SUPREME COURT OF THE UNITED STATES

Nos. 00–1751, 00–1777 and 00–1779

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL., PETITIONERS

00–1751 *v.*

DORIS SIMMONS-HARRIS ET AL.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

00–1777 *v.*

DORIS SIMMONS-HARRIS ET AL.

SENEL TAYLOR, ET AL., PETITIONERS

00–1779 *v.*

DORIS SIMMONS-HARRIS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 27, 2002]

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

The Court's majority holds that the Establishment Clause is no bar to Ohio's payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools' religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short

shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these. "[C]onstitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government." *Agostini* v. *Felton*, 521 U. S. 203, 254 (1997) (SOUTER, J., dissenting). I therefore respectfully dissent.

The applicability of the Establishment Clause[1] to public funding of benefits to religious schools was settled in *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1 (1947), which inaugurated the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.*, at 16.

The Court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson*.

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

---

[1] "Congress shall make no law respecting an establishment of religion," U. S. Const., Amdt. 1.

religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension.[2] Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.

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

I

The majority's statements of Establishment Clause doctrine cannot be appreciated without some historical perspective on the Court's announced limitations on government aid to religious education, and its repeated repudiation of limits previously set. My object here is not to give any nuanced exposition of the cases, which I tried to classify in some detail in an earlier opinion, see *Mitchell* v. *Helms,* 530 U. S. 793, 873–899 (2000) (dissenting opinion), but to set out the broad doctrinal stages covered in the

---

[2] See, *e.g.*, App. 319a (Saint Jerome School Parent and Student Handbook 1999–2000, p. 1) ("FAITH must dominate the entire educational process so that the child can make decisions according to Catholic values and choose to lead a Christian life"); *id.,* at 347a (Westside Baptist Christian School Parent-Student Handbook, p. 7) ("Christ is the basis of all learning. All subjects will be taught from the Biblical perspective that all truth is God's truth").

modern era, and to show that doctrinal bankruptcy has been reached today.

Viewed with the necessary generality, the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

A

Everson v. *Board of Ed. of Ewing* inaugurated the modern development of Establishment Clause doctrine at the behest of a taxpayer challenging state provision of "tax-raised funds to pay the bus fares of parochial school pupils" on regular city buses as part of a general scheme to reimburse the public-transportation costs of children attending both public and private nonprofit schools. 330 U. S., at 17. Although the Court split, no Justice disagreed with the basic doctrinal principle already quoted, that "[n]o tax in any amount . . . can be levied to support any religious activities or institutions, . . . whatever form they may adopt to teach . . . religion." *Id.*, at 16. Nor did any Member of the Court deny the tension between the

New Jersey program and the aims of the Establishment Clause. The majority upheld the state law on the strength of rights of religious-school students under the Free Exercise Clause, *id.*, at 17–18, which was thought to entitle them to free public transportation when offered as a "general government servic[e]" to all schoolchildren, *id.*, at 17. Despite the indirect benefit to religious education, the transportation was simply treated like "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," *id.*, at 17–18, and, most significantly, "state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic," *id.*, at 17. The dissenters, however, found the benefit to religion too pronounced to survive the general principle of no establishment, no aid, and they described it as running counter to every objective served by the establishment ban: New Jersey's use of tax-raised funds forced a taxpayer to "contribut[e] to the propagation of opinions which he disbelieves in so far as . . . religions differ," *id.*, at 45 (internal quotation marks omitted); it exposed religious liberty to the threat of dependence on state money, *id.,* at 53; and it had already sparked political conflicts with opponents of public funding, *id.*, at 54.[3]

The difficulty of drawing a line that preserved the basic principle of no aid was no less obvious some 20 years later in *Board of Ed. of Central School Dist. No. 1* v. *Allen,* 392 U. S. 236 (1968), which upheld a New York law authorizing local school boards to lend textbooks in secular subjects to children attending religious schools, a result not self-evident from *Everson*'s "general government services"

---

[3]See *Everson,* 330 U. S., at 54, n. 47 (noting that similar programs had been struck down in six States, upheld in eight, and *amicus curiae* briefs filed by "three religious sects, one labor union, the American Civil Liberties Union, and the states of Illinois, Indiana, Louisiana, Massachusetts, Michigan and New York").

rationale. The Court relied instead on the theory that the in-kind aid could only be used for secular educational purposes, 392 U. S., at 243, and found it relevant that "no funds or books are furnished [directly] to parochial schools, and the financial benefit is to parents and children, not to schools," *id.*, at 243–244.[4] Justice Black, who wrote *Everson*, led the dissenters. Textbooks, even when "'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect," 392 U. S., at 252, he wrote, and Justice Douglas raised other objections underlying the establishment ban, *id.*, at 254–266. Religious schools would request those books most in keeping with their faiths, and public boards would have final approval power: "If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church and state separate has been lost. If the board resists, then the battle line between church and state will have been drawn . . . ." *Id.*, at 256 (Douglas, J., dissenting). The scheme was sure to fuel strife among religions as well: "we can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church." *Id.,* at 265.

Transcending even the sharp disagreement, however, was

"the consistency in the way the Justices went about

---

[4] The Court noted that "the record contains no evidence that any of the private schools . . . previously provided textbooks for their students," and "[t]here is some evidence that at least some of the schools did not." *Allen*, 392 U. S., at 244, n. 6. This was a significant distinction: if the parochial schools provided secular textbooks to their students, then the State's provision of the same in their stead might have freed up church resources for allocation to other uses, including, potentially, religious indoctrination.

> deciding the case . . . . Neither side rested on any facile application of the 'test' or any simplistic reliance on the generality or evenhandedness of the state law. Disagreement concentrated on the true intent inferrable behind the law, the feasibility of distinguishing in fact between religious and secular teaching in church schools, and the reality or sham of lending books to pupils instead of supplying books to schools. . . . [T]he stress was on the practical significance of the actual benefits received by the schools." *Mitchell*, 530 U. S., at 876 (SOUTER, J., dissenting).

