchell, 530 U.S. 793](#)).

⁷⁷ [Aguilar, 473 U.S. at 404-06](#) (majority opinion), overruled by [Agostini, 521 U.S. 203](#).

⁷⁸ [id. at 406](#). Eighty-four percent of the private school students provided these services were enrolled in Roman Catholic schools, and 8% were enrolled in Hebrew day schools. *Id.*

⁷⁹ [id. at 406-07](#).

⁸⁰ *Id.*

⁸¹ [id. at 412](#) (internal quotation marks omitted) (quoting [Meek v. Pittenger, 421 U.S. 349, 371 \(1975\)](#), overruled by [Mitchell, 530 U.S. 793](#)).

⁸² *Id.*

[*78] Rehnquist appropriately attacked the illogic of the excessive entanglement prong,⁸⁴ and the author of the Lemon test, Chief Justice Burger, put this case in proper perspective when he wrote:

Under the guise of protecting Americans from the evils of an Established Church such as those of the 18th century and earlier times, today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I... . Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously affiliated schools.

What is disconcerting about the result reached today is that, in the face of the human cost entailed by this decision, the Court does not even attempt to identify any threat to religious liberty posed by the operation of Title I... . It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's school children as textbooks, transportation to and from school, and school nursing services.

... .

... Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.⁸⁵

[*79] Issued the same day as Aguilar, *School District of Grand Rapids v. Ball* also involved using public school employees to teach private school students in private school classrooms rented for a nominal sum.⁸⁶ At issue were two programs sponsored by the School District of Grand Rapids. The Shared Time program offered classes taught during the regular school day that supplemented the core curriculum courses required by the State of Michigan for accreditation.⁸⁷ The second program was the Community Education program which was taught after school by part-time public employees, many of whom were teachers in the religiously affiliated schools.⁸⁸

⁸³ [Id. at 412-13.](#)

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

Id. (citations omitted).

⁸⁴ [Id. at 420-21](#) (Rehnquist, J., dissenting) ("In this case the Court takes advantage of the 'Catch-22' paradox of its own creation, whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement." (citation omitted)). Justice O'Connor, presaging her opinion for the Court in *Agostini v. Felton*, expressed doubts as to the propriety of the excessive entanglement prong of the *Lemon* test. [Id. at 429-30](#) (O'Connor, J., dissenting).

⁸⁵ [Id. at 419-20](#) (Burger, C.J., dissenting) (citations omitted). The dilemma facing the parents of children using the services now outlawed in *Aguilar* is breathtaking. These parents, whose tax dollars support the federal program now being denied their needy children, must choose between the remedial services their children need and their deeply held convictions to educate their children in religious schools. They must decide whether their children's remedial needs trump religious training or whether a religious education that supports the moral upbringing at home takes first priority. In such situations, parents essentially must choose between their free exercise rights coupled with their fundamental right to raise and educate their children versus giving their children an opportunity to succeed in school and the workforce. See generally [Pierce v. Soc'y of Sisters, 268 U.S. 510 \(1925\)](#) (finding parents have the right to choose where their children will be educated).

⁸⁶ [Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 375-78 \(1985\)](#), overruled by [Agostini v. Felton, 521 U.S. 203 \(1997\)](#). The public school employees removed all religious symbols from their rented classrooms and posted signs stating that this room was a "public school classroom." [Id. at 378.](#)

⁸⁷ [Id. at 375.](#) A typical student spent about 10% of his or her time in these classes, which consisted of remedial mathematics and reading, art, music, and physical education.

Splitting 5-4 again,⁸⁹ the Court found that the Shared Time program violated the Establishment Clause because its primary effect was to advance religion.⁹⁰ To reach this conclusion, Justice Brennan used the pervasively sectarian test which required the Court to determine whether the religious schools in question fit the criteria. [*80] Justice Brennan did so by examining the record and finding that many of the schools included in their curriculum prayer and attendance at religious services, many were run by churches or organizations whose members must ascribe to a particular religious belief, many had faculties and student bodies composed largely of members of a particular denomination, and many of the schools gave admission preference to children based on their denomination.⁹¹ Moreover, Justice Brennan found a parent handbook from one of the Catholic schools and a policy statement from one of the Christian schools that provided "substantial evidence" suggesting the religious schools on trial shared "deep religious purposes."⁹² Armed with this evidence developed by trolling through the religious convictions of the church-related schools, Justice Brennan concluded the schools were too sectarian because "a substantial portion of their functions are subsumed in the religious mission" which was "the only reason for the [religious] schools' existence."⁹³ The secular education in the religious schools went "hand in hand" with the religious mission of the schools such that the two missions were "inextricably intertwined."⁹⁴

Ball, issued in 1985, was the last time the Supreme Court used the pervasively sectarian test to strike down public aid for religious schools. The dawn of the neutrality principle (equal treatment of both religious and secular

⁸⁸ [Id. at 377](#). The Community Education program included classes in arts and crafts, home economics, Spanish, gymnastics, yearbook production, drama, newspaper, humanities, chess, model building, and nature appreciation, among others. [Id. at 376-77](#).

⁸⁹ Justice Brennan wrote the opinion for the Court, and was joined by Justices Blackmun, Marshall, and Stevens. Justice Powell concurred, and the Chief Justice and Justices White, Rehnquist, and O'Connor dissented with respect to the Shared Time program. With respect to the Community Education program, the Chief Justice and Justice O'Connor concurred with the judgment of the Court. [Id. at 398](#) (Burger, C.J., concurring in the judgment in part and dissenting in part); [id. at 398-400](#) (O'Connor, J., concurring in the judgment in part and dissenting in part).

⁹⁰ Using the pervasively sectarian test, Justice Brennan, for the Court, found that the publicly funded educational programs in the private schools may impermissibly advance religion in three ways: (1) the publicly paid teachers in the programs may intentionally or inadvertently indoctrinate students in religious beliefs; (2) the programs may create for the impressionable youngsters a symbolic link between government and religion, thereby demonstrating the power of the government in support of the religious denomination operating the school; and (3) the programs subsidize the religious functions of the religiously affiliated schools by assuming "a substantial portion of their [the religious schools'] responsibility for teaching secular subjects." See [id. at 385, 397](#) (majority opinion). Note that Justice Brennan contends that the religious schools have a "responsibility for teaching secular subjects," no doubt because of accreditation by the State of Michigan. In spite of this accreditation and the assumption of responsibility performed by public schools through taxes paid by, among others, the parents of children in religious schools, Justice Brennan and the Court denied any aid for these religious schools.

⁹¹ [Id. at 384 n.6](#).

⁹² [Id. at 379](#). The parent handbook stated that the goal of Catholic education is "[a] God oriented environment which permeates the total educational program," "[a] Christian atmosphere which guides and encourages participation in the church's commitment to social justice," and "[a] continuous development of knowledge of the Catholic faith, its traditions, teachings and theology." *Id.* (alterations in original) (internal quotation marks omitted) (quoting [Ams. United for Separation of Church & State v. Sch. Dist. of Grand Rapids](#), 546 F. Supp. 1071, 1080 (W.D. Mich. 1982)). Similarly, the Christian school policy stated that faith must be an integral part of the entire educational program, rather than simply being one course in the curriculum. *Id.* The policy stated "it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program." *Id.* (quoting [Ams. United](#), 546 F. Supp. at 1081).

⁹³ [Id. at 384](#) (internal quotation marks omitted) (quoting, respectively, [Ams. United](#), 546 F. Supp. at 1084, and [Lemon v. Kurtzman](#), 403 U.S. 602, 657 (1971) (Brennan, J., concurring)).

⁹⁴ *Id.* (quoting [Lemon](#), 403 U.S. at 657 (Brennan, J., concurring)).

institutions) pushed the specter of the pervasively sectarian test back into the deep shadows of religious discrimination.

This dawn of neutrality was vividly seen in the next major Establishment Clause case, *Witters v. Washington Department of Services for the Blind*, where the Court unanimously ruled that a [*81] blind student could use public rehabilitation funds to attend a Bible college.⁹⁵ The Court was apparently untroubled by the pervasively sectarian nature of the ultimate recipient of these funds (the Inland Empire School of the Bible received the public funds as tuition), nor by the fact that this school taught the "Bible, ethics, speech, and church administration in order to equip [the plaintiff] for a career as a pastor, missionary, or youth director."⁹⁶ Contrary to the practice followed in *Ball*, *Aguilar*, and other cases which applied the pervasively sectarian test, the Court did not troll through the theological beliefs and practices at the school to learn whether class began with prayer, whether a statement of faith or membership in a particular denomination was necessary for admission, or whether there were brochures or policy statements that proclaimed that the school integrated Christian faith and education (one must certainly assume it did!), thereby combining the school's religious and secular functions.⁹⁷ Rather than focusing on the religious school as the ultimate recipient of the public funds, Justice Marshall focused on the fact that any funds which flow to the school "did so only as a result of the genuinely independent and private choices of aid recipients."⁹⁸ Justice Marshall, in an apparent attempt to distinguish this decision from previous cases, noted that the Washington program created no financial incentive to undertake a religious education, provided no more benefits to those who applied their aid to religious education, and did not limit the benefit, in whole or large part, to students at religious institutions.⁹⁹

On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the [*82] fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.¹⁰⁰

In a word, the program is neutral; it treats all similarly situated individuals and institutions equally.¹⁰¹

⁹⁵ [Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 482 \(1986\)](#).

⁹⁶ [Id. at 483](#).

⁹⁷ Compare [id. at 482-90](#), with [Aguilar v. Felton, 473 U.S. 402, 412-13 \(1985\)](#), overruled by [Agostini v. Felton, 521 U.S. 203 \(1997\)](#), and [Ball, 473 U.S. at 384 n.6](#), overruled by [Agostini, 521 U.S. 203](#).

⁹⁸ [Witters, 474 U.S. at 487](#).

⁹⁹ [Id. at 488](#).

¹⁰⁰ *Id.* Justice Marshall further noted that from a review of the record, no significant sum under the program would flow to religious education. *Id.*

¹⁰¹ In analyzing this opinion, it appears that the principal objection of the Justices consistently denying aid to institutions which integrate faith and learning (Blackmun, Brennan, and Marshall) is that these state programs benefit only religious institutions. Yet, as noted by Justice Rehnquist in *Mueller*, the purpose of this aid is simply to "level the playing field" somewhat between funding for religious schools, which at private expense satisfies the public purpose of educating the next generation of American workers, and the billions of state and local dollars spent on public education. See [Mueller v. Allen, 463 U.S. 388, 402 \(1983\)](#). Pursuant to Justice Marshall's logic in *Witters*, a state program which eliminated "free public education" and gave parents of school-aged children a voucher to be used at any accredited institution which taught the state-mandated curriculum would be constitutional. See [Witters, 474 U.S. at 487](#). Such a neutral program would enjoy the benefits of market competition, and would advance the religious freedom of those parents who want their children to be taught the state-mandated subjects in a way compatible with a religious tradition. Despite this logic by the unanimous Court in *Witters*, four members of the Court in *Zelman* determined that a Cleveland school voucher program applying these principles was unconstitutional. [Zelman v. Simmons-Harris,](#)

The unanimous decision in *Witters* did not spell the immediate demise of the pervasively sectarian test, which once again crept out of the grave in *Bowen v. Kendrick*, a case involving a facial challenge on Establishment Clause grounds to the Adolescent Family Life Act ("AFLA").¹⁰² AFLA authorized grants to public and nonprofit [*83] organizations "for services and research in the area of premarital adolescent sexual relations and pregnancy."¹⁰³ AFLA expressly stated that the federally provided services should emphasize support by the family, religious and charitable organizations, and required grant applicants to describe how they would involve religious and charitable organizations in the services provided.¹⁰⁴ Citing *Ball*, the district court found AFLA unconstitutional because it envisioned a direct role for religious organizations in providing services, and it found "unrealistic" the presumption that AFLA-supported counselors from religious organizations could put aside their religious beliefs when counseling.¹⁰⁵

Chief Justice Rehnquist, joined by Justices White, O'Connor, Scalia, and Kennedy, reversed the district court's decision and remanded the case to determine, among other things, whether AFLA-aid was flowing to "pervasively sectarian" institutions.¹⁰⁶ In reversing the district court, the Chief Justice stated that although much of AFLA-funded services involved some sort of education or counseling, there was nothing "inherently religious" about these activities that would cause the advancement of religion.¹⁰⁷ Moreover, he rejected the claim that AFLA was unconstitutional on its face, stating that the Court had never held that religious organizations are ineligible under the First Amendment from participating in publicly funded social welfare programs.¹⁰⁸

[536 U.S. 639, 686, 716-717 \(2002\)](#) (Souter, J., dissenting). Fortunately for the parents seeking an escape from the Cleveland public school system for their children, these four members of the Court were a minority. [Id. at 686.](#)

Yet, even a voucher system is merely form over substance. By sending their children to religious schools, parents are exercising their independent judgment to educate their children in a setting with a religious worldview. Their children, who are taught that mathematics exemplifies the orderliness of God's creation, still obtain the necessary mathematical skills to pass state competency exams and contribute to the American economy. Their children, who are taught that the Pilgrims came to Plymouth for religious freedom purposes, still learn that the colonies declared their independence on July 4, 1776, and fought the British for independence. These children, though practicing their skills by reading the New Testament, are nonetheless taught that sentences should contain a subject and verb, and perhaps a direct or indirect object. These courses, certainly comparable to ones taught in public schools, prepare the Christian (or Jewish) school student to prepare for a career as a banker, teacher, bricklayer, or even a Supreme Court Justice such as Chief Justice Roberts, Justice Scalia, and Justice Thomas, all of whom attended either Catholic elementary or high schools. See Clarence Thomas, *My Grandfather's Son* 14-15 (2007); Mark A. Graber, Clarence Thomas, in *Biographical Encyclopedia of the Supreme Court* 542, 542 (Melvin I. Urofsky ed., 2006); Tony Mauro, Roberts, John Glover Jr., in *Biographical Encyclopedia of the Supreme Court* 429, 429 (Melvin I. Urofsky ed., 2006); George Kannar, *The Constitutional Catechism of Antonin Scalia*, [99 Yale L.J. 1297, 1309 n.53 \(1990\)](#).

