SUPREME COURT OF THE UNITED STATES

No. 98–1648

GUY MITCHELL, ET AL., PETITIONERS *v.*
MARY L. HELMS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 28, 2000]

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

As part of a longstanding school aid program known as Chapter 2, the Federal Government distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools, with the enrollment of each participating school determining the amount of aid that it receives. The question is whether Chapter 2, as applied in Jefferson Parish, Louisiana, is a law respecting an establishment of religion, because many of the private schools receiving Chapter 2 aid in that parish are religiously affiliated. We hold that Chapter 2 is not such a law.

I

A

Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. 97–35, 95 Stat. 469, as

amended, 20 U. S. C. §§7301–7373,[1] has its origins in the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. 89–10, 79 Stat. 27, 55, and is a close cousin of the provision of the ESEA that we recently considered in *Agostini* v. *Felton*, 521 U. S. 203 (1997). Like the provision at issue in *Agostini*, Chapter 2 channels federal funds to local educational agencies (LEA's), which are usually public school districts, via state educational agencies (SEA's), to implement programs to assist children in elementary and secondary schools. Among other things, Chapter 2 provides aid

> "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials." 20 U. S. C. §7351(b)(2).

LEA's and SEA's must offer assistance to both public and private schools (although any private school must be nonprofit). §§7312(a), 7372(a)(1). Participating private schools receive Chapter 2 aid based on the number of children enrolled in each school, see §7372(a)(1), and allocations of Chapter 2 funds for those schools must generally be "equal (consistent with the number of children to be served) to expenditures for programs . . . for children enrolled in the public schools of the [LEA]," §7372(b). LEA's must in all cases "assure equitable participation" of the children of private schools "in the purposes and benefits" of Chapter 2. §7372(a)(1); see

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[1] Chapter 2 is now technically Subchapter VI of Chapter 70 of 20 U. S. C., where it was codified by the Improving America's Schools Act of 1994, Pub. L. 103–382, 108 Stat. 3707. For convenience, we will use the term "Chapter 2," as the lower courts did. Prior to 1994, Chapter 2 was codified at 20 U. S. C. §§2911–2976 (1988 ed.).

§7372(b). Further, Chapter 2 funds may only "supplement and, to the extent practical, increase the level of funds that would . . . be made available from non-Federal sources." §7371(b). LEA's and SEA's may not operate their programs "so as to supplant funds from non-Federal sources." *Ibid.*

Several restrictions apply to aid to private schools. Most significantly, the "services, materials, and equipment" provided to private schools must be "secular, neutral, and nonideological." §7372(a)(1). In addition, private schools may not acquire control of Chapter 2 funds or title to Chapter 2 materials, equipment, or property. §7372(c)(1). A private school receives the materials and equipment listed in §7351(b)(2) by submitting to the LEA an application detailing which items the school seeks and how it will use them; the LEA, if it approves the application, purchases those items from the school's allocation of funds, and then lends them to that school.

In Jefferson Parish (the Louisiana governmental unit at issue in this case), as in Louisiana as a whole, private schools have primarily used their allocations for nonrecurring expenses, usually materials and equipment. In the 1986–1987 fiscal year, for example, 44% of the money budgeted for private schools in Jefferson Parish was spent by LEA's for acquiring library and media materials, and 48% for instructional equipment. Among the materials and equipment provided have been library books, computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings.[2]

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[2] Congress in 1988 amended the section governing the sorts of materials and equipment available under Chapter 2. Compare 20 U. S. C. §3832(1)(B) (1982 ed.) with §7351(b)(2) (1994 ed.). The record in this case closed in 1989, and the effect of the amendment is not at issue.

It appears that, in an average year, about 30% of Chapter 2 funds spent in Jefferson Parish are allocated for private schools. For the 1985–1986 fiscal year, 41 private schools participated in Chapter 2. For the following year, 46 participated, and the participation level has remained relatively constant since then. See App. 132a. Of these 46, 34 were Roman Catholic; 7 were otherwise religiously affiliated; and 5 were not religiously affiliated.

B

Respondents filed suit in December 1985, alleging, among other things, that Chapter 2, as applied in Jefferson Parish, violated the Establishment Clause of the First Amendment of the Federal Constitution. The case's tortuous history over the next 15 years indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle.