B

Allen recognized the reality that "religious schools pursue two goals, religious instruction and secular education," 392 U. S., at 245; if state aid could be restricted to serve the second, it might be permissible under the Establishment Clause. But in the retrenchment that followed, the Court saw that the two educational functions were so intertwined in religious primary and secondary schools that aid to secular education could not readily be segregated, and the intrusive monitoring required to enforce the line itself raised Establishment Clause concerns about the entanglement of church and state. See *Lemon* v. *Kurtzman,* 403 U. S. 602, 620 (1971) (striking down program supplementing salaries for teachers of secular subjects in private schools). To avoid the entanglement, the Court's focus in the post-*Allen* cases was on the principle of divertibility, on discerning when ostensibly secular government aid to religious schools was susceptible to religious uses. The greater the risk of diversion to religion (and the monitoring necessary to avoid it), the less legitimate the aid scheme was under the no-aid principle. On the one hand, the Court tried to be practical, and when the aid recipients were not so "pervasively sectarian" that their secular and religious functions were inextricably

intertwined, the Court generally upheld aid earmarked for secular use. See, *e.g., Roemer* v. *Board of Public Works of Md.,* 426 U. S. 736 (1976); *Hunt* v. *McNair,* 413 U. S. 734 (1973); *Tilton* v. *Richardson,* 403 U. S. 672 (1971). But otherwise the principle of nondivertibility was enforced strictly, with its violation being presumed in most cases, even when state aid seemed secular on its face. Compare, *e.g.*, *Levitt* v. *Committee for Public Ed. & Religious Liberty,* 413 U. S. 472, 480 (1973) (striking down state program reimbursing private schools' administrative costs for teacher-prepared tests in compulsory secular subjects), with *Wolman* v. *Walter,* 433 U. S. 229, 255 (1977) (upholding similar program using standardized tests); and *Meek* v. *Pittenger,* 421 U. S. 349, 369–372 (1975) (no public funding for staff and materials for "auxiliary services" like guidance counseling and speech and hearing services), with *Wolman*, *supra*, at 244 (permitting state aid for diagnostic speech, hearing, and psychological testing).

The fact that the Court's suspicion of divertibility reflected a concern with the substance of the no-aid principle is apparent in its rejection of stratagems invented to dodge it. In *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756 (1973), for example, the Court struck down a New York program of tuition grants for poor parents and tax deductions for more affluent ones who sent their children to private schools. The *Nyquist* Court dismissed warranties of a "statistical guarantee," that the scheme provided at most 15% of the total cost of an education at a religious school, *id.*, at 787–788, which could presumably be matched to a secular 15% of a child's education at the school. And it rejected the idea that the path of state aid to religious schools might be dispositive: "far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.*, at 781. The

point was that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.*, at 783.[5] *Nyquist* thus held that aid to parents through tax deductions was no different from forbidden direct aid to religious schools for religious uses. The focus remained on what the public money bought when it reached the end point of its disbursement.

C

Like all criteria requiring judicial assessment of risk, divertibility is an invitation to argument, but the object of the arguments provoked has always been a realistic assessment of facts aimed at respecting the principle of no aid. In *Mueller* v. *Allen,* 463 U. S. 388 (1983), however, that object began to fade, for *Mueller* started down the road from realism to formalism.

The aid in *Mueller* was in substance indistinguishable from that in *Nyquist*, see 463 U. S., at 396–397, n. 6, and both were substantively difficult to distinguish from aid directly to religious schools, *id.*, at 399. But the Court upheld the Minnesota tax deductions in *Mueller*, emphasizing their neutral availability for religious and secular

---

[5]The Court similarly rejected a path argument in *Wolman* v. *Walter,* 433 U. S. 229 (1977), overruled by *Mitchell* v. *Helms,* 530 U. S. 793 (2000), where the State sought to distinguish *Meek* v. *Pittenger,* 421 U. S. 349 (1975), overruled by *Mitchell, supra*, based on the fact that, in *Meek*, the State had lent educational materials to individuals rather than to schools. "Despite the technical change in legal bailee," the Court explained, "the program in substance is the same as before," and "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." *Wolman*, *supra,* at 250. Conversely, the Court upheld a law reimbursing private schools for state-mandated testing, dismissing a proffered distinction based on the indirect path of aid in an earlier case as "a formalistic dichotomy that bears . . . little relationship either to common sense or to the realities of school finance." *Committee for Public Ed. and Religious Liberty* v. *Regan,* 444 U. S. 646, 658 (1980).

educational expenses and the role of private choice in taking them. *Id.*, at 397–398. The Court relied on the same two principles in *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986), approving one student's use of a vocational training subsidy for the blind at a religious college, characterizing it as aid to individuals from which religious schools could derive no "large" benefit: "the full benefits of the program [are not] limited, in large part or in whole, to students at sectarian institutions." *Id.*, at 488.

School Dist. of Grand Rapids v. *Ball,* 473 U. S. 373, 395–396, and n. 13 (1985), overruled in part by *Agostini* v. *Felton,* 521 U. S. 203 (1997), clarified that the notions of evenhandedness neutrality and private choice in *Mueller* did not apply to cases involving direct aid to religious schools, which were still subject to the divertibility test. But in *Agostini*, where the substance of the aid was identical to that in *Ball*, public employees teaching remedial secular classes in private schools, the Court rejected the 30-year-old presumption of divertibility, and instead found it sufficient that the aid "supplement[ed]" but did not "supplant" existing educational services, 521 U. S., at 210, 230. The Court, contrary to *Ball*, viewed the aid as aid "directly to the eligible students . . . no matter where they choose to attend school." 521 U. S., at 229.