¹⁰² [Bowen v. Kendrick, 487 U.S. 589, 593 \(1988\)](#).

¹⁰³ [Id. at 593](#) (internal quotation marks omitted) (quoting S. Rep. No. 97-161, at 1 (1981)). Grant recipients were to provide care to the pregnant adolescents and adolescent parents, and provide prevention services. [Id. at 594.](#)

¹⁰⁴ [Id. at 596](#) (citing [42 U.S.C. §§300z\(a\)\(10\)\(C\), -5\(a\)\(21\)](#) (2000)). Successful grant applicants included state and local health agencies, community health associations, private hospitals and healthcare centers, and community and charitable organizations, including grantees with "institutional ties to religious denominations." [Id. at 597.](#)

¹⁰⁵ [Id. at 598-99](#) (internal quotation marks omitted) (quoting [Kendrick v. Bowen, 657 F. Supp. 1547, 1563 \(D.D.C. 1987\)](#), rev'd, [487 U.S. 589](#)).

¹⁰⁶ [Id. at 620-21.](#)

¹⁰⁷ [Id. at 605.](#)

¹⁰⁸ [Id. at 609.](#) He cited *Bradfield v. Roberts* as an example of a religious institution participating in a federally funded program. *Id.* (citing [Bradfield v. Roberts, 175 U.S. 291, 298 \(1899\)](#)). In *Bradfield* the Court upheld the federally funded construction of a

With respect to the pervasively sectarian test, the Chief Justice observed that the state programs that the Court had previously struck down involved funds flowing almost exclusively to pervasively [*84] sectarian institutions.¹⁰⁹ Given AFLA's "facially neutral grant requirements" and the wide range of public and private agencies eligible for the program, there was nothing on the face of AFLA to conclude that a "significant proportion" of the public funds would flow to pervasively sectarian institutions.¹¹⁰

The remand instructions in *Bowen* closed the coffin on the pervasively sectarian test. Although the Court directed the district court to determine whether any AFLA grants were distributed to pervasively sectarian institutions, the Court stated that "pervasively sectarian" must not be equated with "affiliation with a religious institution" or "religiously inspired."¹¹¹ The Court further suggested that the district court consider whether the AFLA grants funded "specifically religious activities," used material with explicitly religious content, or instilled the views of a particular religious faith.¹¹²

Of particular interest in the *Bowen* case was the concurring opinion of Justices Kennedy and Scalia, the Court's two newest members. Justice Kennedy, in his first opportunity to consider the pervasively sectarian test, wrote that he was "not confident that the term 'pervasively sectarian' is a well-founded juridical category."¹¹³ Consistent with *Witters*, Justice Kennedy's focus was on the neutrality of the statute and the conduct of the recipient, rather than the status of the recipient. He wrote:

Where, as in this litigation, a statute provides that the benefits of a program are to be distributed in a neutral fashion to religious and nonreligious applicants alike, and the program withstands a facial challenge, it is not unconstitutional as applied solely by reason of the religious character of a specific recipient. The question in an as-[*85] applied challenge is not whether the entity is of a religious character, but how it spends its grant.¹¹⁴

Seven years later, in *Zobrest v. Catalina Foothills School District*, the Court focused again upon neutrality.¹¹⁵ Writing on behalf of himself and Justices White, Thomas, Scalia, and Kennedy, Chief Justice Rehnquist stated that the Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."¹¹⁶ Like *Mueller*, the aid in this case (a sign interpreter used by a deaf student at a Catholic school) was not the result of direct federal aid to the

building on the grounds of a hospital conducted under the auspices of the [Roman Catholic Church. *Bradfield*, 175 U.S. at 298-99](#). The Court concluded that the religious affiliation of the hospital was "wholly immaterial." *Id.*

¹⁰⁹ [Bowen](#), 487 U.S. at 610-11.

¹¹⁰ [Id.](#) at 610.

¹¹¹ [Id.](#) at 621 (internal quotation marks omitted). Chief Justice Rehnquist cited *Tilton*, *Hunt*, and *Roemer* to support this charge to the district court. *Id.* Justice Blackmun in his dissent claimed that the Court's reliance on these three cases involving religiously affiliated liberal arts colleges was misplaced, and that the religious organizations receiving AFLA funds were more akin to the parochial schools found to be pervasively sectarian than to the three liberal arts colleges. [Id.](#) at 632-33 (Blackmun, J., dissenting).

¹¹² [Id.](#) at 621 (majority opinion) (internal quotation marks omitted). The Court noted that views of grantees on premarital sex, abortion, and the like would not be sufficient to void the grant on Establishment Clause grounds if these views coincided with religious views. *Id.*

¹¹³ [Id.](#) at 624 (Kennedy, J., concurring).

¹¹⁴ *Id.* Compare *id.*, with [Witters v. Wash. Dep't of Servs. for the Blind](#), 474 U.S. 481, 488 (1986).

¹¹⁵ [Zobrest v. Catalina Foothills Sch. Dist.](#), 509 U.S. 1, 8 (1993).

¹¹⁶ *Id.*

religious school, but was the result of the parents' private decision to send their deaf son to a Catholic high school.¹¹⁷ The nature of the school, whether public or private, religious or completely secular, was immaterial to the majority in the case.¹¹⁸

The nature of the school, however, was not immaterial to Justice Blackmun, who dissented in an opinion joined by Justice Souter. Justice Blackmun concluded that the Catholic high school receiving federal aid was "pervasively religious" since the education provided was "inextricably intertwined" with religious values.¹¹⁹ Justice Blackmun supported this conclusion by noting that the overriding objective of the school was to "instill a sense of Christian values," and **[*86]** that its "distinguishing purpose" was "the inculcation in its students of the faith and morals of the Roman Catholic Church."¹²⁰ Further, religion was a required subject at the high school, students were strongly encouraged to attend daily Mass, and teachers were required to sign a faculty employment agreement that stated they would "assist[] students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum."¹²¹ In other words, the school expected its faculty to teach using an orthodox Catholic worldview. Justice Blackmun's objection was that the state-employed sign-language interpreter would communicate the material covered in the religion class, as well as the "nominally secular subjects that are taught from a religious perspective," and that in this "environment so pervaded by discussions of the divine, the interpreter's every gesture would be infused with religious significance."¹²² This highly discriminatory view toward an orthodox perspective on religion was, quite fortunately, now limited to only two Justices.¹²³

The next major case¹²⁴ to drive a nail into the coffin of the pervasively **[*87]** sectarian test was *Agostini v. Felton*.¹²⁵ *Agostini* was simply Act II of *Aguilar*, but in this Act the Court overruled *Aguilar* as well as the Shared Time

¹¹⁷ [Id. at 9-10.](#)

¹¹⁸ [Id. at 10.](#)

The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.

Id. That is, whether a school is orthodox and mixes faith with learning is immaterial as long as the public funding is distributed on a religiously neutral basis (no favoritism afforded religious schools), and the funds are distributed as a result of private choice (which is, of course, the case in every instance when parents select a religious school on behalf of their child).

¹¹⁹ [Id. at 18](#) (Blackmun, J., dissenting) (internal quotation marks omitted).

¹²⁰ *Id.* (internal quotation marks omitted).

¹²¹ *Id.* (internal quotation marks omitted).

¹²² [Id. at 19.](#)

¹²³ Justice O'Connor, in a very short opinion joined by Justice Stevens, opined that the Court should have decided this case on statutory and regulatory issues, rather than the constitutional issue addressed by the majority. [Id. at 24](#) (O'Connor, J., dissenting).

¹²⁴ A very important case involving the Establishment Clause, but not the pervasively sectarian test, was [Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 \(1995\)](#). Ronald Rosenberger was an undergraduate student at the University of Virginia in 1990, and he and other similarly minded students established a student organization called Wide Awake Productions. *Id.* at 825. This student organization published a news journal called *Wide Awake: A Christian Perspective* at the University of Virginia. *Id.* at 826. In its first issue, the editors wrote that this journal offered "a Christian perspective on both personal and

elements of Ball. ¹²⁶ In overruling these cases, Justice O'Connor reviewed, and then shattered, one of the principal presumptions buttressing the pervasively sectarian test. ¹²⁷ In Ball, the Court presumed that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a [*88] consequence of private decisionmaking." ¹²⁸ In other words, the Court in Ball presumed that providing aid to Christian schools for secular education would free up money for "religious indoctrination." ¹²⁹ Citing Witters, Justice O'Connor wrote that the Court now rejects this presumption particularly

community issues, especially those relevant to college students at the University of Virginia." *Id.* (internal quotation marks omitted). The first issue had articles about racism, crisis pregnancies, prayer, stress, reviews of religious music, and C.S. Lewis's ideas about evil and free will, all written from a Christian perspective. *Id.* Similar to fourteen other student news journals, Wide Awake Productions submitted a bill for printing costs to the university. *Id.* at 827. Unlike the fourteen other news journals, the university refused to pay Wide Awake's outside printing bill because the university interpreted the Establishment Clause as prohibiting this payment, since such a payment would, in its opinion, result in advancing religion. See *id.*

Rosenberger is primarily about free speech, and more particularly, viewpoint discrimination. It is important for our purposes because it again underscores the importance of neutrality. Justice Kennedy in this 5-4 decision ruled that the university's singling out for denial of payment the printing costs for Wide Awake discriminated against the Christian views of Ronald Rosenberger and other university students. *Id.* at 845-46. As long as the fourteen secular organizations were receiving funds, it was viewpoint discrimination not to provide the one Christian organization with the same benefit.

¹²⁵ [Agostini v. Felton, 521 U.S. 203 \(1997\)](#). Agostini is important for Establishment Clause jurisprudence for several reasons. First, it was written by Justice O'Connor who, as we will note in the next case, gained importance during her Supreme Court tenure because she became the crucial swing vote in many 5-4 cases. See *id.* at 208. Secondly, Agostini modified the Lemon test by reducing the importance of the "excessive entanglement" prong, and making "excessive entanglement" one of three elements of the "primary effect" prong. See *id.* at 232-35. This modified Lemon test retains the first two prongs of the original test (the legislation must have a secular purpose and must not have the primary effect of advancing or inhibiting religion), and in determining whether a statute advances or inhibits religion, the Court examines whether the government aid in question (1) results in governmental indoctrination; (2) defines recipients by reference to religion; or (3) creates excessive entanglement. *Id.* at 234-35. Finally, Agostini is important because it remains the current test for the Establishment Clause, and has now endured for over eleven years.

¹²⁶ *Id.* at 208-09. In Aguilar, the Court held that the Establishment Clause prohibited the New York City Board of Education from sending public school teachers into religious schools to provide remedial education required by [Title I of the Elementary and Secondary Education Act](#). [Aguilar v. Felton, 473 U.S. 402, 404-08, 414 \(1985\)](#), overruled by [Agostini, 521 U.S. 203](#). To comply with this ruling, in Agostini, the City School Board spent over \$ 100 million providing eligible private school children with computer-aided instruction, leasing sites off the private school campuses, buying and furnishing mobile instructional units which were often parked on the private school campuses but not connected to the private school buildings, and transporting students to the off premises sites. [Agostini, 521 U.S. at 213](#). These additional costs reduced the amount of money available for remedial education, resulting in the reduction in the number of students who received these educational benefits. According to one source, the cost required to comply with Aguilar "resulted in a decline of about 35 percent in the number of private school children who are served." *Id.* at 214 (internal quotation marks omitted) (quoting S. Rep. No. 100-222, at 14 (1987)). Procedurally, the petitioners sought relief from the permanent injunction under [Federal Rule of Civil Procedure 60\(b\)](#), and although this relief was denied by the district court, this decision was appealed through the circuit court to the Supreme Court. *Id.* at 214.

¹²⁷ The remaining two presumptions Justice O'Connor shattered were factually specific to Aguilar and Ball. The first presumption, based primarily upon Meek and Wolman, is that public employees who work on the premises of a religious school will conform their instruction to the pervasively sectarian environment in which they are teaching. [Agostini, 521 U.S. at 219](#). That is, "any public employee who works on the premises of a religious school is presumed to inculcate religion in her work." *Id.* at 222. The second presumption was that the presence of public school teachers on the grounds of a parochial school would create a "graphic symbol" of the union between church and state, particularly when seen by children in their formative years. *Id.* at 220 (internal quotation marks omitted) (quoting [Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 391 \(1985\)](#)). The Court feared that the perception of a symbolic union would convey a message of government endorsement of religion which would violate a "core purpose" of the Establishment Clause. *Id.* (internal quotation marks omitted) (quoting [Ball, 473 U.S. at 389](#)).