In 1990, after extended discovery, Chief Judge Heebe of the District Court for the Eastern District of Louisiana granted summary judgment in favor of respondents. *Helms* v. *Cody*, Civ. A. No. 85–5533, 1990 WL 36124 (Mar. 27), App. to Pet. for Cert. 137a. He held that Chapter 2 violated the Establishment Clause because, under the second part of our three-part test in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), the program had the primary effect of advancing religion. Chapter 2 had such effect, in his view, because the materials and equipment loaned to the Catholic schools were direct aid to those schools and because the Catholic schools were, he concluded after detailed inquiry into their doctrine and curriculum, "pervasively sectarian." App. to Pet. for Cert. 151a. Chief Judge Heebe relied primarily on *Meek* v. *Pittenger*, 421 U. S. 349 (1975), and *Wolman* v. *Walter*, 433 U. S. 229 (1977), in which we held unconstitutional programs that provided many of the

same sorts of materials and equipment as does Chapter 2. In 1994, after having resolved the numerous other issues in the case, he issued an order permanently excluding pervasively sectarian schools in Jefferson Parish from receiving any Chapter 2 materials or equipment.

Two years later, Chief Judge Heebe having retired, Judge Livaudais received the case. Ruling in early 1997 on postjudgment motions, he reversed the decision of former Chief Judge Heebe and upheld Chapter 2, pointing to several significant changes in the legal landscape over the previous seven years. *Helms* v. *Cody*, 1997 WL 35283 (Jan. 28), App. to Pet. for Cert. 79a. In particular, Judge Livaudais cited our 1993 decision in *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, in which we held that a State could, as part of a federal program for the disabled, provide a sign-language interpreter to a deaf student at a Catholic high school.

Judge Livaudais also relied heavily on a 1995 decision of the Court of Appeals for the Ninth Circuit, *Walker* v. *San Francisco Unified School Dist.*, 46 F. 3d 1449, upholding Chapter 2 on facts that he found "virtually indistinguishable." The Ninth Circuit acknowledged in *Walker*, as Judge Heebe had in his 1990 summary judgment ruling, that *Meek* and *Wolman* appeared to erect a constitutional distinction between providing textbooks (permissible) and providing any other in-kind aid (impermissible). 46 F. 3d, at 1464–1465; see *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968) (upholding textbook program). The Court of Appeals viewed this distinction, however, as "thin" and "unmoored from any Establishment Clause principles," and, more importantly, as "rendered untenable" by subsequent cases, particularly *Zobrest*. 46 F. 3d, at 1465–1466. These cases, in the Ninth Circuit's view, revived the principle of *Allen* and of *Everson* v.

Board of Ed. of Ewing,[3] that "state benefits provided to all citizens without regard to religion are constitutional." 46 F. 3d, at 1465. The Ninth Circuit also relied, *id.*, at 1467, on our observation in *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687 (1994), that "we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges," *id.*, at 704. The Ninth Circuit purported to distinguish *Meek* and *Wolman* based on the percentage of schools receiving aid that were parochial (a large percentage in those cases and a moderate percentage in *Walker*), 46 F. 3d, at 1468, but that court undermined this distinction when it observed that *Meek* also upheld "the massive provision of textbooks to parochial schools." 46 F. 3d, at 1468, n. 16. Thus, although the Ninth Circuit did not explicitly hold that *Meek* and *Wolman* were no longer good law, its reasoning seemed to require that conclusion.

Finally, in addition to relying on our decision in *Zobrest* and the Ninth Circuit's decision in *Walker*, Judge Livaudais invoked *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), in which, a few months after *Walker*, we held that the Establishment Clause does not require a public university to exclude a student-run religious publication from assistance available to numerous other student-run publications.

Following Judge Livaudais's ruling, respondents appealed to the Court of Appeals for the Fifth Circuit. While that appeal was pending, we decided *Agostini*, in which we approved a program that, under Title I of the ESEA, provided public employees to teach remedial classes at

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[3] *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947) (upholding reimbursement to parents for costs of busing their children to public or private school).

private schools, including religious schools. In so holding, we overruled *Aguilar* v. *Felton*, 473 U. S. 402 (1985), and partially overruled *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985), both of which had involved such a program.