In the 12 years between *Ball* and *Agostini*, the Court decided not only *Witters*, but two other cases emphasizing the form of neutrality and private choice over the substance of aid to religious uses, but always in circumstances where any aid to religion was isolated and insubstantial. *Zobrest* v. *Catalina Foothills School Dist.,* 509 U. S. 1 (1993), like *Witters*, involved one student's choice to spend funds from a general public program at a religious school (to pay for a sign-language interpreter). As in *Witters*, the Court reasoned that "[d]isabled children, not sectarian schools, [were] the primary beneficiaries . . . ; to the extent sectarian schools benefit at all . . . , they are only inciden-

tal beneficiaries." 509 U. S., at 12. *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819 (1995), like *Zobrest* and *Witters*, involved an individual and insubstantial use of neutrally available public funds for a religious purpose (to print an evangelical magazine).

To be sure, the aid in *Agostini* was systemic and arguably substantial, but, as I have said, the majority there chose to view it as a bare "supplement." 521 U. S., at 229. And this was how the controlling opinion described the systemic aid in our most recent case, *Mitchell* v. *Helms,* 530 U. S. 793 (2000), as aid going merely to a "portion" of the religious schools' budgets, *id.*, at 860 (O'CONNOR, J., concurring in judgment). The plurality in that case did not feel so uncomfortable about jettisoning substance entirely in favor of form, finding it sufficient that the aid was neutral and that there was virtual private choice, since any aid "first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere." *Id.*, at 816. But that was only the plurality view.

Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools. Today's cases are notable for their stark illustration of the inadequacy of the majority's chosen formal analysis.

II

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

A

Consider first the criterion of neutrality. As recently as two Terms ago, a majority of the Court recognized that neutrality conceived of as evenhandedness toward aid recipients had never been treated as alone sufficient to satisfy the Establishment Clause, *Mitchell,* 530 U. S., at 838–839 (O'CONNOR, J., concurring in judgment); *id.*, at 884 (SOUTER, J., dissenting). But at least in its limited significance, formal neutrality seemed to serve some purpose. Today, however, the majority employs the neutrality criterion in a way that renders it impossible to understand.

Neutrality in this sense refers, of course, to evenhandedness in setting eligibility as between potential religious and secular recipients of public money. *Id.,* at 809–810 (plurality opinion); *id.,* at 878–884 (SOUTER, J., dissenting) (three senses of "neutrality").[6] Thus, for example, the aid scheme in *Witters* provided an eligible recipient with a scholarship to be used at any institution within a practically unlimited universe of schools, 474 U. S., at 488; it did not tend to provide more or less aid depending on which one the scholarship recipient chose, and there was no indication that the maximum scholarship amount would be insufficient at secular schools. Neither did any condition of Zobrest's interpreter's subsidy favor religious education. See 509 U. S., at 10.

---

[6]JUSTICE O'CONNOR apparently no longer distinguishes between this notion of evenhandedness neutrality and the free-exercise neutrality in *Everson*. Compare *ante*, at 8 (concurring opinion), with *Mitchell*, 530 U. S., at 839 (opinion concurring in judgment) ("Even if we at one time used the term 'neutrality' in a descriptive sense to refer to those aid programs characterized by the requisite equipoise between support of religion and antagonism to religion, JUSTICE SOUTER's discussion convincingly demonstrates that the evolution in the meaning of the term in our jurisprudence is cause to hesitate before equating the neutrality of recent decisions with the neutrality of old").

In order to apply the neutrality test, then, it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction. Here, one would ask whether the voucher provisions, allowing for as much as $2,250 toward private school tuition (or a grant to a public school in an adjacent district), were written in a way that skewed the scheme toward benefiting religious schools.

This, however, is not what the majority asks. The majority looks not to the provisions for tuition vouchers, Ohio Rev. Code Ann. §3313.976 (West Supp. 2002), but to every provision for educational opportunity: "The program permits the participation of *all* schools within the district, [as well as public schools in adjacent districts], religious or nonreligious." *Ante*, at 11 (emphasis in original). The majority then finds confirmation that "participation of *all* schools" satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools, *ante,* at 11–12, thus showing there is no favor of religion.

The illogic is patent. If regular, public schools (which can get no voucher payments) "participate" in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. "Neutrality" as the majority employs the term is, literally, verbal and nothing more. This, indeed, is the only way the majority can gloss over the very nonneutral feature of the total scheme covering "*all* schools": public tutors may receive from the State no more than $324 per child to support extra tutoring (that is, the State's 90% of a total amount of $360), App. 166a, whereas the tuition voucher schools (which turn out to be mostly

religious) can receive up to $2,250, *id.,* at 56a.[7]

Why the majority does not simply accept the fact that the challenge here is to the more generous voucher scheme and judge its neutrality in relation to religious use of voucher money seems very odd. It seems odd, that is, until one recognizes that comparable schools for applying the criterion of neutrality are also the comparable schools for applying the other majority criterion, whether the immediate recipients of voucher aid have a genuinely free choice of religious and secular schools to receive the voucher money. And in applying this second criterion, the consideration of "*all* schools" is ostensibly helpful to the majority position.

B

The majority addresses the issue of choice the same way it addresses neutrality, by asking whether recipients or potential recipients of voucher aid have a choice of public schools among secular alternatives to religious schools. Again, however, the majority asks the wrong question and misapplies the criterion. The majority has confused choice

---

[7]The majority's argument that public school students within the program "direct almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school," *ante*, at 12, n. 3, was decisively rejected in *Committee for Public Ed.* & *Religious Liberty* v. *Nyquist,* 413 U. S. 756, 782–783, n. 38 (1973):

"We do not agree with the suggestion . . . that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. . . . The grants to parents of private school children are given in addition to the right that they have to send their children to public schools 'totally at state expense.' And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause."