¹²⁸ *Id.*

¹²⁹ [Id.](#) at 220-21.

where, as here, the decision as to whether money will ultimately flow to religious institutions is made "only as a result of the genuinely independent and private choices of individuals."¹³⁰ The Court, therefore, concluded that the Establishment Clause did not bar "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis," and that the program was not an endorsement of religion.¹³¹

The ever-growing distaste for the pervasively sectarian test was next evident in Justice Thomas's dissent to the denial of a petition for writ of certiorari in *Columbia Union College v. Clarke*.¹³² In his dissenting opinion, Justice Thomas stated that the Court had invented the pervasively sectarian test as a way of differentiating "between schools that carefully segregate religious and secular activities and schools that consider their religious and educational missions indivisible and therefore require religion to permeate all activities."¹³³ Citing *Agostini*, *Rosenberger*, *Zobrest*, and *Witters*, Justice Thomas noted that the Court no longer required organizations to renounce their religious mission in order to participate in public programs, and that religious institutions may receive "public assistance that is made available based upon neutral, secular criteria."¹³⁴ Justice Thomas further noted that the pervasively sectarian test "directly collided with our decisions that have prohibited governments from [*89] discriminating in the distribution of public benefits based upon religious status or sincerity."¹³⁵ Justice Thomas, therefore, urged the Court to use the *Columbia Union College* case to "scrap the 'pervasively sectarian' test and reaffirm that the Constitution requires, at a minimum, neutrality not hostility toward religion. By so doing, we would vindicate *Columbia Union's* right to be free from invidious religious discrimination."¹³⁶

Though declining to hear *Columbia Union College*, the Court had an opportunity to lay the pervasively sectarian test to rest when it heard *Mitchell v. Helms*, which involved a federal program that provided local school districts funds for the purchase of computers and other educational materials.¹³⁷ The program required each local school district to provide roughly equal amounts of materials, on a per student basis, to nonprofit private schools in the district.¹³⁸ In the Louisiana district at issue, about 30% of the federal funds went to private schools, and most of these schools were Roman Catholic.¹³⁹ Mary Helms, a parent of one of the public school students, sued the local district on the grounds that it was subsidizing religious schools in violation of the Establishment Clause.¹⁴⁰

¹³⁰ *Id.* at 225-26 (internal quotation marks omitted) (quoting *Witters v. Wash. Dep't of Serv. for the Blind*, 474 U.S. 481, 487 (1986)).

¹³¹ *Id.* at 234-35. Justice O'Connor quoted from *Witters* the proposition that a person's choice to "use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion." *Id.* at 235 (alterations in original) (internal quotation marks omitted) (quoting *Witters*, 474 U.S. at 488-89). Justice Souter saw the impact of the Court's decision in *Agostini*, and in his dissent joined by Justices Stevens, Ginsburg, and Breyer, claimed the ruling "authorizes direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government." *Id.* at 240-41 (Souter, J., dissenting).

¹³² *Columbia Union Coll. v. Clarke*, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from denial of cert.).

¹³³ *Id.*

¹³⁴ *Id.* at 1014.

¹³⁵ *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)).

¹³⁶ *Id.* at 1014-15 (citation omitted).

¹³⁷ *Mitchell v. Helms*, 530 U.S. 793, 802 (2000) (plurality opinion).

¹³⁸ *Id.* at 802-03.

¹³⁹ *Id.* at 803.

¹⁴⁰ *Id.* at 803-04.

Justice Thomas, in a lengthy opinion for the plurality,¹⁴¹ extensively reviewed the history of the Establishment Clause jurisprudence before upholding the Act.¹⁴² Justice Souter, writing for **[*90]** the dissent, similarly performed an extensive review of Establishment Clause jurisprudence, but he identified several factors that the Court had used in the past to complement the neutrality stressed in Justice Thomas's opinion.¹⁴³ One such factor identified by Justice Souter as "heightening Establishment Clause concern" is whether the schools are pervasively religious.¹⁴⁴

To support his argument, Justice Souter cited the Roman Catholic Code of Canon Law to show the inseparability of religion and education in Roman Catholic schools.¹⁴⁵ Based on this evidence and "long experience," Justice Souter wrote:

We have concluded that religious teaching in such schools is at the core of the instructors' individual and personal obligations, and that individual religious teachers will teach religiously. [Accordingly, a]s 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.¹⁴⁶

Justice Thomas, in response, assailed Justice Souter's defense of the pervasively sectarian test. Justice Thomas noted first of all that the relevance of the test has been in sharp decline, with the Court striking down no aid program since 1985 in *Aguilar and Ball*, both of which the Court for all relevant purposes had overruled.¹⁴⁷ Secondly, Justice Thomas contended that "the religious nature of a recipient should not matter to the constitutional analysis, so long as the **[*91]** recipient adequately furthers the government's secular purpose."¹⁴⁸ In fact, Justice Thomas

¹⁴¹ [Id. at 801-36](#). The Chief Justice and Justices Scalia and Kennedy joined Thomas's opinion. [Id. at 801](#). Justice O'Connor joined the judgment, but not the plurality opinion, and her concurring opinion was joined by Justice Breyer. *Id.* at 836 (O'Connor, J., concurring in the judgment). Justice Souter filed a dissenting opinion joined by Justices Stevens and Ginsberg. *Id.* at 867 (Souter, J., dissenting).

¹⁴² See [id. at 807-14](#) (plurality opinion). Justice Thomas applied the Agostini test and focused on the second prong (primary effect), and particularly two components of that prong: governmental indoctrination and defining recipients by reference to religion. [Id. at 808](#). In addressing both of these components, Justice Thomas concentrated on the "principle of neutrality," in which aid is given to "a broad range of groups or persons without regard to their religion." [Id. at 809](#). Justice Thomas noted: "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." *Id.* In other words, "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." [Id. at 810](#) (citation omitted). Justice Thomas focused on aid being based on the independent 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." *Id.*

¹⁴³ [Id. at 867-99](#) (Souter, J., dissenting).

¹⁴⁴ [Id. at 885](#).

¹⁴⁵ [Id. at 886](#). He noted, for example, that according to Canon 803, the Roman Catholic Church requires that education provided at a Catholic school be based upon the principles of Catholic doctrine. [Id. at 886](#) & n.6. Similarly, according to Canon 798, religious education in Roman Catholic schools is considered part of required religious practice, and Canons 802 and 804 require the local bishop to establish and maintain schools which impart "an education imbued with the Christian spirit." [Id. at 886 n.6](#) (internal quotation marks omitted).

¹⁴⁶ [Id. at 886-87](#) (citations omitted) (footnote omitted).

¹⁴⁷ [Id. at 826](#) (plurality opinion).

added, use of the pervasively sectarian test demonstrates "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." ¹⁴⁹

Justice Thomas further maintained that the pervasively sectarian test's inquiry into the recipient's religious views was unnecessary and offensive. ¹⁵⁰ The plurality found "profoundly troubling" the "trolling through a person's or institution's religious beliefs" required by the pervasively sectarian test. ¹⁵¹ Citing *Rosenberger*, *Lamb's Chapel*, and *Widmar*, Justice Thomas noted that the use of the pervasively sectarian test collided with "our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." ¹⁵²

Finally, Justice Thomas cited the deplorable history which surrounds the pervasively sectarian test. ¹⁵³ He noted, for instance, the anti-Catholic bias which led to the near passage of the Blaine Amendment, which would have deprived public aid to sectarian ("code" for Catholic) schools. ¹⁵⁴ Justice Thomas concluded: "In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." ¹⁵⁵

Justice O'Connor in her concurring opinion did not use the phrase "pervasively sectarian test." ¹⁵⁶ Her failure to express this phrase, **[*92]** however, does not mean that she adhered to the continued vitality of the test. As noted by Justice Thomas in his plurality opinion, ¹⁵⁷ Justice O'Connor's failure to address the pervasively sectarian test is important in and of itself, since a significant portion of the federal funds at issue went to Catholic schools. ¹⁵⁸ In other words, Justice O'Connor knew from the record that Catholic schools benefited from this federal program, and she purposely avoided use of the pervasively sectarian test in determining the constitutionality of the aid. ¹⁵⁹ In

¹⁴⁸ [Id. at 827](#). "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." *Id.* This is eminently logical. If a synagogue competes for a publicly funded literacy program and wins the grant, the government is not advancing religion but advancing literacy.

¹⁴⁹ [Id. at 827-28](#).

¹⁵⁰ [Id. at 828](#).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ [Id. at 828-29](#).

¹⁵⁴ *Id.* Justice Thomas pointed out that Justice Souter referred only to Catholic schools in the portion of his dissent devoted to the pervasively sectarian test, exemplifying the Court's almost exclusive application of the test to Catholic schools. [Id. at 829](#).

¹⁵⁵ [Id. at 829](#).

¹⁵⁶ [Id. at 836-67](#) (O'Connor, J., concurring in the judgment). Justice O'Connor's concurrence was prompted by the plurality's almost exclusive focus on neutrality to determine the constitutionality of public aid to religious institutions. [Id. at 837](#). Justice O'Connor considered the plurality's focus upon neutrality as being "a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school aid programs... .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." *Id.* This "singular importance" of neutrality, plus the plurality's approval of actual diversion of governmental aid to religious indoctrination, caused Justice O'Connor to write her concurring opinion. [Id. at 837-38](#).

¹⁵⁷ [Id. at 827](#) & n.13 (plurality opinion).

¹⁵⁸ [Id. at 803](#).

short, by joining the judgment and upholding the aid to the Catholic schools, schools typically found pervasively sectarian, Justice O'Connor effectively "buried the test" with the plurality.

Justice O'Connor's complete abandonment of the test is further evidenced by her joining the plurality in explicitly rejecting the foundational presumption of the test and expressly overruling *Meek v. Pittenger* and *Wolman v. Walter*.¹⁶⁰ Justice O'Connor's concurring opinion emphasizes, contrary to the dissent, that courts may not presume that religious institutions receiving aid directly from the government will "necessarily," "inescapably," or "inevitably" divert those funds to pay for "religious indoctrination."¹⁶¹ Rather than [*93] presuming an unconstitutional diversion of aid, Justice O'Connor reversed the presumption and presumed that government officials and employees of religious organizations will act in "good faith" and comply with all program rules.¹⁶² Therefore, to overcome this new presumption of compliance, "plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes,"¹⁶³ and the aid must be more than de minimis.¹⁶⁴

The *Meek* and *Wolman* presumption of diversion is the heart and soul of the pervasively sectarian test. If a plaintiff must prove that a religious school actually diverted funds from a textbook program to purchase Bibles or hymnals for use in worship services, the focus is on the use of the funds and the activities it supports and not the nature of the school. Rather than denying all aid to religious schools for instructional material since such aid would free up money to pay salaries of Bible teachers, Justice O'Connor and the plurality eliminated the presumption of unconstitutionality based on the religiosity of the school.¹⁶⁵ The focus is now "entirely on the content of the aid and restrictions on its use, rather than on the character of the aid-receiving institutions."¹⁶⁶

II. Confusion in the Post-Mitchell Cases on the Continued Vitality of the Test

Justice O'Connor's concurring opinion in *Mitchell* clearly implied the death of the pervasively sectarian test by removing the presumption which provided its foundation and by not applying it in a situation where the Court had

¹⁵⁹ See *id. at 827* & n.13. Justice O'Connor followed the same pattern of silence in her majority opinion in *Agostini. Agostini v. Felton*, 521 U.S. 203 (1997). Again, Justice O'Connor knew that the schools benefiting from the remedial education programs were pervasively sectarian, but she again refused to apply this test. The Eighth Circuit Court of Appeals panel on which she sat in *Americans United for Separation of Church & State v. Prison Fellowship Ministries* used the same strategy, criticizing Chief Judge Pratt's use of the test and discarding it completely in favor of an *Agostini* analysis. *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 414 n.2 (8th Cir. 2007). In all three instances (*Agostini*, *Mitchell*, and *Prison Fellowship Ministries*) religious institutions meeting the criteria of "pervasively sectarian" received aid, and in each instance there was silence as to the character of the religious institution. The focus was rather on the conduct using the aid; that is, whether the aid itself led to government-subsidized religious activity.

¹⁶⁰ See *Mitchell*, 530 U.S. at 850-51 (O'Connor, J., concurring in the judgment). See *supra notes 30-36, 50-53* and accompanying text for a discussion of *Meek* and *Wolman*.

¹⁶¹ *Id. at 850-56* (emphasis omitted) (internal quotation marks omitted) (quoting *Wolman v. Walter*, 433 U.S. 229, 250 (1977), overruled by *Mitchell*, 530 U.S. 793; *Meek v. Pittenger*, 421 U.S. 349, 366 (1975), overruled by *Mitchell*, 530 U.S. 793).

¹⁶² *Id. at 863-64*.

¹⁶³ *Id. at 857*.

¹⁶⁴ See *id. at 864* (rejecting evidence of actual diversion as de minimis); see also *id. at 861* (rejecting claim that "government must have a failsafe mechanism capable of detecting any instance of diversion").