The Fifth Circuit thus faced a dilemma between, on the one hand, the Ninth Circuit's holding and analysis in *Walker* and our subsequent decisions in *Rosenberger* and *Agostini*, and, on the other hand, our holdings in *Meek* and *Wolman*. To resolve the dilemma, the Fifth Circuit abandoned any effort to find coherence in our case law or to divine the future course of our decisions and instead focused on our particular holdings. *Helms* v. *Picard*, 151 F. 3d 347, 371 (1998). It thought such an approach required not only by the lack of coherence but also by *Agostini*'s admonition to lower courts to abide by any applicable holding of this Court even though that holding might seem inconsistent with our subsequent decisions, see *Agostini*, 521 U. S., at 237. The Fifth Circuit acknowledged that *Agostini*, by recognizing our rejection of the rule that "all government aid that directly assists the educational function of religious schools is invalid," *id.*, at 225, had rejected a premise of *Meek*, but that court nevertheless concluded that *Agostini* had neither directly overruled *Meek* and *Wolman* nor rejected their distinction between textbooks and other in-kind aid. The Fifth Circuit therefore concluded that *Meek* and *Wolman* controlled, and thus it held Chapter 2 unconstitutional. We granted certiorari. 527 U. S. 1002 (1999).

II

The Establishment Clause of the First Amendment dictates that "Congress shall make no law respecting an establishment of religion." In the over 50 years since *Everson*, we have consistently struggled to apply these

simple words in the context of governmental aid to religious schools.[4] As we admitted in *Tilton* v. *Richardson*, 403 U. S. 672 (1971), "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area." *Id*., at 678 (plurality opinion); see *id*., at 671 (White, J., concurring in judgment).

In *Agostini*, however, we brought some clarity to our case law, by overruling two anomalous precedents (one in whole, the other in part) and by consolidating some of our previously disparate considerations under a revised test. Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, see 403 U. S., at 612–613, in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors, see 521 U. S., at 222–223. We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect. *Agostini*, *supra*, at 232–233. We also acknowledged that our cases had pared somewhat the factors that could justify a finding of excessive entanglement. 521 U. S., at 233–234. We then set out revised criteria for determining the effect of a statute:

> "To summarize, New York City's Title I program does not run afoul of any of three primary criteria we

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[4] Cases prior to *Everson* discussed the issue only indirectly, see *e.g.*, *Vidal* v. *Philadelphia*, 2 How. 127, 198–200 (1844); *Quick Bear* v. *Leupp*, 210 U. S. 50, 81 (1908), or evaluated aid to schools under other provisions of the Constitution, see *Cochran* v. *Louisiana Bd. of Ed.*, 281 U. S. 370, 374–375 (1930).

currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id*., at 234.

In this case, our inquiry under *Agostini*'s purpose and effect test is a narrow one. Because respondents do not challenge the District Court's holding that Chapter 2 has a secular purpose, and because the Fifth Circuit also did not question that holding, cf. 151 F. 3d, at 369, n. 17, we will consider only Chapter 2's effect. Further, in determining that effect, we will consider only the first two *Agostini* criteria, since neither respondents nor the Fifth Circuit has questioned the District Court's holding, App. to Pet. for Cert. 108a, that Chapter 2 does not create an excessive entanglement. Considering Chapter 2 in light of our more recent case law, we conclude that it neither results in religious indoctrination by the government nor defines its recipients by reference to religion. We therefore hold that Chapter 2 is not a "law respecting an establishment of religion." In so holding, we acknowledge what both the Ninth and Fifth Circuits saw was inescapable– *Meek* and *Wolman* are anomalies in our case law. We therefore conclude that they are no longer good law.

A

As we indicated in *Agostini*, and have indicated elsewhere, the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action. See *Agostini*, *supra*, at 226 (quoting *Zobrest*, 509 U. S., at 10 (presence of sign-language interpreter in Catholic school "'cannot be attributed to *state* decisionmaking'") (emphasis added in *Agostini*)); 521 U. S., at 230 (question is whether "any use of

[governmental] aid to indoctrinate religion could be attributed to the State"); see also *Rosenberger*, 515 U. S., at 841–842; *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, 488–489 (1986); *Mueller* v. *Allen*, 463 U. S. 388, 397 (1983); cf. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence"). We have also indicated that the answer to the question of indoctrination will resolve the question whether a program of educational aid "subsidizes" religion, as our religion cases use that term. See *Agostini*, 521 U. S., at 230–231; see also *id*., at 230.

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, see *Allen*, 392 U. S., at 245–247 (discussing dual secular and religious purposes of religious schools), then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid

is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.