in spending scholarships with choice from the entire menu of possible educational placements, most of them open to anyone willing to attend a public school. I say "confused" because the majority's new use of the choice criterion, which it frames negatively as "whether Ohio is coercing parents into sending their children to religious schools," *ante*, at 14, ignores the reason for having a private choice enquiry in the first place. Cases since *Mueller* have found private choice relevant under a rule that aid to religious schools can be permissible so long as it first passes through the hands of students or parents.[8] The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private

---

[8] In some earlier cases, "private choice" was sensibly understood to go beyond the mere formalism of path, to ensure that aid was neither systemic nor predestined to go to religious uses. Witters, for example, had a virtually unlimited choice among professional training schools, only a few of which were religious; and Zobrest was simply one recipient who chose to use a government-funded interpreter at a religious school over a secular school, either of which was open to him. But recent decisions seem to have stripped away any substantive bite, as "private choice" apparently means only that government aid follows individuals to religious schools. See, *e.g., Agostini* v. *Felton,* 521 U. S. 203, 229 (1997) (state aid for remedial instruction at a religious school goes "directly to the eligible students . . . no matter where they choose to attend school").

hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

Defining choice as choice in spending the money or channeling the aid is, moreover, necessary if the choice criterion is to function as a limiting principle at all. If "choice" is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school. See *supra*, at 13 (noting the same result under the majority's formulation of the neutrality criterion). And because it is unlikely that any participating private religious school will enroll more pupils than the generally available public system, it will be easy to generate numbers suggesting that aid to religion is not the significant intent or effect of the voucher scheme.

That is, in fact, just the kind of rhetorical argument that the majority accepts in these cases. In addition to secular private schools (129 students), the majority considers public schools with tuition assistance (roughly 1,400 students), magnet schools (13,000 students), and community schools (1,900 students), and concludes that fewer than 20% of pupils receive state vouchers to attend religious schools. *Ante*, at 17. (In fact, the numbers would seem even more favorable to the majority's argument if enrollment in traditional public schools without tutoring were considered, an alternative the majority thinks relevant to the private choice enquiry, *ante*, at 14). JUSTICE O'CONNOR focuses on how much money is spent on each educational option and notes that at most $8.2 million is spent on vouchers for students attending religious schools, *ante*, at 3 (concurring opinion), which is only 6% of the

State's expenditure if one includes separate funding for Cleveland's community ($9.4 million) and magnet ($114.8 million) public schools. The variations show how results may shift when a judge can pick and choose the alternatives to use in the comparisons, and they also show what dependably comfortable results the choice criterion will yield if the identification of relevant choices is wide open. If the choice of relevant alternatives is an open one, proponents of voucher aid will always win, because they will always be able to find a "choice" somewhere that will show the bulk of public spending to be secular. The choice enquiry will be diluted to the point that it can screen out nothing, and the result will always be determined by selecting the alternatives to be treated as choices.

Confining the relevant choices to spending choices, on the other hand, is not vulnerable to comparable criticism. Although leaving the selection of alternatives for choice wide open, as the majority would, virtually guarantees the availability of a "choice" that will satisfy the criterion, limiting the choices to spending choices will not guarantee a negative result in every case. There may, after all, be cases in which a voucher recipient will have a real choice, with enough secular private school desks in relation to the number of religious ones, and a voucher amount high enough to meet secular private school tuition levels. See *infra*, at 20–23. But, even to the extent that choice-to-spend does tend to limit the number of religious funding options that pass muster, the choice criterion has to be understood this way in order, as I have said, for it to function as a limiting principle.[9] Otherwise there is surely

---

[9] The need for a limit is one answer to JUSTICE O'CONNOR, who argues at length that community schools should factor in the "private choice" calculus. *Ante*, at 11–12 (concurring opinion). To be fair, community schools do exhibit some features of private schools: they are autonomously managed without any interference from the school district or

no point in requiring the choice to be a true or real or genuine one.[10]

State and two have prior histories as private schools. It may be, then, that community schools might arguably count as choices because they are not like other public schools run by the State or municipality, but in substance merely private schools with state funding outside the voucher program.

But once any public school is deemed a relevant object of choice, there is no stopping this progression. For example, both the majority and JUSTICE O'CONNOR characterize public magnet schools as an independent category of genuine educational options, simply because they are "nontraditional" public schools. But they do not share the "private school" features of community schools, and the only thing that distinguishes them from "traditional" public schools is their thematic focus, which in some cases appears to be nothing more than creative marketing. See, *e.g.,* Cleveland Municipal School District, Magnet and Thematic Programs/Schools (including, as magnet schools, "[f]undamental [e]ducation [c]enters," which employ "[t]raditional classrooms and teaching methods with an emphasis on basic skills"; and "[a]ccelerated [l]earning" schools, which rely on "[i]nstructional strategies [that] provide opportunities for students to build on individual strengths, interests and talents").

[10] And how should we decide which "choices" are "genuine" if the range of relevant choices is theoretically wide open? The showcase educational options that the majority and JUSTICE O'CONNOR trumpet are Cleveland's 10 community schools, but they are hardly genuine choices. Two do not even enroll students in kindergarten through third grade, App. 162a, and thus parents contemplating participation in the voucher program cannot select those schools. See Ohio Rev. Code Ann. §3313.975(C)(1) (West Supp. 2002) ("[N]o new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three"). One school was not "in operation" as of 1999, and in any event targeted students below the federal poverty line, App. 162a, not all voucher-eligible students, see n. 21, *infra.* Another school was a special population school for students with "numerous suspensions, behavioral problems and who are a grade level below their peers," *ibid.*, which, as JUSTICE O'CONNOR points out, may be "more attractive to certain inner-city parents," *ante*, at 13, but is probably not an attractive "choice" for most parents.

Of the six remaining schools, the most recent statistics on fourth-grade student performance (unavailable for one school) indicate: three

It is not, of course, that I think even a genuine choice criterion is up to the task of the Establishment Clause when substantial state funds go to religious teaching; the discussion in Part III, *infra*, shows that it is not. The point is simply that if the majority wishes to claim that choice is a criterion, it must define choice in a way that can function as a criterion with a practical capacity to screen something out.