¹⁶⁵ See *id. at 809* (plurality opinion); *id. at 863-64* (O'Connor, J., concurring in the judgment). This adds to the burden a plaintiff must carry in this type of litigation. Finding proof about the religiosity of the institution is far easier to obtain than performing a forensic accounting to prove actual diversion.

¹⁶⁶ Ira C. Lupu & Robert W. Tuttle, Government Partnerships with Faith-Based Service Providers: The State of the Law 23 (2002), available at <http://www.religionandsocialpolicy.org/docs/legal/reports/12-4-2002> state of the .pdf.

previously applied it. She did not in express terms, however, proclaim the burial of the test as had Justice Thomas. This failure by Justice O'Connor to state clearly and finally that the test is dead has resulted in considerable confusion in the lower [*94] courts since 2000 and the Mitchell decision. This Part examines by circuit the post-Mitchell cases mentioning the pervasively sectarian test.¹⁶⁷

A. Fourth Circuit

The case which Justice Thomas used as a vehicle to express his displeasure with the pervasively sectarian test¹⁶⁸ yielded an early post-Mitchell appellate opinion on the continued vitality of the test. *Columbia Union College v. Oliver* involved the college's application for a grant from Maryland's Joseph A. Sellinger Program, which gives public aid directly to private colleges based on neutral criteria.¹⁶⁹ Since the governmental body authorized to make these grants denied Columbia Union's application because of its pervasively sectarian nature, the test was front and center in this case.¹⁷⁰

Given the test's centrality, Chief Judge Wilkinson analyzed in detail Justice Thomas's plurality opinion in Mitchell as well as the concurring opinion of Justice O'Connor which Chief Judge Wilkinson considered controlling.¹⁷¹ With respect to Justice O'Connor's opinion, the Chief Judge noted that Justice O'Connor agreed with the plurality on many issues, and that two specific issues caused her to write a separate concurrence:¹⁷² first, the relative importance of neutrality (Justice O'Connor considered neutrality of public aid to religious [*95] institutions important but not dispositive, while the plurality considered it singularly important);¹⁷³ and secondly, diversion of aid to religious activity (Justice O'Connor maintained that the plurality opinion approved of "actual diversion of government aid to religious indoctrination,"¹⁷⁴ and contended that such diversion would appear as government support to advance religion).¹⁷⁵

¹⁶⁷ There are no reported post-Mitchell cases involving the pervasively sectarian test in the D.C., First, Third, Fifth, or Eleventh Circuits. The recent Tenth Circuit decision of [Colorado Christian University v. Weaver, 534 F.3d 1245 \(10th Cir. 2008\)](#), is analyzed at length in Part IV, *infra*.

¹⁶⁸ See *supra* notes 132-36 and accompanying text.

¹⁶⁹ [Columbia Union Coll. v. Oliver, 254 F.3d 496, 498-99 \(4th Cir. 2001\)](#). This was the same program at issue in [Roemer v. Board of Public Works, 426 U.S. 736 \(1976\)](#).

¹⁷⁰ [Columbia Union Coll., 254 F.3d at 498](#). Columbia Union College, which is affiliated with the Seventh-day Adventist Church, had a student body of which 80% are members of the church. *Id.* Procedurally, the college applied for a Sellinger grant, which the Maryland Higher Education Commission denied on the basis that the college was pervasively sectarian and therefore ineligible for the grant. [Id. at 498-99](#). The college then filed suit and the district court upheld the commission's determination. [Id. at 499-500](#). The college then appealed to the Fourth Circuit, which reversed and remanded. [Id. at 500](#). The commission then appealed this decision to the U.S. Supreme Court, which denied certiorari, but this gave Justice Thomas the opportunity to express his displeasure with the pervasively sectarian test. ***Columbia Union Coll. v. Clarke, 527 U.S. 1013, 1013-14 (1999)*** (Thomas, J., dissenting from denial of cert.). Upon remand, the district court determined that the college was not pervasively sectarian, and therefore the commission appealed this decision to the Fourth Circuit, which is the subject Chief Judge Wilkinson addressed. [Columbia Union Coll., 254 F.3d at 500-01](#).

¹⁷¹ [Columbia Union Coll., 254 F.3d at 501-04](#).

¹⁷² [Id. at 502-03](#).

¹⁷³ [Id. at 503](#).

¹⁷⁴ *Id.* (internal quotation marks omitted) (quoting [Mitchell v. Helms, 530 U.S. 793, 837 \(2000\)](#) (O'Connor, J., concurring in the judgment)).

¹⁷⁵ *Id.*

Of particular significance to the continued vitality of the pervasively sectarian test, according to Chief Judge Wilkinson, was the fact that Justice O'Connor joined the plurality in specifically overruling Meek and Wolman and their presumption that secular instructional materials given to pervasively religious institutions would be diverted for use in religious indoctrination.¹⁷⁶ Instead of this presumption, Justice O'Connor would require plaintiffs to "prove that the aid in question actually is, or has been, used for religious purposes."¹⁷⁷ Chief Judge Wilkinson noted: "By focusing on actual diversion of aid instead of the presumption that any secular class at a religious school would 'inevitably inculcate religion,' Justice O'Connor acknowledged her agreement with the plurality that the pervasively sectarian doctrine was becoming ever more problematic for Establishment Clause purposes."¹⁷⁸

After a careful and thorough review of the plurality opinion as well as the controlling concurring opinion by Justice O'Connor, Chief Judge Wilkinson stated that Mitchell

establishes three fundamental guideposts for Establishment Clause cases. First, the neutrality of aid criteria is an important factor, even if it is not the only factor, in assessing a public assistance program. Second, the actual diversion of government aid to religious purposes is prohibited. Third, and relatedly, "presumptions of religious indoctrination" inherent in the pervasively sectarian analysis "are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause." The O'Connor concurring opinion, which is the controlling opinion from Mitchell, replaced the [*96] pervasively sectarian test with a principle of "neutrality plus." Neutrality is a necessary and important consideration in judging Establishment Clause cases, but it may not be sufficient in and of itself. Instead, courts must examine whether actual diversion of aid occurs and whether the "particular facts of each case" reveal that the Establishment Clause has been violated.¹⁷⁹

The irrebuttable presumption of illegal use of public aid by religious organizations that integrate religion and secular mission was the very foundation of the pervasively sectarian test. Without the presumption, the focus is on conduct. The operative question shifts from what is the nature of the institution to the use of the money. That is, the question becomes whether the institution has diverted any secular aid to inherently religious objects or activities, such as sacred writings, religion classes, chapels, etc. This inquiry is less intrusive and less discriminatory, since it does not require a court to troll through the party's religious practices and it does not categorically deny public funds to any institution which takes its religion "too seriously."

B. Sixth Circuit

The Sixth Circuit examined the post-Mitchell vitality of the pervasively sectarian test in *Steele v. Industrial Development Board*, which involved a bond issue for a private religious college.¹⁸⁰ In response to the defendants' claim that the pervasively sectarian test did not survive Mitchell, the district court stated that because neither Justice O'Connor nor Justice Breyer joined in any part of the Mitchell plurality, the test remained.¹⁸¹ The district court

¹⁷⁶ *Id.*

¹⁷⁷ *Id. at 504* (internal quotation marks omitted) (quoting *Mitchell*, 530 U.S. at 857).

¹⁷⁸ *Id.* (quoting *Mitchell*, 530 U.S. at 857). In fact, Justice O'Connor did not disagree with the plurality's holding that the pervasively sectarian test should be "buried now." *Id. at 503* (internal quotation marks omitted) (quoting *Mitchell*, 530 U.S. at 829 (plurality opinion)).

¹⁷⁹ *Id. at 504* (citation omitted) (footnote omitted). Applying the "neutrality plus" test to the facts of the case, the court determined that the Establishment Clause did not bar Columbia Union College from aid under the Sellinger program. *Id. at 507*. Judge Motz concurred in the judgment but noted that she was reluctant to rely on Mitchell since the Supreme Court had never overruled *Roemer*, which was factually similar to the present case. *Id. at 510-11* (Motz, J., concurring in the judgment). See also *Person v. Mayor of Baltimore*, 437 F. Supp. 2d 476 (D. Md. 2006) (applying the "neutrality plus" test and determining that Baltimore's incentive package to bring the National Baptist Convention to the city for its convention was constitutional).

¹⁸⁰ *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 694 (M.D. Tenn. 2000), rev'd, 301 F.3d 401 (6th Cir. 2002). The bond went to support the David Lipscomb University, a private religious college affiliated with the Churches of Christ. *Id.*

declared that it "would not abandon a recognized and applicable test under Establishment Clause jurisprudence unless and until the Supreme [*97] Court has clearly determined that it is no longer a valid approach." ¹⁸² The district court then applied the test, conducted an examination deemed "unnecessary" and "offensive" by Justice Thomas in Mitchell, ¹⁸³ and found that the bond issue violated the Establishment Clause. ¹⁸⁴

The Sixth Circuit, in a split decision, reversed the district court and held that the proposed revenue bonds issued to the university were constitutional as they were "part of a neutral program to benefit education ... and conferred at best only an indirect benefit to the school." ¹⁸⁵ Though the Sixth Circuit reversed the district court's [*98] holding, the court did not disagree with the lower court's opinion regarding the pervasively sectarian test. The court stated

¹⁸¹ [Id. at 706.](#)

¹⁸² [Id. at 707.](#)

¹⁸³ [Mitchell, 530 U.S. at 828](#) (plurality opinion). The district court in Steele examined the following thirteen areas to determine whether David Lipscomb University was "pervasively sectarian," and therefore whether a public bond issue for its benefit would violate the Establishment Clause:

1. Whether the school adheres to the American Association of University Professors ("AAUP") Statement of Principles on Academic Freedom.
2. Whether the school is sponsored by a religious organization or church.
3. Whether the school teaches religious doctrine in its programs.
4. Whether institutional documents state religious restrictions on what can be taught.
5. Whether the board of trustees is elected by the church.
6. Whether the church approves certain financial transactions.
7. Whether a majority of students - or a percentage greater than the population in that area - are members of the church.
8. Whether religion or theology classes are required.
9. Whether classes begin with prayer.
10. Whether admissions are restricted based upon the applicant's religion.
11. Whether attendance is required at religious activities.
12. Whether obedience to the doctrine and dogmas of the faith are compelled.
13. Whether the school takes other actions to attempt to propagate a particular religion.

[Steele, 117 F. Supp. 2d at 710.](#)

¹⁸⁴ [Steele, 117 F. Supp. 2d at 734.](#)

¹⁸⁵ [Steele v. Indus. Dev. Bd., 301 F.3d 401, 416 \(6th Cir. 2002\)](#). This holding is in accord with another prior post-Mitchell Sixth Circuit case which found constitutional a Michigan bond used to benefit a Roman Catholic school. See [Johnson v. Econ. Dev. Corp. of Oakland, 241 F.3d 501 \(6th Cir. 2001\)](#). Regarding the pervasively sectarian test, the concurring opinion of Judge Nelson argued that the bond was constitutional regardless of whether the Roman Catholic school was pervasively sectarian. See [id. at 518-19](#) (Nelson, J., concurring) (quoting Justice Thomas's plurality opinion in Mitchell). The majority, however, considered Justice O'Connor's opinion controlling, and determined that she had not eliminated the pervasively sectarian test. [Id. at 510 n.2](#) (majority opinion). Drawing a distinction between sectarian institutions (religiously affiliated) and pervasively sectarian institutions (integration of religious mission and education), the majority examined the nature of the Roman Catholic school and found it to be sectarian, but not pervasively sectarian. See [id. at 516-17](#). See also [Conley v. Jackson Twp. Trs., 376 F. Supp. 2d 776, 783-85 \(N.D. Ohio 2005\)](#) (finding the YMCA is a religious organization but not a pervasively sectarian one). Since the court in Johnson (as in Steele) decided the case upon the indirect nature of the aid rather than on the nature of the institution, the discussion on the pervasively sectarian test was dicta.

that while "the vitality of the pervasively sectarian test is questionable[,] ... there is no single part of any opinion that commands the support of a majority of the Court," and therefore "the only binding precedent of Mitchell is the holding."¹⁸⁶ In other words, since Mitchell was a plurality opinion, the lower courts remain bound by pre-Mitchell law as to the pervasively sectarian test, particularly since the Supreme Court has stated that lower courts must treat prior Supreme Court decisions as controlling until the Supreme Court overrules them.¹⁸⁷ "It is for the Supreme Court, not this Court, to jettison the pervasively sectarian test, which it has not done."¹⁸⁸

Undoubtedly more daring, but clearly in line with the analysis of Justice O'Connor's concurring Mitchell opinion, is the opinion of Judge Cohn in *American Atheists, Inc. v. City of Detroit Downtown Development Authority*.¹⁸⁹ In preparation for the 2005 Major League Baseball All-Star Game and the 2006 National Football League Super Bowl, the City of Detroit issued grants to building owners and lessees that reimbursed them for up to half of the cost of exterior building improvements.¹⁹⁰ Plaintiffs challenged the constitutionality of giving grants to three churches.¹⁹¹

Judge Cohn, in a lengthy opinion, analyzed the facts using the Agostini test and reviewed the status of the pervasively sectarian test after Mitchell.¹⁹² In this regard, he noted that "[a] review of Mitchell establishes that ... there has been a jurisprudential shift in the Supreme Court's view of government aid to pervasively sectarian institutions," which he was bound to recognize.¹⁹³ What he recognized was that "the viability of the 'pervasively sectarian' doctrine is in serious decline as the plurality in Mitchell expressly abandoned it and Justice O'Connor and Justice Breyer implicitly [*99] abandoned it by concurring with the decision to uphold the Chapter 2 program."¹⁹⁴

Judge Cohn agreed with Chief Judge Wilkinson in *Columbia Union College v. Oliver* regarding the "three fundamental guideposts for Establishment Clause cases."¹⁹⁵ These guideposts of neutrality, no actual diversion of government aid to religious purposes, and no presumption of religious indoctrination, shift the focus from who the recipient is to what the recipient does. If there is no presumption of religious indoctrination in pervasively sectarian

¹⁸⁶ [Steele, 301 F.3d at 408.](#)

¹⁸⁷ [Id. at 408-09](#) (citing [Agostini v. Felton, 521 U.S. 203, 237 \(1997\)](#)).