As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so "only as a result of the genuinely independent and private choices of individuals." *Agostini*, *supra*, at 226 (internal quotation marks omitted). We have viewed as significant whether the "private choices of individual parents," as opposed to the "unmediated" will of government, *Ball*, 473 U. S., at 395, n. 13 (internal quotation marks omitted), determine what schools ultimately benefit from the governmental aid, and how much. 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. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, see, *e.g.*, Gilder, The Revitalization of Everything: The Law of the Microcosm, Harv. Bus. Rev. 49 (Mar./Apr. 1988), and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones.

The principles of neutrality and private choice, and their relationship to each other, were prominent not only in *Agostini*, *supra*, at 225–226, 228, 230–232, but also in *Zobrest*, *Witters*, and *Mueller*.[5] The heart of our reasoning in *Zobrest*, upholding governmental provision of a sign-

[5] JUSTICE O'CONNOR acknowledges that "neutrality is an important reason for upholding government-aid programs," one that our recent cases have "emphasized . . . repeatedly." *Post*, at 3 (opinion concurring in judgment).

language interpreter to a deaf student at his Catholic high school, was as follows:

> "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 [statute], 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 [statute] creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking." 509 U. S., at 10.

As this passage indicates, the private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government even when the interpreter translated classes on Catholic doctrine.

Witters and *Mueller* employed similar reasoning. In *Witters*, we held that the Establishment Clause did not bar a State from including within a neutral program providing tuition payments for vocational rehabilitation a blind person studying at a Christian college to become a pastor, missionary, or youth director. We explained:

> "Any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. Washington's program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited and . . . creates no financial incentive for students to undertake sectarian education. . . . [T]he fact that aid goes

> to individuals means that the decision to support religious education is made by the individual, not by the State.
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> "[I]t does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion." 474 U. S., at 487–488 (footnote, citations, and internal quotation marks omitted).[6]

Further, five Members of this Court, in separate opinions, emphasized both the importance of neutrality and of private choices, and the relationship between the two. See *id.*, at 490–491 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring); *id.*, at 493 (O'CONNOR, J.,

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[6]The majority opinion also noted that only a small portion of the overall aid under the State's program would go to religious education, see *Witters*, 474 U. S., at 488, but it appears that five Members of the Court thought this point irrelevant. See *id.*, at 491, n. 3 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring) (citing *Mueller* v. *Allen*, 463 U. S. 388, 401 (1983), to assert that validity of program "does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training"); 474 U. S., at 490 (White, J., concurring) (agreeing with "most of JUSTICE POWELL's concurring opinion with respect to the relevance of *Mueller*," but not specifying further); *id.*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment) (agreeing with Justice Powell's reliance on *Mueller* and explaining that the program did not have an impermissible effect, because it was neutral and involved private choice, and thus "[n]o reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief"). More recently, in *Agostini* v. *Felton*, 521 U. S. 203 (1997), we held that the proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the constitutional inquiry. *Id.*, at 229 (refusing "to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid"); see also *post*, at 13 (O'CONNOR, J., concurring in judgment) (quoting this passage).

concurring in part and concurring in judgment); see also *id.*, at 490 (White, J., concurring).

The tax deduction for educational expenses that we upheld in *Mueller* was, in these respects, the same as the tuition grant in *Witters*. We upheld it chiefly because it "neutrally provides state assistance to a broad spectrum of citizens," 463 U. S., at 398–399, and because "numerous, private choices of individual parents of school-age children," *id.*, at 399, determined which schools would benefit from the deductions. We explained that "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Ibid.* (citation omitted); see *id.*, at 397 (neutrality indicates lack of state *imprimatur*).

Agostini's second primary criterion for determining the effect of governmental aid is closely related to the first. The second criterion requires a court to consider whether an aid program "define[s] its recipients by reference to religion." 521 U. S., at 234. As we briefly explained in *Agostini*, *id.*, at 230–231, this second criterion looks to the same set of facts as does our focus, under the first criterion, on neutrality, see *id.*, at 225–226, but the second criterion uses those facts to answer a somewhat different question– whether the criteria for allocating the aid "creat[e] a financial incentive to undertake religious indoctrination." *Id.*, at 231. In *Agostini* we set out the following rule for answering this question:

> "This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of ad-

vancing religion." *Ibid*.