If, contrary to the majority, we ask the right question about genuine choice to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher pro-

---

scored well below the Cleveland average in each of five tested subjects on state proficiency examinations, one scored above in one subject, and only one community school, Old Brooklyn Montessori School, was even an arguable competitor, scoring slightly better than traditional public schools in three subjects, and somewhat below in two. See Ohio Dept. of Ed., 2002 Community School Report Card, Hope Academy, Lincoln Park, p. 5; *id.,* Hope Academy, Cathedral Campus, at 5; *id.,* Hope Academy, Chapelside Campus, at 5; *id.,* Hope Academy, Broadway Campus, at 5; *id.,* Old Brooklyn Montessori School, at 5; 2002 District Report Card, Cleveland Municipal School District, p. 1. These statistics are consistent with 1999 test results, which were only available for three of the schools. Brief for Ohio School Boards Association et al. as *Amici Curiae* 26–28 (for example, 34.3% of students in the Cleveland City School District were proficient in math, as compared with 3.3% in Hope Chapelside and 0% in Hope Cathedral).

I think that objective academic excellence should be the benchmark in comparing schools under the majority's test; JUSTICE O'CONNOR prefers comparing educational options on the basis of subjective "parental satisfaction," a*nte*, at 14, and I am sure there are other plausible ways to evaluate "genuine choices." Until now, our cases have never talked about the quality of educational options by whatever standard, but now that every educational option is a relevant "choice," this is what the "genuine and independent private choice" enquiry, *ante*, at 10 (opinion of the Court), would seem to require if it is to have any meaning at all. But if that is what genuine choice means, what does this enquiry have to do with the Establishment Clause?

gram (only 53 of which accepted voucher students in 1999–2000), 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones. See App. 281a–286a. Unfortunately for the majority position, there is no explanation for this that suggests the religious direction results simply from free choices by parents. One answer to these statistics, for example, which would be consistent with the genuine choice claimed to be operating, might be that 96.6% of families choosing to avail themselves of vouchers choose to educate their children in schools of their own religion. This would not, in my view, render the scheme constitutional, but it would speak to the majority's choice criterion. Evidence shows, however, that almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools. App. to Pet. for Cert. in No. 00–1777, p. 147a.[11] The families made it clear they had not chosen the schools because they wished their children to be proselytized in a religion not their own, or in any religion, but because of educational opportunity.[12]

Even so, the fact that some 2,270 students chose to apply their vouchers to schools of other religions, App. 281a–286a, might be consistent with true choice if the

---

[11] For example, 40% of families who sent their children to private schools for the first time under the voucher program were Baptist, App. 118a, but only one school, enrolling 44 voucher students, is Baptist, *id.,* at 284a.

[12] When parents were surveyed as to their motives for enrolling their children in the voucher program, 96.4% cited a better education than available in the public schools, and 95% said their children's safety. *Id.,* at 69a–70a. When asked specifically in one study to identify the most important factor in selecting among participating private schools, 60% of parents mentioned academic quality, teacher quality, or the substance of what is taught (presumably secular); only 15% mentioned the religious affiliation of the school as even a consideration. *Id.,* at 119a.

students "chose" their religious schools over a wide array of private nonreligious options, or if it could be shown generally that Ohio's program had no effect on educational choices and thus no impermissible effect of advancing religious education. But both possibilities are contrary to fact. First, even if all existing nonreligious private schools in Cleveland were willing to accept large numbers of voucher students, only a few more than the 129 currently enrolled in such schools would be able to attend, as the total enrollment at all nonreligious private schools in Cleveland for kindergarten through eighth grade is only 510 children, see Brief for California Alliance for Public Schools as *Amicus Curiae* 15, and there is no indication that these schools have many open seats.[13] Second, the $2,500 cap that the program places on tuition for participating low-income pupils has the effect of curtailing the participation of nonreligious schools: "nonreligious schools with higher tuition (about $4,000) stated that they could afford to accommodate just a few voucher students."[14] By

---

[13] JUSTICE O'CONNOR points out that "there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program." *Ante*, at 10. But there is equally no evidence to support her assertion that "many parents with vouchers selected nonreligious private schools over religious alternatives," *ante*, at 9, and in fact the evidence is to the contrary, as only 129 students used vouchers at private nonreligious schools.

[14] General Accounting Office Report No. 01–914, School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee 25 (Aug. 2001) (GAO Report). Of the 10 nonreligious private schools that "participate" in the Cleveland voucher program, 3 currently enroll no voucher students. And of the remaining seven schools, one enrolls over half of the 129 students that attend these nonreligious schools, while only two others enroll more than 8 voucher students. App. 281a–286a. Such schools can charge full tuition to students whose families do not qualify as "low income," but unless the number of vouchers are drastically increased, it is unlikely that these students will constitute a large fraction of voucher recipients, as the program gives preference in the

comparison, the average tuition at participating Catholic schools in Cleveland in 1999–2000 was $1,592, almost $1,000 below the cap.[15]

---

allocation of vouchers to low-income children. See Ohio Rev. Code Ann. §3313.978(A) (West Supp. 2002).