¹⁸⁸ [Id. at 409](#). The dissenting judge in Steele provided a full analysis of the pervasively sectarian test and applied it in detail. [Id. at 426-34](#) (Clay, J., dissenting).

¹⁸⁹ [Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 503 F. Supp. 2d 845, 857-58 \(E.D. Mich. 2007\)](#).

¹⁹⁰ [Id. at 849-50.](#)

¹⁹¹ *Id.*

¹⁹² [Id. at 858-64.](#)

¹⁹³ [Id. at 857-58.](#)

¹⁹⁴ [Id. at 862](#). Judge Cohn recognized that he was diverging from the opinion of the Sixth Circuit in Steele. He noted in this regard that although the Sixth Circuit had declined to overrule the pervasively sectarian test because the Supreme Court had not expressly done so, the Sixth Circuit had stated that "after Mitchell the viability of the prohibition is 'questionable' and stated that it did not determine the outcome of the case." [Id. at 862 n.18](#) (citing [Steele v. Indus. Dev. Bd., 301 F.3d 401, 408-09 \(6th Cir. 2002\)](#)).

¹⁹⁵ [Id. at 863 n.19](#) (quoting [Columbia Union Coll. v. Oliver, 254 F.3d 496, 504 \(4th Cir. 2001\)](#)).

institutions, then there is no need to "troll" through the religious beliefs of the organization, and a court's inquiry is limited to whether the organization actually diverted public aid impermissibly to inherently religious activities.¹⁹⁶

C. Second Circuit

Decided two months before *Columbia Union College v. Oliver*, the Second Circuit in *DeStefano v. Emergency Housing Group, Inc.*, did not have the benefit of Chief Judge Wilkinson's opinion, but yet came to nearly the same conclusion regarding post-Mitchell Establishment Clause law.¹⁹⁷ *DeStefano* involved an Establishment Clause challenge to New York's funding of a private alcohol treatment facility which incorporated Alcoholics Anonymous (and its twelve step process including references to God) in its treatment program.¹⁹⁸ The court began its analysis of *Mitchell* by looking at the plurality's emphasis on the neutral administration of government aid.¹⁹⁹ According to the court's analysis, the *Mitchell* plurality stands [*100] for the proposition that so long as government funds "are equally available to other religious, irreligious[,] and areligious alcohol treatment programs, the State is free to fund ... the religious activities of A[lcoholics Anonymous] without any danger that the resulting indoctrination could be attributed to the government."²⁰⁰ The court noted, however, that five Justices in *Mitchell* disagreed with Justice Thomas's sole emphasis on neutrality, and therefore Justice Thomas's opinion was not binding precedent.²⁰¹

Similar to other courts, the Second Circuit found Justice O'Connor's opinion controlling,²⁰² and determined that Justice O'Connor's position on public support for religious organizations required not only neutrality, but also no "actual diversion of government aid to religious indoctrination."²⁰³ Because of this requirement, the court found that publicly funded employees violated the Establishment Clause when they "presided over religious meetings and ... expounded upon religious texts - all with the goal of convincing citizens to "turn [their] will and [their] lives over to the care of God."²⁰⁴ The Second Circuit, therefore, in accordance with Chief Judge Wilkinson and District Judge Cohn, interpreted the controlling precedent of Justice O'Connor in *Mitchell* to prohibit the public funding of inherently religious activities, and not to prohibit the public funding of religious organizations which carried out both secular and religious activities.

D. Seventh Circuit

The Seventh Circuit considered the post-Mitchell status of the pervasively sectarian test in *Freedom from Religion Foundation, Inc. v. Bugher*, which involved a Wisconsin program that provided cash subsidies to both public and private schools for telecommunications.²⁰⁵ The plaintiff challenged the constitutionality of the cash subsidies to the

¹⁹⁶ [Id. at 863](#) ("The O'Connor-Breyer approach, which permits aid to thoroughly sectarian institutions but not to their sectarian activities[,] for the moment controls the outcome in the Supreme Court." (quoting Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, [43 B.C. L. Rev. 1139, 1149 \(2002\)](#))).

¹⁹⁷ [DeStefano v. Emergency Hous. Group, Inc.](#), [247 F.3d 397 \(2d Cir. 2001\)](#).

¹⁹⁸ [Id. at 401-03](#).

¹⁹⁹ [Id. at 418](#).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² [Id. at 418-19](#).

²⁰³ [Id. at 418](#) (internal quotation marks omitted) (quoting [Mitchell v. Helms](#), [530 U.S. 793, 837 \(2000\)](#) (O'Connor, J., concurring in the judgment)).

²⁰⁴ [Id. at 419](#) (third and fourth alterations in original).

²⁰⁵ Freedom from [Religion Found., Inc. v. Bugher](#), [249 F.3d 606, 608 \(7th Cir. 2001\)](#).

religious schools and the court agreed with the plaintiff, since the state had not established a monitoring system to **[*101]** assure that the funds were spent as intended. ²⁰⁶ The Seventh Circuit, which called Mitchell's burial of the pervasively sectarian test ambiguous, ²⁰⁷ determined that it need not resolve the ambiguity since Mitchell was distinguishable on its facts. ²⁰⁸ In addition, although Mitchell overruled Meek and Wolman, it did not overrule specifically Committee for Public Education & Religious Liberty v. Nyquist, ²⁰⁹ which the court deemed controlling on the facts presented. ²¹⁰

E. Ninth Circuit

Two district court cases in the Ninth Circuit demonstrate post-Mitchell confusion on the pervasively sectarian test. In Barnes-Wallace v. Boy Scouts of America, a lesbian couple and an agnostic couple, on behalf of their Boy Scout-aged sons, asserted that the Boy Scouts' long-term favorable lease of public parkland violated the Establishment Clause. ²¹¹ The crux of their claim was that the Boy Scouts organization was pervasively sectarian, and therefore the lease impermissibly advanced religion. ²¹² This gave the district court an opportunity to comment on whether the test survived Mitchell.

The court provided a short review of the pervasively sectarian test and noted that although the test had not been formally overruled, the test "cannot be reconciled with the Supreme Court's recent Establishment Clause precedent." ²¹³ The district court acknowledged that four members of the Supreme Court had "stated explicitly that the pervasively sectarian nature of the government aid recipient is no longer relevant," the Supreme Court had not relied on the test to strike down any government aid program since 1985, and the **[*102]** Supreme Court had overruled the 1985 cases which had struck down government aid programs. ²¹⁴

The plaintiffs urged the court to follow the precedent in Steele and recognize the continued vitality of the test. ²¹⁵ The court refused to do so, however, since it read Justice O'Connor's concurring opinion in Mitchell "as squarely contradicting the pervasively sectarian test." ²¹⁶ The court, therefore, concluded "that the Supreme Court has effectively, if not explicitly, overruled use of the pervasively sectarian test." ²¹⁷

²⁰⁶ [Id. at 608, 613-14.](#)

²⁰⁷ [Id. at 612.](#)

²⁰⁸ [Id. at 613.](#) The Seventh Circuit noted that the government program in Mitchell loaned instructional material to the religious schools, whereas the Wisconsin program provided direct monetary grants to the schools. [Id. at 609, 613.](#)

²⁰⁹ See [Mitchell v. Helms, 530 U.S. 793, 808 \(2000\).](#)

²¹⁰ [Bugher, 249 F.3d at 614.](#)

²¹¹ [Barnes-Wallace v. Boy Scouts of Am., 275 F. Supp. 2d 1259, 1263-64 \(S.D. Cal. 2003\)](#), aff'd in part on other grounds sub nom. [Barnes-Wallace v. City of San Diego, 530 F.3d 776 \(9th Cir. 2008\).](#)

²¹² [Id. at 1267.](#)

²¹³ [Id. at 1267-68.](#)

²¹⁴ [Id. at 1268.](#) The Court further added that the Supreme Court had since upheld publicly funded programs for students who attended pervasively sectarian schools, even though dissenters argued the relevance of the pervasively sectarian test. *Id.*

²¹⁵ [Id. at 1268-69.](#)

²¹⁶ [Id. at 1269.](#)

²¹⁷ *Id.*

Several years later, another district court in the Ninth Circuit came to a contrary conclusion. *Christianson v. Leavitt* concerned a grant from the Department of Health and Human Services' Compassion Capital Fund to the Northwest Marriage Institute, whose mission was "providing Bible education in marriage and related subjects, and ... providing professional, Bible-based pre-marital and marriage counseling."²¹⁸ The plaintiffs in *Christianson* asserted that the grants to the Northwest Marriage Institute constituted unconstitutional aid to a pervasively sectarian institution.²¹⁹ In considering this issue, the court recognized the questionable vitality of the test, but stated that the plurality in *Mitchell* was not a majority, and therefore that the test was not expressly rejected by the full Court.²²⁰ The court concluded, therefore, that it was bound by Supreme Court precedent that had not been expressly overruled.²²¹

F. Eighth Circuit

A review of the case law in the Eighth Circuit brings us full circle to the Introduction of this Article. In *Prison Fellowship Ministries*, Chief Judge Pratt, in an exhaustive opinion spanning nearly eighty [*103] pages, spent precious little time analyzing whether Justice O'Connor's concurring opinion doomed the pervasively sectarian test.²²² He did not reference or analyze the overruling of *Meek and Wolman*, and he did not consider the implications of Justice O'Connor's abandonment of the presumption that religious institutions will inevitably divert funds for religious indoctrination.²²³ Although he had the benefit of Chief Judge Wilkinson's opinion in *Columbia Union College v. Oliver* and even cited the case, Chief Judge Pratt did not consider its analysis on this issue.²²⁴ Chief Judge Pratt's consideration of the pervasively sectarian test's vitality was minimal: "While the plurality opinion in *Mitchell v. Helms* maligned the 'pervasively sectarian' inquiry, it remains the law."²²⁵

Chief Judge Pratt's minimal approach was exceeded only by the approach of the Eighth Circuit, which found that Chief Judge Pratt's extensive investigation into *Prison Fellowship Ministries'* religious views was "unnecessary" and "offensive."²²⁶ The court declared that Chief Judge Pratt had correctly stated the *Agostini* test, "whether aid has the effect of advancing or endorsing religion," but wrongly applied a "'pervasively sectarian' analysis."²²⁷ The court then stated it would apply the "clear framework" of *Agostini*.²²⁸ Without discarding expressly the pervasively sectarian test, the Eighth Circuit panel, enjoying the prestige, wisdom, and jurisprudence of retired Justice O'Connor, completely ignored the pervasively sectarian test.²²⁹ By ignoring it and thereby effectively overruling it,

²¹⁸ [Christianson v. Leavitt, 482 F. Supp. 2d 1237, 1239-41 \(W.D. Wash. 2007\)](#).

²¹⁹ [Id. at 1244-45](#).

²²⁰ [Id. at 1244 n.2](#).

²²¹ *Id.* The court, nonetheless, found that the Northwest Marriage Institute was not a pervasively sectarian institution, since it had removed all religious references from its materials after receiving the grants from the Compassion Capital Fund. *Id.* at 1245-48.

²²² See [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 \(S.D. Iowa 2006\)](#), *aff'd in part, rev'd in part, 509 F.3d 406 (8th Cir. 2007).*

²²³ See *id.*

²²⁴ See [id. at 917](#).

²²⁵ *Id.*

²²⁶ [Prison Fellowship Ministries, 509 F.3d at 414 n.2](#) (quoting [Mitchell v. Helms, 530 U.S. 793, 828 \(2000\)](#) (plurality opinion)).

²²⁷ [Id. at 424](#) & n.4.

²²⁸ [Id. at 424 n.4](#).

the Eighth Circuit panel, in vintage Justice O'Connor style, silently hammered yet another stake in the heart of the vampire-like pervasively sectarian test.

[*104]

III. The Executive Branch Is Less Confused, but Interpretation Questions Remain

The courts are not the sole interpreters of the Constitution, and in the Bush Administration, the pervasively sectarian test was a dead letter. In fact, the work done by the White House in opening the availability of federal and state grants to religious organizations through the Faith-Based and Community Initiative would have been impossible in the face of a vibrant and applied pervasively sectarian test which bars public aid to institutions that apply their serious faith to their particular social mission.