The cases on which *Agostini* relied for this rule, and *Agostini* itself, make clear the close relationship between this rule, incentives, and private choice. For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly "independent," *Witters*, 474 U. S., at 487. See *Agostini*, *supra*, at 232 (holding that Title I did not create any impermissible incentive, because its services were "available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school"); *Zobrest*, 509 U. S., at 10 (discussing, in successive sentences, neutrality, private choice, and financial incentives, respectively); *Witters*, *supra*, at 488 (similar). When such an incentive does exist, there is a greater risk that one could attribute to the government any indoctrination by the religious schools. See *Zobrest*, *supra*, at 10.

We hasten to add, what should be obvious from the rule itself, that simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates, under *Agostini*'s second criterion, an "incentive" for parents to choose such an education for their children. For *any* aid will have some such effect. See *Allen*, 392 U. S., at 244; *Everson*, 330 U. S., at 17; see also *Mueller*, 463 U. S., at 399.

B

Respondents inexplicably make no effort to address Chapter 2 under the *Agostini* test. Instead, dismissing *Agostini* as factually distinguishable, they offer two rules that they contend should govern our determination of whether Chapter 2 has the effect of advancing religion. They argue first, and chiefly, that "direct, nonincidental" aid to the primary educational mission of religious schools

is always impermissible. Second, they argue that provision to religious schools of aid that is divertible to religious use is similarly impermissible.[7] Respondents' arguments are inconsistent with our more recent case law, in particular *Agostini* and *Zobrest*, and we therefore reject them.

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[7] Respondents also contend that Chapter 2 aid supplants, rather than supplements, the core educational function of parochial schools and therefore has the effect of furthering religion. Our case law does provide some indication that this distinction may be relevant to determining whether aid results in governmental indoctrination, see *Agostini*, 521 U. S., at 228–229; *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 12 (1993); but see *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 396 (1985), but we have never delineated the distinction's contours or held that it is constitutionally required.

Nor, to the extent that the supplement/supplant line is separable from respondents' direct/indirect and "no divertibility" arguments, do we need to resolve the distinction's constitutional status today, for, as we have already noted, Chapter 2 itself requires that aid may only be supplemental. 20 U. S. C. §7371(b). See also *post*, at 33 (O'CONNOR, J., concurring in judgment) (declining to decide whether supplement/supplant distinction is a constitutional requirement); but see *post*, at 17 (explaining that computers are "necessary" to "the educational process"). We presume that whether a parish has complied with that statutory requirement would be, at the very least, relevant to whether a violation of any constitutional supplement/supplant requirement has occurred, yet we have no reason to believe that there has been any material statutory violation. A statewide review by the Louisiana SEA indicated that §7371(b) receives nearly universal compliance. App. 112a. More importantly, neither the District Court nor the Fifth Circuit even hinted that Jefferson Parish had violated §7371(b), and respondents barely mention the statute in their brief to this Court, offering only the slimmest evidence of any possible violation, see *id.*, at 63a. Respondents argue that any Chapter 2 aid that a school uses to comply with state requirements (such as those relating to computers and libraries) necessarily violates whatever supplement/supplant line may exist in the Constitution, but our decision in *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646 (1980), upholding reimbursement to parochial schools of costs relating to state-mandated testing, rejects any such blanket rule.

1

Although some of our earlier cases, particularly *Ball*, 473 U. S., at 393–394, did emphasize the distinction between direct and indirect aid, the purpose of this distinction was merely to prevent "subsidization" of religion, see *id.*, at 394. As even the dissent all but admits, see *post*, at 22 (opinion of SOUTER, J.), our more recent cases address this purpose not through the direct/indirect distinction but rather through the principle of private choice, as incorporated in the first *Agostini* criterion (*i.e.*, whether any indoctrination could be attributed to the government). If aid to schools, even "direct aid," is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any "support of religion," *Witters*, *supra*, at 489. See *supra*, at 10–11. Although the presence of private choice is easier to see when aid literally passes through the hands of individuals– which is why we have mentioned directness in the same breath with private choice, see, *e.g.*, *Agostini*, *supra*, at 226; *Witters*, *supra*, at 487; *Mueller*, *supra*, at 399– there is no reason why the Establishment Clause requires such a form.