[15]GAO Report 25. A 1993–1994 national study reported a similar average tuition for Catholic elementary schools ($1,572), but higher tuition for other religious schools ($2,213), and nonreligious schools ($3,773). U. S. Dept. of Education, Office of Educational Research and Improvement, National Center for Education Statistics, Private Schools in the United States: A Statistical Profile, 1993–94 (NCES 1997–459 June 1997) (Table 1.5). The figures are explained in part by the lower teaching expenses of the religious schools and general support by the parishes that run them. Catholic schools, for example, received 24.1% of their revenue from parish subsidies in the 2000–2001 school year. National Catholic Educational Association, Balance Sheet for Catholic Elementary Schools: 2001 Income and Expenses 25 (2001). Catholic schools also often rely on priests or members of religious communities to serve as principals, 32% of 550 reporting schools in one study, *id.*, at 21; at the elementary school level, the average salary of religious sisters serving as principals in 2000–2001 was $28,876, as compared to lay principals, who received on average $45,154, and public school principals who reported an average salary of $72,587. *Ibid.*

JUSTICE O'CONNOR argues that nonreligious private schools can compete with Catholic and other religious schools below the $2,500 tuition cap. See *ante*, at 9–10. The record does not support this assertion, as only three secular private schools in Cleveland enroll more than eight voucher students. See n. 14, *supra*. Nor is it true, as she suggests, that our national statistics are spurious because secular schools cater to a different market from Catholic or other religious schools: while there is a spectrum of nonreligious private schools, there is likely a commensurate range of low-end and high-end religious schools. My point is that at each level, the religious schools have a comparative cost advantage due to church subsidies, donations of the faithful, and the like. The majority says that nonreligious private schools in Cleveland derive similar benefits from "third-party contributions," *ante*, at 14, n. 4, but the one affidavit in the record that backs up this assertion with data concerns a private school for "emotionally disabled and developmentally delayed children" that received 11% of its budget from the United Way organization, App. 194a–195a, a large proportion to be sure, but not even half of the 24.1% of budget that Catholic schools on

Of course, the obvious fix would be to increase the value of vouchers so that existing nonreligious private and non-Catholic religious schools would be able to enroll more voucher students, and to provide incentives for educators to create new such schools given that few presently exist. Private choice, if as robust as that available to the seminarian in *Witters*, would then be "true private choice" under the majority's criterion. But it is simply unrealistic to presume that parents of elementary and middle school-children in Cleveland will have a range of secular and religious choices even arguably comparable to the statewide program for vocational and higher education in *Witters*. And to get to that hypothetical point would require that such massive financial support be made available to religion as to disserve every objective of the Establishment Clause even more than the present scheme does. See Part III–B*, infra*.[16]

There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students. And contrary to the majority's assertion, *ante*, at 12, public schools in adjacent districts hardly have a financial incentive to participate in

---

average receive in parish subsidies alone, see *supra* this note.

[16]The majority notes that I argue both that the Ohio program is unconstitutional because the voucher amount is too low to create real private choice and that any greater expenditure would be unconstitutional as well. *Ante*, at 14, n. 4. The majority is dead right about this, and there is no inconsistency here: any voucher program that satisfied the majority's requirement of "true private choice" would be even more egregiously unconstitutional than the current scheme due to the substantial amount of aid to religious teaching that would be required.

the Ohio voucher program, and none has.[17] For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sake of channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian.

III

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

A

The scale of the aid to religious schools approved today

---

[17] As the Court points out, *ante*, at 3, n. 1, an out-of-district public school that participates will receive a $2,250 voucher for each Cleveland student on top of its normal state funding. The basic state funding, though, is a drop in the bucket as compared to the cost of educating that student, as much of the cost (at least in relatively affluent areas with presumptively better academic standards) is paid by local income and property taxes. See Brief for Ohio School Boards Association et al. as *Amici Curiae* 19–21. The only adjacent district in which the voucher amount is close enough to cover the local contribution is East Cleveland City (local contribution, $2,019, see Ohio Dept. of Ed., 2002 Community School Report Card, East Cleveland City School District, p. 2), but its public-school system hardly provides an attractive alternative for Cleveland parents, as it too has been classified by Ohio as an "academic emergency" district. See *ibid.*

is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported. Each measure has received attention in previous cases. On one hand, the sheer quantity of aid, when delivered to a class of religious primary and secondary schools, was suspect on the theory that the greater the aid, the greater its proportion to a religious school's existing expenditures, and the greater the likelihood that public money was supporting religious as well as secular instruction. As we said in *Meek*, "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role" as the object of aid that comes in "substantial amounts." 421 U. S., at 365. Cf. *Nyquist*, 413 U. S., at 787–788 (rejecting argument that tuition assistance covered only 15% of education costs, presumably secular, at religious schools). Conversely, the more "attenuated [the] financial benefit . . . that eventually flows to parochial schools," the more the Court has been willing to find a form of state aid permissible. *Mueller*, 463 U. S., at 400.[18]

On the other hand, the Court has found the gross amount unhelpful for Establishment Clause analysis when the aid afforded a benefit solely to one individual, however substantial as to him, but only an incidental benefit to the religious school at which the individual

---

[18] The majority relies on *Mueller*, *Agostini*, and *Mitchell* to dispute the relevance of the large number of students that use vouchers to attend religious schools, *ante*, at 16–17, but the reliance is inapt because each of those cases involved insubstantial benefits to the religious schools, regardless of the number of students that benefited. See, *e.g., Mueller*, 463 U. S., at 391 ($112 in tax benefit to the highest-bracket taxpayer, see Brief for Respondents Becker et al. in *Mueller* v. *Allen*, O. T. 1982, No. 82–195, p. 5); *Agostini*, 521 U. S., at 210 (aid "must 'supplement, and in no case supplant'"); *Mitchell*, 530 U. S., at 866 (O'CONNOR, J., concurring in judgment) *("de minimis")*. See also *supra*, at 11.

chose to spend the State's money. See *Witters*, 474 U. S., at 488; cf. *Zobrest*, 509 U. S., at 12. When neither the design nor the implementation of an aid scheme channels a series of individual students' subsidies toward religious recipients, the relevant beneficiaries for establishment purposes, the Establishment Clause is unlikely to be implicated. The majority's reliance on the observations of five Members of the Court in *Witters* as to the irrelevance of substantiality of aid in that case, see *ante*, at 9, is therefore beside the point in the matter before us, which involves considerable sums of public funds systematically distributed through thousands of students attending religious elementary and middle schools in the city of Cleveland.[19]