Even in the absence of a vigorous judicially applied pervasively sectarian test, there remains significant residue of this form of religious discrimination. To find and eliminate this residue, the Administration created Centers for the Faith-Based and Community Initiatives in the Departments of Justice, Education, Health and Human Services, Housing and Urban Development, and Labor and tasked these Centers to conduct

a department-wide audit to identify all existing barriers to the participation of faith-based and other community organizations in the delivery of social services by the department, including but not limited to regulations, rules, orders, procurement, and other internal policies and practices, and outreach activities that either facially discriminate against or otherwise discourage or disadvantage the participation of faith-based and other community organizations in Federal programs²³⁰

Based on the audits conducted by the Centers, the White House issued a report which, among other things, identified the existing barriers to participation in federal social service programs by religious organizations.²³¹ Not surprisingly, there is a causal connection between the pervasively sectarian test and the top listed barrier, "an overriding perception by Federal officials that close collaboration with **[*105]** religious organizations is legally suspect."²³² As the report notes: "Federal officials ... often seem stuck in a 'no-aid,' strict separationist framework that permitted Federal funding only of religiously affiliated organizations offering secular services in a secularized setting, and deny equal treatment to organizations with an obvious religious character."²³³ Similarly, the second

²²⁹ See *id. at 424*. This is similar to the approach followed by Justice O'Connor in *Agostini*; there is no mention in *Agostini* of the pervasively sectarian test, even though some of the schools receiving aid were undoubtedly pervasively sectarian. See *Agostini v. Felton*, 521 U.S. 203, 208-40 (1997).

²³⁰ Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001).

²³¹ Ctrs. for Faith-Based & Cmty. Initiatives Taskforce, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs* 1 (2001), available at <http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf>.

²³² *Id. at 10*. The White House report provides the following examples:

As the Labor Department's report notes, reviewers of grant applications assume that Jefferson's "wall of separation" metaphor automatically disqualifies all but the most secularized providers, leading to Federal resistance to collaborating with religious groups, and thus the actual exclusion of faith-based organizations despite the absence of any constitutional or statutory basis. One Education Department official asserted that the Constitution flatly forbids the use of grant funds even for activities that merely have a religious component. Such restrictive attitudes beget an administrative bias against religion and religious organizations where the Constitution requires that there be none.

Id. at 11.

²³³ *Id.*

barrier listed in the report, the exclusion of faith-based organizations from funding, ²³⁴ alludes to the pervasively sectarian test as a culprit for the discrimination against religious institutions by the federal government. ²³⁵

[*106] To break down these barriers and remedy the discrimination against religious providers, the White House issued guidance on the Faith-Based and Community Initiative, and the various Cabinet agencies promulgated regulations encouraging the participation by religious organizations in federally funded social programs. ²³⁶ The White House's guidance focused upon conduct, and not status, and advised religious organizations partnering with the federal government to refrain from using federal grant funds for "inherently religious activities" such as "religious worship, instruction, [and] proselytization." ²³⁷ Similarly, several federal departments now have regulations that welcome the participation of religious institutions in federal programs, and these regulations ensure that any participating religious institution will retain its "independence, autonomy, right of expression, religious character, and authority over its governance." ²³⁸ **[*107]** These regulations further state, however, that if the religious

²³⁴ *Id. at 12*. The White House report states that although some federal programs prohibit religious organizations from seeking grants, usually the discrimination is more subtle and takes the form of an "unwelcoming environment" in which the organizations must hide their religious character to be eligible for grants. *Id.* Because of the widespread presumption in the federal government that "funding faith-based groups is constitutionally suspect," the lack of language in funding announcements welcoming faith-based groups to apply is construed by federal program officials as requiring their exclusion. *Id.*

²³⁵ See *id. at 12-13*. The White House report states:

Organizations considered "pervasively sectarian" or "too religious" are suspect; those that are ruled "secular enough" can apply. Such invidious categorizations, gleaned from trolling through an institution's religious beliefs, is pervasive at HUD, which uses the term "primarily religious" for faith-based organizations considered to be problematic.

....

The division into acceptable and problematic religious organizations is not required by current Supreme Court precedent. Lacking a clear and fixed meaning, the categorization requires an intrusive case-by-case determination by HUD staff, who are forced to delve into the authenticity of religious beliefs, an inquiry that a recent Supreme Court plurality derided as "not only unnecessary but also offensive." Because there is no clear guidance, HUD field officials and their State and local government partners apply the rules inconsistently even within a single program, creating additional complications for faith-based applicants.

Id. (footnotes omitted).

²³⁶ The White House, *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government* 10 (2006), available at <http://whitehouse.gov/government/fbci/guidance> document 01-06.pdf [hereinafter *Guidance*].

²³⁷ *Id. at 10* (internal quotation marks omitted). The White House's guidance states that:

The United States Supreme Court has said that faith-based organizations may not use direct government support to support "inherently religious" activities. Don't be put off by the term "inherently religious" - it's simply a phrase that has been used by the courts in church-state cases. Basically, it means you can not use any part of a direct Federal grant to fund religious worship, instruction, or proselytization. Instead, organizations may use government money only to support the non-religious social services that they provide. Therefore, faith-based organizations that receive direct governmental funds should take steps to separate, in time or location, their inherently religious activities from the government-funded services that they offer. Such organizations should also carefully account for their use of all government money.

This does not mean your organization can't have religious activities. It simply means you can't use taxpayer dollars to fund them.

Id.

²³⁸ See, e.g., *34 C.F.R. § 75.52(d) (2007)*. The regulation states:

(1) A faith-based organization that applies for or receives a grant under a program of the Department may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(2) A faith-based organization may, among other things -

organization receiving federal funds wants to exercise its freedom of religion and worship God or proselytize, it may do so only at services separated "in time or location from any programs or services supported by a grant from the Department" and it may not coerce any person receiving federally paid benefits to participate in the service.²³⁹

The Administration's approach paralleled Justice O'Connor's concurring opinion in *Mitchell* as interpreted by the Fourth Circuit in *Columbia Union College v. Oliver* and the Eighth Circuit in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*.²⁴⁰ With the effective demise of the pervasively sectarian test, there is no longer a need for the federal agencies to inquire into the nature of the institution providing publicly funded services. The agency need not, therefore, intrusively examine the corporate charters and mission statements of the institutions in question, or look at many other indices of pervasive sectarianism as outlined in the cases above.²⁴¹ The federal government need only examine the conduct of religious institutions receiving public funds to ensure that they abide by the restriction to separate by time or place inherently religious activities from funded secular activities.²⁴²

Although an examination of conduct is certainly less discriminatory than an inquest into nature, no similar requirement is imposed upon secular organizations. More importantly, what constitutes "inherently religious activities" is less than precise.²⁴³ Current examples provided in the regulations include "religious worship, instruction, [and] proselytization."²⁴⁴ Certainly a worship service similar to that conducted in a church, synagogue, or mosque would unquestionably fall within these parameters. Yet, there are many occasions, particularly under the rubric of "religious instruction," where through the use of sacred writings teaching may cross the line into "religious instruction."

[*108] Illustrative of this problem is the Prison Fellowship Ministries InnerChange program. The program's curriculum contains several mandatory religion classes, such as an Old and New Testament survey course, and courses entitled "Experiencing God" and "Spiritual Freedom."²⁴⁵ These classes certainly appear to require time and place separation from the publicly funded program. The program also includes more secular sounding classes, such as Anger Management, Substance Abuse, Victim Impact, Financial Management, and Criminal Thinking, as

- (i) Retain religious terms in its name;
- (ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;
- (iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;
- (iv) Select its board members and otherwise govern itself on a religious basis; and
- (v) Include religious references in its mission statement and other chartering or governing documents.

Id.

²³⁹ Id. § 75.52(c); see also The White House, Faith-Based and Community Initiatives, Regulatory Changes, <http://www.whitehouse.gov/government/fbci/regulatory-changes.html> (last visited Oct. 28, 2008) (containing comparable provisions in other Federal Departments).

²⁴⁰ See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007); see also supra notes 169-79 and accompanying text.

²⁴¹ See discussion supra Part I.

²⁴² See, e.g., *Columbia Union Coll. v. Oliver*, 245 F.3d 496, 505-07 (4th Cir. 2001).

²⁴³ See Guidance, supra note 236, at 10 (internal quotation marks omitted).

²⁴⁴ Id.

²⁴⁵ *Prison Fellowship Ministries*, 509 F.3d at 415.

well as classes on Marriage, Family, and Parenting. ²⁴⁶ The Eighth Circuit noted, however, that even these secular-sounding programs had religious content in them. ²⁴⁷ The licensed substance abuse program, for instance, is based on the belief that "only Jesus Christ is the cure for addiction." ²⁴⁸

Is this treatment program "secular enough" for public funds? How much religious content is too much? This area is subject to great interpretation, which invites criticism of the rule of law and the judicial system because of the inevitable disparity of results. Accordingly, this is an area which the judiciary should wisely avoid although it cannot because of the current status of the law. ²⁴⁹

IV. Stopping the Discrimination and Confusion with the Ultimate Solution

The plurality in *Mitchell* was blunt in their criticism of the lack of "even-handedness" in the pervasively sectarian test: "The application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." ²⁵⁰ The Fourth Circuit's Chief Judge Wilkinson was even blunter when he **[*109]** stated that to deny public funding to an otherwise eligible religious organization is really a denial of free speech. ²⁵¹ A restriction by the state on speech because of the speaker's motivating ideology or perspective constitutes viewpoint discrimination, which is "uniquely antithetical to First Amendment ideals of freedom of belief and expression." ²⁵² Chief Judge Wilkinson noted: "Government must not be permitted to silence one side of a debate, in this case the religious perspective, while permitting other more favored views to flourish unopposed." ²⁵³ He concluded that Maryland denied funding to Columbia Union for only one reason, the sectarian character of the college. ²⁵⁴ "By denying Columbia Union funding on the basis of its sectarian approach to education, Maryland has impermissibly discriminated against the college on the basis of its religious point of view." ²⁵⁵

This discrimination on the basis of religious viewpoint is just as heinous as racial discrimination; in fact, the evil of religious discrimination was addressed roughly seventy-five years before any of the states ratified constitutional amendments to provide equal protection for racial minorities. Certainly, a law which prohibits all aid to historically

²⁴⁶ [Id. at 415-16.](#)

²⁴⁷ [Id. at 416.](#)

²⁴⁸ Id. (internal quotation marks omitted).

²⁴⁹ See Carl H. Esbeck, Religion and the First Amendment: Some Causes of the Recent Confusion, [42 Wm. & Mary L. Rev. 883, 907-14 \(2001\)](#). Professor Esbeck argues that the judiciary violates church-state separation when they inquire into the nature and character of religious institutions, and that the courts lack competency and jurisdiction to make distinctions of which religious institutions are "too religious" and which are "secular enough." See id. at 907; see also Carl H. Esbeck, Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause, [13 Notre Dame J.L. Ethics & Pub. Pol'y 285, 292-300 \(1999\)](#) (addressing how applying the pervasively sectarian test itself violates church-state separation).

²⁵⁰ [Mitchell v. Helms, 530 U.S. 793, 828 \(2000\)](#) (plurality opinion).

²⁵¹ [Columbia Union Coll. v. Clarke, 159 F.3d 151, 169-70 \(4th Cir. 1998\)](#) (Wilkinson, C.J., dissenting).

²⁵² [Id. at 170.](#)

²⁵³ Id.

²⁵⁴ Id.

²⁵⁵ Id.; see also [Gentala v. City of Tucson, 244 F.3d 1065, 1082-86 \(9th Cir. 2001\)](#) (Fernandez, J., dissenting). Judge Fernandez stated that the denial of a benefit to a religious organization when other nonprofit organizations are granted the benefit is tantamount to a direct restriction on religious organizations. [Id. at 1085.](#) It is similar to charging the religious organization alone if the city repairs the sidewalks or provides fire and police protection. Id. Therefore, in seeking to avoid an Establishment Clause claim, the City of Tucson commits a free exercise violation.

black colleges and universities would be appropriately called "racist," and would meet universal disapprobation. Citizens today would similarly condemn a law which provided aid to all schools except Jewish schools, or provided aid to only one church such as the situation throughout most of colonial North America.²⁵⁶ **[*110]** Yet, for at least a decade, it was the policy of the U.S. Supreme Court to prohibit virtually all aid to orthodox Jewish or Christian schools (including, of course, Catholic schools) that teach the same state-mandated subjects as publicly financed schools, and remnants of that previous policy still exist.