Indeed, *Agostini* expressly rejected the absolute line that respondents would have us draw. We there explained that "we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid." 521 U. S., at 225. *Agostini* relied primarily on *Witters* for this conclusion and made clear that private choice and neutrality would resolve the concerns formerly addressed by the rule in *Ball*. It was undeniable in *Witters* that the aid (tuition) would ultimately go to the Inland Empire School of the Bible and would support religious education. We viewed this arrangement, however, as no different from a government issuing a paycheck to one of its employees knowing that

the employee would direct the funds to a religious institution. Both arrangements would be valid, for the same reason: "[A]ny money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of' individuals." *Agostini*, *supra*, at 226 (quoting *Witters*, 474 U. S., at 487). In addition, the program in *Witters* was neutral. 521 U. S., at 225 (quoting *Witters*, *supra*, at 487).

As *Agostini* explained, the same reasoning was at work in *Zobrest*, where we allowed the government-funded interpreter to provide assistance at a Catholic school, "even though she would be a mouthpiece for religious instruction," because the interpreter was provided according to neutral eligibility criteria and private choice. 521 U. S., at 226. Therefore, the religious messages interpreted by the interpreter could not be attributed to the government, see *ibid*. (We saw no difference in *Zobrest* between the government hiring the interpreter directly and the government providing funds to the parents who then would hire the interpreter. 509 U. S., at 13, n. 11.) We rejected the dissent's objection that we had never before allowed "a public employee to participate directly in religious indoctrination." See *id*., at 18 (Blackmun, J., dissenting). Finally, in *Agostini* itself, we used the reasoning of *Witters* and *Zobrest* to conclude that remedial classes provided under Title I of the ESEA by public employees did not impermissibly finance religious indoctrination. 521 U. S., at 228; see *id*., at 230–232. We found it insignificant that students did not have to directly apply for Title I services, that Title I instruction was provided to students in groups rather than individually, and that instruction was provided in the facilities of the private schools. *Id*., at 226–229.

To the extent that respondents intend their direct/indirect distinction to require that any aid be literally placed in the hands of schoolchildren rather than given

directly to the school for teaching those same children, the very cases on which respondents most rely, *Meek* and *Wolman*, demonstrate the irrelevance of such formalism. In *Meek*, we justified our rejection of a program that loaned instructional materials and equipment by, among other things, pointing out that the aid was loaned to the schools, and thus was "direct aid." 421 U. S., at 362–363. The materials-and-equipment program in *Wolman* was essentially identical, except that the State, in an effort to comply with *Meek*, see *Wolman*, 433 U. S., at 233, 250, loaned the aid to the students. (The revised program operated much like the one we upheld in *Allen*. Compare *Wolman*, *supra*, at 248, with *Allen*, 392 U. S., at 243–245.) Yet we dismissed as "technical" the difference between the two programs: "[I]t would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." 433 U. S., at 250. *Wolman* thus, although purporting to reaffirm *Meek*, actually undermined that decision, as is evident from the similarity between the reasoning of *Wolman* and that of the *Meek* dissent. Compare *Wolman*, *supra*, at 250 (The "technical change in legal bailee" was irrelevant), with *Meek*, *supra*, at 391 (REHNQUIST, J., concurring in judgment in part and dissenting in part) ("Nor can the fact that the school is the bailee be regarded as constitutionally determinative"). That *Meek* and *Wolman* reached the same result, on programs that were indistinguishable but for the direct/indirect distinction, shows that that distinction played no part in *Meek*.

Further, respondents' formalistic line breaks down in the application to real-world programs. In *Allen*, for example, although we did recognize that students themselves received and owned the textbooks, we also noted that the books provided were those that the private schools required for courses, that the schools could collect students' requests for books and submit them to the board

of education, that the schools could store the textbooks, and that the textbooks were essential to the schools' teaching of secular subjects. See 392 U. S., at 243–245. Whether one chooses to label this program "direct" or "indirect" is a rather arbitrary choice, one that does not further the constitutional analysis.

Of course, we have seen "special Establishment Clause dangers," *Rosenberger*, 515 U. S., at 842, when *money* is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly. See 515 U. S., at 842 (collecting cases); *id.*, at 846–847 (O'CONNOR, J., concurring); see also *Bowen* v. *Kendrick*, 487 U. S. 589, 608–609 (1988); compare *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646 (1980), with *Levitt* v. *Committee for Public Ed. & Religious Liberty*, 413 U. S. 472 (1973).[8] But direct payments of money are not at issue in