---

[19] No less irrelevant, and lacking even arguable support in our cases, is JUSTICE O'CONNOR's argument that the $8.2 million in tax-raised funds distributed under the Ohio program to religious schools is permissible under the Establishment Clause because it "pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions," *ante*, at 3. Our cases have consistently held that state benefits at some level can go to religious institutions when the recipients are not pervasively sectarian, see, *e.g., Tilton* v. *Richardson,* 403 U. S. 672 (1971) (aid to church-related colleges and universities); *Bradfield* v. *Roberts,* 175 U. S. 291 (1899) (religious hospitals); when the benefit comes in the form of tax exemption or deduction, see, *e.g., Walz* v. *Tax Comm'n of City of New York,* 397 U. S. 664 (1970) (property-tax exemptions); *Mueller* v. *Allen,* 463 U. S. 388 (1983) (tax deductions for educational expenses); or when the aid can plausibly be said to go to individual university students, see, *e.g., Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986) (state scholarship programs for higher education, and by extension federal programs such as the G. I. Bill). The fact that those cases often allow for large amounts of aid says nothing about direct aid to pervasively sectarian schools for religious teaching. This "greater justifies the lesser" argument not only ignores the aforementioned cases, it would completely swallow up our aid-to-school cases from *Everson* onward: if $8.2 million in vouchers is acceptable, for example, why is there any requirement against greater than *de minimis* diversion to religious uses? See *Mitchell*, 530 U. S., at

The Cleveland voucher program has cost Ohio taxpayers $33 million since its implementation in 1996 ($28 million in voucher payments, $5 million in administrative costs), and its cost was expected to exceed $8 million in the 2001–2002 school year. People for the American Way Foundation, Five Years and Counting: A Closer Look at the Cleveland Voucher Program 1–2 (Sept. 25, 2001) (hereinafter Cleveland Voucher Program) (cited in Brief for National School Boards Association et al. as *Amici Curiae* at 9). These tax-raised funds are on top of the textbooks, reading and math tutors, laboratory equipment, and the like that Ohio provides to private schools, worth roughly $600 per child. Cleveland Voucher Program 2.[20]

The gross amounts of public money contributed are symptomatic of the scope of what the taxpayers' money buys for a broad class of religious-school students. In paying for practically the full amount of tuition for thousands of qualifying students,[21] compare *Nyquist*, *supra,* at 781–783 (state aid amounting to 50% of tuition was unconstitutional), the scholarships purchase everything that tuition purchases, be it instruction in math or indoctrination in faith. The consequences of "substantial" aid hy-

---

866 (O'CONNOR, J., concurring in judgment).

[20] The amount of federal aid that may go to religious education after today's decision is startling: according to one estimate, the cost of a national voucher program would be $73 billion, 25% more than the current national public-education budget. People for the American Way Foundation, Community Voice or Captive of the Right? 10 (Dec. 2001).

[21] Most, if not all, participating students come from families with incomes below 200% of the poverty line (at least 60% are below the poverty line, App. in Nos. 00–3055, etc. (CA6), p. 1679), and are therefore eligible for vouchers covering 90% of tuition, Ohio Rev. Code Ann. §3313.978(A) (West Supp. 2002); they may make up the 10% shortfall by "in-kind contributions or services," which the recipient school "shall permit," §3313.976(A)(8). Any higher income students in the program receive vouchers paying 75% of tuition costs. §3313.978(A).

pothesized in *Meek* are realized here: the majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.

B

It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme, but something has to be said about the enormity of the violation. I anticipated these objectives earlier, *supra*, at 5, in discussing *Everson*, which cataloged them, the first being respect for freedom of conscience. Jefferson described it as the idea that no one "shall be compelled to . . . support any religious worship, place, or ministry whatsoever," A Bill for Establishing Religious Freedom, in 5 The Founders' Constitution 84 (P. Kurland & R. Lerner eds. 1987), even a "teacher of his own religious persuasion," *ibid.*, and Madison thought it violated by any "'authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment.'" Memorial and Remonstrance ¶3, reprinted in *Everson,* 330 U. S., at 65–66. "Any tax to establish religion is antithetical to the command that the minds of men always be wholly free," *Mitchell*, 530 U. S., at 871 (SOUTER, J., dissenting) (internal quotation marks and citations omitted).[22] Madison's objection to three pence has simply been lost in the majority's formalism.

As for the second objective, to save religion from its own corruption, Madison wrote of the "'experience . . . that

---

[22] As a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause. See Feldman, Intellectual Origins of the Establishment Clause, 77 N. Y. U. L. Rev. 346, 398 (May 2002) ("In the time between the proposal of the Constitution and of the Bill of Rights, the predominant, not to say exclusive, argument against established churches was that they had the potential to violate liberty of conscience").

ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.'" Memorial and Remonstrance ¶7, reprinted in *Everson* 330 U. S., at 67. In Madison's time, the manifestations were "pride and indolence in the Clergy; ignorance and servility in the laity[,] in both, superstition, bigotry and persecution," *ibid.*; in the 21st century, the risk is one of "corrosive secularism" to religious schools, *Ball*, 473 U. S., at 385, and the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith. Even "[t]he favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." *Lee* v. *Weisman*, 505 U. S. 577, 608 (1992) (Blackmun, J., concurring).