The religious discrimination inherent in the pervasively sectarian test was the subject of the Tenth Circuit's recent decision in *Colorado Christian University v. Weaver*.²⁵⁷ The case involved a challenge to a 1977 Colorado statute that barred students from using state scholarships at pervasively sectarian colleges and universities.²⁵⁸ Colorado Christian University ("CCU"), an accredited private university that provides education "framed by a Christian world view," applied to participate in the state financial aid programs so that its students, like students going to all public universities and all secular private colleges, could use the tax-funded scholarships (funded, at least in part, by the taxes of families whose children attended CCU).²⁵⁹ The State investigated CCU's application and requested syllabi for the theology courses at CCU and information about the religious beliefs of the faculty, students, and trustees.²⁶⁰ After reviewing the requested information, the State decided that CCU's theology courses impermissibly "tended to indoctrinate or proselytize," that CCU's trustees were limited to one religion (Christianity), and that CCU required some of its students to attend chapel.²⁶¹ On the basis of these criteria, the State determined that CCU was a pervasively sectarian institution and therefore students could not use taxpayer-funded scholarships to attend CCU.²⁶²

CCU filed suit, claiming that the pervasively sectarian statute and the State's decision denying scholarships to students attending CCU violated the First Amendment's Establishment and Free Exercise **[*111]** Clauses, as well as the Fourteenth Amendment's Equal Protection Clause.²⁶³ The district court, focusing heavily on the free exercise claim and applying *Locke v. Davey*, granted the State's motion of summary judgment.²⁶⁴ On appeal, the

²⁵⁶ See Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 4 (1988). Cord states:

At the outbreak of the American Revolution in 1775, there were established churches in nine of the thirteen colonies. The Anglican Church had been established in Virginia in 1609, in New York's lower counties in 1693, in Maryland in 1702, in South Carolina in 1706, in North Carolina nominally in 1711, and in Georgia in 1758. The Congregational Church was established in Massachusetts, Connecticut, and New Hampshire.

Id. (footnotes omitted).

²⁵⁷ [*Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 \(10th Cir. 2008\)](#). The importance of this case is evidenced by the fact that seven organizations (including the U.S. Department of Justice's Civil Rights Division) submitted amicus briefs on behalf of Colorado Christian University, and ten organizations filed amicus briefs on behalf of the [State of Colorado](#). *Id.* at 1246, 1249-50.

²⁵⁸ [Id.](#) at 1250-51. The pertinent state statute deems a college or university as pervasively sectarian if its faculty and students are "exclusively of one religious persuasion," if attendance at religious services is required, if there is no strong commitment to academic freedom, if there are required religion courses "that tend to indoctrinate or proselytize," if the governing board reflects or is limited to persons "of any particular religion," and if funds come primarily "from sources advocating a particular religion." *Id.*

²⁵⁹ [Id.](#) at 1252 (internal quotation marks omitted).

²⁶⁰ [Id.](#) at 1252-53.

²⁶¹ [Id.](#) at 1253 (alteration in original) (internal quotation marks omitted).

²⁶² [Id.](#) at 1250.

²⁶³ [Id.](#) at 1253.

Tenth Circuit analyzed in detail the holding of *Locke v. Davey*, and concluded that *Locke* was distinguishable from CCU's claim under the Free Exercise Clause and, more importantly, did not mandate the use of the rational basis test in determining the free exercise claim.²⁶⁵

Of particular interest to this Article is the Tenth Circuit's approach to the pervasively sectarian test, specifically its analysis of the test's inherent intrusiveness into religious beliefs and practices, as well as the test's discriminatory effects. Regarding the intrusiveness component, Judge McConnell, writing for the unanimous court, began his analysis by quoting Mitchell's assertion that the government's trolling through a religious institution's beliefs was "offensive."²⁶⁶ He then provided a short history of the Supreme Court's requirement that the state not become "excessively entangled" with religious organizations.²⁶⁷ After conducting this analysis, Judge McConnell stated:

Properly understood, the doctrine [prohibiting entanglement of church and state] protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits [*112] (as in *Lemon*) or as a basis for regulation or exclusion from benefits (as here).²⁶⁸

Judge McConnell found that Colorado engaged in "second-guessing" when it reviewed closely the syllabi of two theology courses to determine whether they were likely to convince students of religious truths.²⁶⁹ In conducting this inquiry, the State had to discern the boundary between religious faith and otherwise "acceptable" theological study.²⁷⁰ This inquiry of "what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."²⁷¹ It constitutes nothing less than "'governmental censorship,' which 'would be far more inconsistent with the Establishment Clause[]'s dictates than would governmental provision of [assistance] on a religion-blind basis.'"²⁷²

The State of Colorado unconstitutionally censored CCU by trolling through CCU's religious education curriculum looking for material that "tended to indoctrinate or proselytize,"²⁷³ and by reviewing CCU's governing board to

²⁶⁴ *Colo. Christian Univ. v. Baker*, No. 04-cv-02512-[MSK-BNB](#), 2007 WL 1489801, at 4-8, 15 (*D. Colo. May 18, 2007*) (citing [Locke v. Davey](#), 540 U.S. 712, 720 (2004)), rev'd sub nom. [Colo. Christian Univ. v. Weaver](#), 534 F.3d 1245 (10th Cir. 2008).

²⁶⁵ [Weaver](#), 534 F.3d at 1254-56.

We therefore reject the argument of the state defendants and their amici that *Locke* compels affirmance in this case. Although *Locke* precludes any sweeping argument that the State may never take the religious character of an activity into consideration when deciding whether to extend public funding, the decision does not imply that states are free to discriminate in funding against religious institutions however they wish, subject only to a rational basis test.

[Id. at 1256](#). An analysis of the Tenth Circuit's focus on the free exercise claim is beyond the scope of this Article.

²⁶⁶ [Id. at 1261](#) (quoting [Mitchell v. Helms](#), 530 U.S. 793, 828 (2000)).

²⁶⁷ *Id.* (internal quotation marks omitted).

²⁶⁸ *Id.* (citing Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 *Wash. & Lee L. Rev.* 347, 397 (1984)).

²⁶⁹ [Id. at 1261-62](#).

²⁷⁰ See [id. at 1262](#).

²⁷¹ *Id.* (quoting [New York v. Cathedral Acad.](#), 434 U.S. 125, 133 (1977)).

²⁷² *Id.* (second alteration in original) (quoting [Rosenberger v. Rector & Visitors of Univ. of Va.](#), 515 U.S. 819, 844-45 (1995)).

²⁷³ *Id.* (internal quotation marks omitted).

determine whether its membership reflected a particular religion. ²⁷⁴ Judge McConnell noted that, according to Colorado Supreme Court precedent, this required state officials to examine the educational policies of the college trustees to determine whether these policies were consistent with the shared religious beliefs of the board. ²⁷⁵ Judge McConnell stated:

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We do not see how the state can constitutionally do this. It is not for the state to decide what Catholic - or evangelical, or Jewish - "policy" is on educational issues. That is a question of religious doctrine on which the State may take no position without entangling itself in an intrafaith dispute. Asking whether a university's educational policy on a given issue has "the image or likeness of a particular religion," is thus unconstitutional. ²⁷⁶

Judge McConnell found each of the remaining criteria in Colorado's "pervasively sectarian" definition to be similarly unconstitutionally intrusive. Determining whether a college consists "primarily," "exclusively," or "predominantly" of "[one] particular religion" requires, of course, the State to make theological judgments. ²⁷⁷ Similarly, the Colorado provision deeming a college pervasively sectarian if it requires attendance at religious "convocations or services" "threatens to embroil the government in line-drawing and second-guessing regarding matters about which it has neither competence nor legitimacy." ²⁷⁸ Even the statutory requirement that the college must have a "strong commitment to [*114] principles of academic freedom" is unconstitutionally intrusive particularly where, as in this

Many courses in secular universities are regarded by their critics as excessively indoctrinating, and are as vehemently defended by those who think the content is beneficial. Such disagreements are to be expected in a diverse society. But when the beholder is the State, what is beheld is the exercise of religion, and what is at stake is the right of students to receive the equal benefits of public support for higher education, the Constitution interposes its protection. The First Amendment does not permit government officials to sit as judges of the "indoctrination" quotient of theology classes.

[Id. at 1263.](#)

²⁷⁴ Id.

²⁷⁵ Id.

²⁷⁶ Id. (alteration in original) (citation omitted) (quoting [Ams. United for Separation of Church & State Fund, Inc. v. State](#), 648 P.2d 1072, 1088 (Colo. 1982)). Judge McConnell noted that this inquiry into the religious nature of an organization was rejected by both the Supreme Court and the D.C. Circuit. Id. at 1263-64 (citing [NLRB v. Catholic Bishop of Chi.](#), 440 U.S. 490, 499, 502 (1979); [Univ. of Great Falls v. NLRB](#), 278 F.3d 1335, 1341-44 (D.C. Cir. 2002)). After discussing the pertinent facts of these cases, Judge McConnell stated: "It is no business of the State to decide what policies are entailed by or 'reflect' the institution's religious beliefs." [Id. at 1264.](#)

²⁷⁷ [Id. at 1264](#) (internal quotation marks omitted). In the present case, CCU was not affiliated with any particular Christian denomination, and the State therefore simply labeled it as "Christian." [Id. at 1264-65.](#) The court wrote:

Members of the LDS Church [Mormons] stoutly insist that they are Christians, but some Christians, with equal sincerity and sometimes vehemence, say they are not. In order to administer Colorado's exclusionary law, government officials have to decide which side in this debate is right. Similar questions plague the religious taxonomy of Jehovah's Witnesses, Christian Scientists, Unitarian-Universalists, various syncretistic groups and even (in some circles) the Roman Catholic Church.

[Id. at 1265.](#)

²⁷⁸ [Id. at 1265.](#) Judge McConnell asked:

What counts as a "religious convocation or service"? Would this include celebration of the mass at graduation ceremonies? Does it matter if the student is required to attend, but not required to partake of the sacrament? What counts as "mandatory" attendance? What if the student is permitted to satisfy the obligation by attendance at a worship service of his own choosing? And what if (as is evidently true at CCU) some but not all students are required to attend?

Id. (citation omitted).

case, one state official questioned whether CCU could have academic freedom if it required a statement of faith for faculty and board members. ²⁷⁹ The court concluded:

If that sort of second-guessing were permitted, state officials would be in a position of examining statements of religious beliefs and determining whether those beliefs are, or are not, consistent with scholarly objectivity. Such determinations would seem to be an excessive entanglement and intrusion into religious affairs. ²⁸⁰

Regarding the discriminatory nature of the Colorado pervasively sectarian statute, Judge McConnell underscored the proposition that our "nation's conception of religious liberty [from the founding] included, at a minimum, the equal treatment of all religious faiths without discrimination or preference." ²⁸¹ The Supreme Court confirmed this non-preference of one denomination over another, the neutral treatment of all religions, as "the clearest command of the Establishment Clause." ²⁸² This principle is not limited, however, to the Establishment Clause, since the Free Exercise Clause and the Equal Protection Clause also prohibit denominational preferences. ²⁸³

The Tenth Circuit found that Colorado committed religious preference by allowing some religious colleges (like the Jesuits' Regis University and the Methodists' University of Denver) to participate in taxpayer-funded student scholarships, while denying the same treatment to others (CCU and the Buddhist Naropa University). ²⁸⁴ This religious preference was, according to the Tenth Circuit, discrimination "on the basis of religious views or religious status," and therefore subject to the strict scrutiny test. ²⁸⁵ That is, Colorado's **["115"]** preference for "sectarian" schools (those schools that do not integrate faith with education), and against "pervasively sectarian" schools (which incorporate a religious worldview in academic studies), is unconstitutional unless the statute is narrowly tailored to achieve a compelling governmental interest. ²⁸⁶ Since the purpose of the pervasively sectarian statute was to conform to 1977 First Amendment jurisprudence that had subsequently changed, the court found no compelling state interest for the statute. ²⁸⁷

The thrust of the Tenth Circuit's decision is that the state cannot prefer the religiously less committed over the religiously devout in the distribution of benefits. This leaves open the possibility, however, that the state can avoid

²⁷⁹ [Id. at 1265-66.](#)

²⁸⁰ [Id. at 1266.](#)

²⁸¹ [Id. at 1257.](#)

²⁸² *Id.* (alteration in original) (internal quotation marks omitted) (quoting [Larson v. Valente, 456 U.S. 228, 244 \(1982\)](#)) (citing [Bd. of Educ. v. Grumet, 512 U.S. 687, 707 \(1994\)](#) ("It is clear that neutrality as among religions must be honored.")).

²⁸³ See *id.*

²⁸⁴ [Id. at 1258.](#)

²⁸⁵ *Id.* (internal quotation marks omitted) (quoting [Employment Div. v. Smith, 494 U.S. 872, 877 \(1990\)](#)). The court noted: "Here, the discrimination is expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board." [Id. at 1259](#). This law "discriminates among religious institutions on the basis of the pervasiveness or intensity of their belief." *Id.*

²⁸⁶ See [id. at 1258](#). Having determined that the Colorado statute ran afoul of the Establishment, Free Exercise, and Equal Protection Clauses, the court then examined whether this religious discrimination required heightened judicial scrutiny. [Id. at 1266](#). Finding that discrimination contrary to the Free Exercise and Equal Protection Clauses generally requires a strict scrutiny analysis, and that matters contrary to the Establishment Clause are usually just flatly forbidden without even an analysis of the government's purpose, the court examined whether the discrimination present here against pervasively sectarian colleges could be justified by the statute being narrowly tailored to achieve a compelling governmental interest. [Id. at 1266-69.](#)

²⁸⁷ [Id. at 1267.](#)

this discriminatory treatment by simply refusing to give aid (scholarships or otherwise) to any religious institution, even if the state gives similar benefits to purely secular schools.