[8]The reason for such concern is not that the form *per se* is bad, but that such a form creates special risks that governmental aid will have the effect of advancing religion (or, even more, a purpose of doing so). An indirect form of payment reduces these risks. See *Mueller*, 463 U. S., at 399 (neutral tax deduction, because of its indirect form, allowed economic benefit to religious schools only as result of private choice and thus did not suggest state sanction of schools' religious messages). It is arguable, however, at least after *Witters*, that the principles of neutrality and private choice would be adequate to address those special risks, for it is hard to see the basis for deciding *Witters* differently simply if the State had sent the tuition check directly to whichever school Witters chose to attend. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 848 (1995) (O'CONNOR, J., concurring) (explaining *Witters* as reconciling principle of neutrality with principle against public funding of religious messages by relying on principle of private choice). Similarly, we doubt it would be unconstitutional if, to modify *Witters*'s hypothetical, see 474 U. S., at 486–487; *supra*, at 17, a government employer directly sent a portion of an employee's paycheck to a religious institution designated by that employee pursuant to a neutral charitable program. We approved a similar arrangement in *Quick Bear*, 210 U. S., at 77–82, and the Federal Government appears to have long had such a program, see 1999 Catalog of Caring: Combined Federal Campaign of the National Capital Area 44,

this case, and we refuse to allow a "special" case to create a rule for all cases.

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Respondents also contend that the Establishment Clause requires that aid to religious schools not be impermissibly religious in nature or be divertible to religious use. We agree with the first part of this argument but not the second. Respondents' "no divertibility" rule is inconsistent with our more recent case law and is unworkable. So long as the governmental aid is not itself "unsuitable for use in the public schools because of religious content," *Allen*, *supra*, at 245, and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern. And, of course, the use to which the aid is put does not affect the criteria governing the aid's allocation and thus does not create any impermissible incentive under *Agostini*'s second criterion.

Our recent precedents, particularly *Zobrest*, require us to reject respondents' argument. For *Zobrest* gave no consideration to divertibility or even to actual diversion. Had such things mattered to the Court in *Zobrest*, we

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45, 59, 74–75 (listing numerous religious organizations, many of which engage in religious education or in proselytizing, to which federal employees may contribute via payroll deductions); see generally *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788 (1985) (discussing Combined Federal Campaign). Finally, at least some of our prior cases striking down direct payments involved serious concerns about whether the payments were truly neutral. See, *e.g.*, *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 762–764, 768, 774–780 (1973) (striking down, by 8-to-1 vote, program providing direct grants for maintenance and repair of school facilities, where payments were allocated per-pupil but were only available to private, nonprofit schools in low-income areas, "'all or practically all'" of which were Catholic). *Id.*, at 768.

would have found the case to be quite easy– for *striking down* rather than, as we did, upholding the program– which is just how the dissent saw the case. See, *e.g.*, 509 U. S., at 18 (Blackmun, J., dissenting) ("Until now, the Court never has authorized a public employee to participate directly in religious indoctrination"); *id.*, at 22 ("[G]overnment crosses the boundary when it furnishes the medium for communication of a religious message. . . . [A] state-employed sign-language interpreter would serve as the conduit for James' religious education, thereby assisting Salpointe [High School] in its mission of religious indoctrination"); *id.*, at 23 (interpreter "is likely to place the *imprimatur* of governmental approval upon the favored religion"); see generally *id.*, at 18–23. Quite clearly, then, we did not, as respondents do, think that the *use* of governmental aid to further religious indoctrination was synonymous with religious indoctrination *by* the government or that such use of aid created any improper incentives.

Similarly, had we, in *Witters*, been concerned with divertibility or diversion, we would have unhesitatingly, perhaps summarily, struck down the tuition-reimbursement program, because it was certain that Witters sought to participate in it to acquire an education in a religious career from a sectarian institution. Diversion was guaranteed. *Mueller* took the same view as *Zobrest* and *Witters*, for we did not in *Mueller* require the State to show that the tax deductions were only for the costs of education in secular subjects. We declined to impose any such segregation requirement for either the tuition-expense deductions or the deductions for items strikingly similar to those at issue in *Meek* and *Wolman*, and here. See *Mueller*, 463 U. S., at 391, n. 2; see also *id.*, at 414 (Marshall, J., dissenting) ("The instructional materials which are subsidized by the Minnesota tax deduction plainly may be used to inculcate religious values and

belief").