The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not "discriminate on the basis of . . . religion," Ohio Rev. Code Ann. §3313.976(A)(4) (West Supp. 2002), which means the school may not give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as non-believers, §§3313.977(A)(1)(c)–(d). This indeed was the exact object of a 1999 amendment repealing the portion of a predecessor statute that had allowed an admission preference for "[c]hildren . . . whose parents are affiliated with any organization that provides financial support to the school, at the discretion of the school." §313.977(A)(1)(d) (West 1999). Nor is the State's religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to

serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job.[23] Cf. National Catholic Educational Association, Balance Sheet for Catholic Elementary Schools: 2001 Income and Expenses 25 (2001) ("31% of [reporting Catholic elementary and middle] schools had at least one full-time teacher who was a religious sister"). Indeed, a separate condition that "[t]he school . . . not . . . teach hatred of any person or group on the basis of . . . religion," §3313.976(A)(6) (West Supp. 2002), could be understood (or subsequently broadened) to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others,[24] if they want government money for

---

[23] And the courts will, of course, be drawn into disputes about whether a religious school's employment practices violated the Ohio statute. In part precisely to avoid this sort of involvement, some Courts of Appeals have held that religious groups enjoy a First Amendment exemption for clergy from state and federal laws prohibiting discrimination on the basis of race or ethnic origin. See, *e.g.*, *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F. 2d 1164, 1170 (CA4 1985) ("The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state both on a substantive and procedural level"); *EEOC* v. *Catholic Univ. of America*, 83 F. 3d 455, 470 (CADC 1996); *Young* v. *Northern Ill. Conference of United Methodist Church*, 21 F. 3d 184, 187 (CA7 1994). This approach would seem to be blocked in Ohio by the same antidiscrimination provision, which also covers "race . . . or ethnic background." Ohio Rev. Code Ann. §3313.976(A)(4) (West Supp. 2002).

[24] See, *e.g.*, Christian New Testament (2 Corinthians 6:14) (King James Version) ("Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?"); The Book of Mormon (2 Nephi 9:24) ("And if they will not repent and believe in his name, and be baptized in his name, and endure to the end, they must be damned; for the Lord God, the Holy One of Israel, has spoken it"); Pentateuch (Deut. 29:18) (The New Jewish Publication Society Translation) (for one who converts to another faith, "[t]he LORD will never forgive him; rather will the LORD's anger and passion rage against that man, till every sanction recorded in this book comes down upon him, and the

their schools.

For perspective on this foot-in-the-door of religious regulation, it is well to remember that the money has barely begun to flow. Prior examples of aid, whether grants through individuals or in-kind assistance, were never significant enough to alter the basic fiscal structure of religious schools; state aid was welcome, but not indispensable. See, *e.g., Mitchell*, 530 U. S., at 802 (federal funds could only supplement funds from nonfederal sources); *Agostini*, 521 U. S., at 210 (federally funded services could "'supplement, and in no case supplant, the level of services'" already provided). But given the figures already involved here, there is no question that religious schools in Ohio are on the way to becoming bigger businesses with budgets enhanced to fit their new stream of tax-raised income. See, *e.g.*, People for the American Way Foundation, A Painful Price 5, 9, 11 (Feb. 14, 2002) (of 91 schools participating in the Milwaukee program, 75 received voucher payments in excess of tuition, 61 of those were religious and averaged $185,000 worth of overpayment per school, justified in part to "raise low salaries"). The administrators of those same schools are also no doubt following the politics of a move in the Ohio State Senate to raise the current maximum value of a school voucher from $2,250 to the base amount of current state spending on each public school student ($4,814 for the 2001 fiscal year). See Bloedel, Bill Analysis of S. B. No. 89, 124th Ohio Gen. Assembly, regular session 2001–2002 (Ohio Legislative Service Commission). Ohio, in fact, is merely replicating the experience in Wisconsin, where a

---

LORD blots out his name from under heaven"); The Koran 334 (The Cow Ch. 2:1) (N. Dawood transl. 4th rev. ed. 1974) ("As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon their hearts and ears; their sight is dimmed and a grievous punishment awaits them").

similar increase in the value of educational vouchers in Milwaukee has induced the creation of some 23 new private schools, Public Policy Forum, Research Brief, vol. 90, no. 1, p. 3 (Jan. 23, 2002), some of which, we may safely surmise, are religious. New schools have presumably pegged their financial prospects to the government from the start, and the odds are that increases in government aid will bring the threshold voucher amount closer to the tuition at even more expensive religious schools.

When government aid goes up, so does reliance on it; the only thing likely to go down is independence. If Justice Douglas in *Allen* was concerned with state agencies, influenced by powerful religious groups, choosing the textbooks that parochial schools would use, 392 U. S., at 265 (dissenting opinion), how much more is there reason to wonder when dependence will become great enough to give the State of Ohio an effective veto over basic decisions on the content of curriculums? A day will come when religious schools will learn what political leverage can do, just as Ohio's politicians are now getting a lesson in the leverage exercised by religion.

Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. See *Mitchell*, *supra*, at 872 (SOUTER, J., dissenting); *Everson*, 330 U. S., at 8–11. As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord. "Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another." *Id.*, at 53. (Rutledge, J., dissenting).

JUSTICE BREYER has addressed this issue in his own

dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty.[25] Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element.[26] Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes,[27] or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention.[28] Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on

---

[25] See R. Martino, Abolition of the Death Penalty (Nov. 2, 1999) ("The position of the Holy See, therefore, is that authorities, even for the most serious crimes, should limit themselves to non-lethal means of punishment") (citing John Paul II, *Evangelium Vitae* n. 56).

[26] H. Donin, To Be a Jew 15 (1972).

[27] See R. Martin, Islamic Studies 224 (2d ed. 1996) (interpreting the Koran to mean that "[m]en are responsible to earn a living and provide for their families; women bear children and run the household").

[28] See The Baptist Faith and Message, Art. XVIII, available at www.sbc.net ("A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ").

supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

* * *

If the divisiveness permitted by today's majority is to be avoided in the short term, it will be avoided only by action of the political branches at the state and national levels. Legislatures not driven to desperation by the problems of public education may be able to see the threat in vouchers negotiable in sectarian schools. Perhaps even cities with problems like Cleveland's will perceive the danger, now that they know a federal court will not save them from it.

My own course as a judge on the Court cannot, however, simply be to hope that the political branches will save us from the consequences of the majority's decision. *Everson*'s statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. I do not have the option to leave it silent, and I hope that a future Court will reconsider today's dramatic departure from basic Establishment Clause principle.