Whether the Founders considered it proper for the state to prefer areligious or irreligious institutions over religious institutions in the distribution of state aid was the subject of the following famous quote by Supreme Court Justice, Harvard Law Professor, and Court historian Joseph Story, who wrote "the most comprehensive treatise on the United States Constitution that had then appeared."²⁸⁸ Justice Story, who began his service on the Court in 1811, wrote:

Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

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... .

The real object of the [First A]mendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.²⁸⁹

The thought that the Framers of the First Amendment would prefer "infidelity" (defined by Noah Webster in 1828 to be "disbelief of the inspiration of the Scriptures, or the divine original of Christianity; unbelief")²⁹⁰ over "fidelity" is comic. First of all, the number of professed non-Christians in the early years of our nation was "minute."²⁹¹ More importantly, although liberty of conscience, free exercise of religion, religious pluralism, and religious equality were important to our nation's Founders,²⁹² these principles were not intended to benefit the "infidels."²⁹³ Constitutional historian John Witte, Jr., noted:

The Founders' principal concern was directed to equality among religions before the law, not equality between religion and nonreligion. Benjamin Huntington indicated, during the House debates over the First Amendment, that "he hoped the amendment would be made in such a way to secure the rights of conscience, and a free exercise of the rights of religion but not to patronize those who professed no religion at all." In the same House debates about including conscientious objection among the rights of conscience, Representative Scott stated firmly, without rejoinder: "There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence... . My design is **[*117]** to guard against those who are of no religion." Equality of faiths and believers before the law was the Founders' principal concern; our modern concern of equality of religion and nonreligion, of believers and nonbelievers, before the law was of little concern to the founders.²⁹⁴

²⁸⁸ [Wallace v. Jaffree, 472 U.S. 38, 104 \(1985\)](#) (Rehnquist, J., dissenting).

²⁸⁹ 2 Joseph Story, Commentaries on the Constitution of the United States §§1874, 1877, at 630-32 (5th ed. 1891).

²⁹⁰ American Dictionary of the English Language (1828).

²⁹¹ Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction 80 (Baker Book House 1988) (1982) (citing Leo Pfeffer, Church, State, and Freedom 142 (rev. ed. 1967)).

²⁹² See generally John Witte, Jr., Religion and the American Constitutional Experiment 41-51 (2d ed. 2005).

²⁹³ Cf. id.

²⁹⁴ [Id. at 50-51](#) (alteration in original) (endnotes omitted).

When one remembers the church-state relationship throughout most of the colonial period,²⁹⁵ the withdrawal of preference for a particular denomination was a very liberalizing event.²⁹⁶ This disestablishment of a particular denomination did not mean withdrawal of all public support for religion.²⁹⁷ In fact:

General governmental support for religion - in the form of tax exemptions to religious properties, land grants and tax subsidies to religious schools and charities, tax appropriations for missionaries and military chaplains, and similar general causes - were for [many of the Founders] not only licit but necessary for good governance.²⁹⁸

Just as the Founders did not prefer the faithless over the faithful, neither should we. Rather, at a minimum, there must be an evenhanded distribution of benefits to both religious schools and colleges and secular schools and colleges - the simple or pure neutrality proclaimed by the Mitchell plurality.²⁹⁹ As Justice Thomas for the plurality explained:

The religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers **[*118]** 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.³⁰⁰

If the secular purpose of a government program is to reduce recidivism of prisoners returning to society after release or to equip future citizens with the skills they need to compete successfully in our global economy, the scope of the government's inquiry should be on the best program to achieve the desired results, rather than the best secular program. This principle of simple neutrality advanced by the Mitchell plurality, which would permit direct public funding of any program (even those that directly subsidize religious activity) that pursues secular goals and treats religious and secular organizations equally, would also cure the present confusion surrounding what constitutes an "inherently religious activity."³⁰¹ It further would remove any disincentive on the government to partner with religious institutions whose activities require monitoring to ensure that no "inherently religious activity" is being done at public expense.³⁰²

²⁹⁵ Witte writes:

In eighteenth-century America, government patronized religion in a variety of ways. Officials donated land and personalty for the building of churches, religious schools, and charities. They collected religious taxes and tithes to support ministers and missionaries. They exempted church property and their ministers from taxation. They had special forms of religious incorporation for churches, religious schools, charities, mission groups, and other religious bodies. They supported Christian education in schools and colleges. They outlawed blasphemy and sacrilege, unnecessary labor on the Sabbath and on religious holidays. They administered religious test oaths and foreclosed dissenters from political office.

[Id. at 60.](#)

²⁹⁶ See [id. at 42-45.](#)

²⁹⁷ See [id. at 61.](#)

²⁹⁸ Id.

²⁹⁹ See [Mitchell v. Helms, 530 U.S. 793, 826-29 \(2000\)](#) (plurality opinion).

³⁰⁰ [Id. at 827](#) (citation omitted).

³⁰¹ For a discussion of this issue, see Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2006: Legal Developments Affecting Government Partnerships with Faith-Based Organizations* 1-18 (2006), available at <http://www.religionandsocialpolicy.org/docs/legal/reports/State> of the Law 2006.pdf.

³⁰² See, e.g., *Moeller v. Bradford County*, No. 3:05-CV-334, slip op. at 2-4 (M.D. Pa. Apr. 3, 2007) (consent order), available at <http://www.religionandsocialpolicy.org/docs/legal/cases/MoellervBradfordCounty> ConsentOrder.pdf. This consent order required

Finally, and perhaps most importantly, adopting "simple or pure neutrality," which focuses upon results and not the provider's character or religious conduct, would eliminate the need by providers **[*119]** which incorporate religion in their program to categorize their public funding as "indirect" rather than "direct." Under current law, providers can saturate their program with religious content if the intended beneficiaries of the program have "genuine choice among options public and private, secular and religious" available to them.³⁰³ The question then becomes what constitutes "genuine choice?" In *Freedom from Religion Foundation, Inc. v. McCallum*, the district court determined that an inmate's choice between one religion-centered program and six secular programs was sufficient choice, even when the religion-centered program was nine to twelve months in length and all the secular programs were two to three months in length.³⁰⁴ The Eighth Circuit in *Prison Fellowship Ministries*, however, determined that Prison Fellowship Ministries' program was ineligible for indirect funding categorization since there was no comparable secular program which the inmate could choose.³⁰⁵ The fact that the Prison Fellowship Ministries program was voluntary was not enough "choice."

Conclusion

In his dissent in *Mitchell*, Justice Souter wrote: "There is no rule of religious equal protection to the effect that any expenditure for the benefit of religious school students is necessarily constitutional so long as public school pupils are favored on ostensibly identical terms."³⁰⁶ That is, according to Justice Souter, there is no rule which requires the state to treat equally the students in public and parochial schools, even though both schools advance the societal interest of an educated citizenry for voting and workforce. In spite of the fact that taxpaying parents of parochial school students pay for the education **[*120]** of their own children plus the education of children attending public schools, they are denied any help from their tax dollars. This not only amounts to viewpoint discrimination, it also is a violation of their right of conscience.

the County to monitor compliance with the law permitting only religious activities separated in "time and space" (more limited than the federal requirement "time or space") by:

- a. Unannounced visits, occurring at least four times each year, to the site of the Funded Program.
- b. Confidential interviews, at least four times per year, of beneficiaries of and participants in the Funded Program.
- c. Annual reviews of those financial and accounting records maintained by the Funded Entity that relate to the Public Funds.
- d... . Annual reviews of any employment-related policies and any advertisements and notices of employment openings maintained or issued by the Funded Entity.
- e. Preparation of written reports documenting each visit, set of interviews, and annual review required above.

Id. at 2-4 (emphasis added). These requirements will result in a preference for secular providers where no such monitoring is necessary.

³⁰³ [Zelman v. Simmons-Harris, 536 U.S. 639, 662 \(2002\)](#).

³⁰⁴ Freedom from [Religion Found., Inc. v. McCallum, 214 F. Supp. 2d 905, 909, 919 \(W.D. Wis. 2002\)](#), aff'd, [324 F.3d 880 \(7th Cir. 2003\)](#); see also [Am. Jewish Cong. v. Corp. for Nat'l & Cmty. Serv., 399 F.3d 351, 358 \(D.C. Cir. 2005\)](#) (holding that educational awards to AmeriCorps participants who taught in religious schools was constitutional because there were "numerous" teaching positions in public and private secular schools, and no one who wanted to teach in a secular school was sent to a religious school). But see [Teen Ranch v. Udow, 389 F. Supp. 2d 827, 837 \(W.D. Mich. 2005\)](#) (holding that youth aged eleven to seventeen did not have capacity to choose between Teen Ranch with its religious program and thirty-five other state contractors and therefore denial of state funding is constitutional), aff'd, [479 F.3d 403 \(6th Cir. 2007\)](#), cert. denied, **128 S. Ct. 653 (2007)** (mem.).

³⁰⁵ [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406, 425-26 \(8th Cir. 2007\)](#).

³⁰⁶ [Mitchell v. Helms, 530 U.S. 793, 877 \(2000\)](#) (Souter, J., dissenting).

This violation of a person's right of conscience is precisely what the First Amendment was designed to protect, at least in terms related to actions by the federal government.³⁰⁷ In the colonies, the primary objection to the established churches concerned state-coerced taxes which supported the teaching of beliefs which many dissidents did not believe or practice.³⁰⁸ Upon pain of imprisonment or fines, a colonial resident had to pay taxes to the church to support it and its programs regardless of whether the person was a member of the church.³⁰⁹ For instance, in colonial Virginia dissenters such as Methodists, Baptists, Quakers, or Deists had to pay tithes to the Anglican Church, even though the Anglican Church was doctrinally contrary to their own beliefs.³¹⁰ According to a generous estimate of Thomas Jefferson, by the time of the American Revolution, "two- **[*121]** thirds of [Virginia's] population [had become] members of the dissenting churches" ³¹¹

When comparing these principles and today's application of the First Amendment with the current tax-supported educational system, the similarities are striking but inversely so. In the twenty-first century, parents are forced by fines, penalties, tax liens and eventual imprisonment to support a school system which often teaches subject matter and beliefs that are contrary to what they teach their children at home.³¹² Further, parents who lack disposable income are generally unable to send their children to private schools that are more compatible with their beliefs, and thus are forced to send their children to public schools that often undermine their children's religious values.

The intense focus on the infamous dicta and metaphor in *Everson* has drowned out that portion of the opinion that comports with its holding that New Jersey's bus program for Catholic school students was constitutional: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."³¹³ Justice Souter's denial of "religious equal protection" is nothing other than hostility to

³⁰⁷ Contrary to popular teaching today, the First Amendment originally exercised no prohibition relating to state actions concerning religious establishments. Prior to the American Revolution, "an establishment of religion, in terms of direct tax aid to churches, was the situation in nine of the thirteen colonies" John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 *J. Church & St.* 753, 754 (1990). Though most colonies had grown weary of direct state establishments of an official church when they wrote new state constitutions in 1776, Massachusetts and Connecticut continued their official sanction of the Congregational Church into the 1800s. *Id.*

³⁰⁸ *Id.*

³⁰⁹ Norine Dickson Campbell, *Patrick Henry: Patriot and Statesman* 17 (1969).

³¹⁰ Coercive laws extended far beyond the mere payment of mandatory taxes. As an example of the coercive religious practices and laws in Virginia, Thomas Jefferson recounted its religious history with its many examples of intolerance in his effort to persuade his colleagues that it was time to end such religious tyranny in Virginia. He stated:

Several acts of the Virginia assembly of 1659, 1662, and 1693, had made it penal in parents to refuse to have their children baptized; had prohibited the unlawful assembling of Quakers; had made it penal for any master of a vessel to bring a Quaker into the state; had ordered those already here, ... to be imprisoned till they should abjure the country; ... had inhibited all persons from suffering their meetings in or near their houses

... By our own act of assembly of 1705, c. 30, if a person brought up in the Christian religion denies the being of a God, or the Trinity, or asserts there are more Gods than one, or denies the Christian religion to be true, ... he is punishable on the first offence by incapacity to hold any office or employment ecclesiastical, civil, or military; on the second by disability to sue, to take any gift or legacy, to be guardian, executor, or administrator, and by three years imprisonment, without bail.

Response of Thomas Jefferson to Virginia Query XVII, *Religion* (1781-1782), reprinted in *Writings*, supra note 13, at 283, 283-84.

³¹¹ Campbell, supra note 309, at 17 n.1 (quoting J.A.C. Chandler & Travis Butler Thames, *Colonial Virginia* 305 (1907)).

³¹² See, e.g., [Parker v. Hurley, 514 F.3d 87, 90 \(1st Cir. 2008\)](#).

³¹³ [Everson v. Bd. of Educ., 330 U.S. 1, 18 \(1947\)](#).

religion. The state is certainly no friend to religion when it uses taxpayer funds to benefit only students in secular schools rather than benefiting both religious schools and secular schools with evenhanded neutrality. The pervasively sectarian test has been an instrument of hostility to religion for over thirty-five years. One could hardly devise a test more hostile and adversarial to a community that takes its faith seriously than the pervasively sectarian test. Judge McConnell's Colorado Christian University v. Weaver opinion, and its finding that the Establishment, Free Exercise, and Equal Protection Clauses prohibit discrimination against religious institutions, hopefully is the wooden stake that finally and emphatically puts this vampire test to eternal rest.

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