JUSTICE O'CONNOR acknowledges that the Court in *Zobrest* and *Witters* approved programs that involved actual diversion. See *post*, at 6 (opinion concurring in judgment). The dissent likewise does not deny that *Witters* involved actual diversion. See *post*, at 30, n. 16. The dissent does claim that the aid in *Zobrest* "was not considered divertible," *post*, at 30, n. 16, but the dissent in *Zobrest*, which the author of today's dissent joined, understood the case otherwise. See *supra*, at 22. As that dissent made clear, diversion is the use of government aid to further a religious message. See *Zobrest*, *supra*, at 21–22 (Blackmun, J., dissenting); see also *post*, at 6, 23 (O'CONNOR, J., concurring in judgment). By that definition, the government-provided interpreter in *Zobrest* was not only divertible, but actually diverted.

Respondents appear to rely on *Meek* and *Wolman* to establish their rule against "divertible" aid. But those cases offer little, if any, support for respondents. *Meek* mentioned divertibility only briefly in a concluding footnote, see 421 U. S., at 366, n. 16, and that mention was, at most, peripheral to the Court's reasoning in striking down the lending of instructional materials and equipment. The aid program in *Wolman* explicitly barred divertible aid, 433 U. S., at 248–249, so a concern for divertibility could not have been part of our reason for finding that program invalid.

The issue is not divertibility of aid but rather whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school. Similarly, the prohibition against the government providing impermissible content resolves the Establishment Clause concerns that

exist if aid is actually diverted to religious uses.[9] In *Agostini*, we explained *Zobrest* by making just this distinction between the content of aid and the use of that aid: "Because the only *government* aid in *Zobrest* was the interpreter, who was *herself not inculcating* any religious messages, no *government* indoctrination took place." 521 U. S., at 224 (second emphasis added). *Agostini* also acknowledged that what the dissenters in *Zobrest* had charged was essentially true: *Zobrest* did effect a "shift . . . in our Establishment Clause law." 521 U. S., at 225. The interpreter herself, assuming that she fulfilled her assigned duties, see *id.*, at 224–225, had "no inherent religious significance," *Allen*, 392 U. S., at 244 (discussing bus rides in *Everson*), and so it did not matter (given the neutrality and private choice involved in the program) that she "would be a mouthpiece for religious instruction," *Agostini*, *supra*, at 226 (discussing *Zobrest*). And just as a government interpreter does not herself inculcate a religious message– even when she is conveying one– so also a government computer or overhead projector does not itself inculcate a religious message, even when it is conveying one.

In *Agostini* itself, we approved the provision of public employees to teach secular remedial classes in private schools partly because we concluded that there was no reason to suspect that indoctrinating content would be part of such governmental aid. See 521 U. S., at 223–225,

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[9] The dissent would find an establishment of religion if a government-provided projector were used in a religious school to show a privately purchased religious film, even though a public school that possessed the same kind of projector would likely be constitutionally barred from *refusing* to allow a student bible club to use that projector in a classroom to show the very same film, where the classrooms and projectors were generally available to student groups. See *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993).

226–227, 234–235. Relying on *Zobrest*, we refused to presume that the public teachers would "'inject religious content'" into their classes, 521 U. S., at 225, especially given certain safeguards that existed; we also saw no evidence that they had done so, *id*., at 226–227.

In *Allen* we similarly focused on content, emphasizing that the textbooks were preapproved by public school authorities and were not "unsuitable for use in the public schools because of religious content." 392 U. S., at 245. See *Lemon*, 403 U. S., at 617 ("We note that the dissenters in *Allen* seemed chiefly concerned with the pragmatic difficulties involved in *ensuring the truly secular content* of the textbooks" (emphasis added)). Although it might appear that a book, because it has a pre-existing content, is not divertible, and thus that lack of divertibility motivated our holding in *Allen*, it is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message.[10] *Post*, at 20 (O'CONNOR, J., concurring in judgment) (agreeing with this point). Indeed, the plaintiffs in *Walker* essentially conceded as much. 46 F. 3d, at 1469, n. 17. A teacher could, for example, easily use Shakespeare's King Lear, even though set in pagan times, to illustrate the Fourth Commandment. See Exodus 20:12 ("Honor your father and your mother"). Thus, it is a non-sequitur for the dissent to contend that the textbooks in *Allen* were "not readily divertible to religious teaching purposes" because they "had a known and

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[10] Although we did, elsewhere in *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968), observe, in response to a party's argument, that there was no evidence that the schools were using secular textbooks to somehow further religious instruction, see *id*., at 248, we had no occasion to say what the consequence would be were such use occurring and, more importantly, we think that this brief concluding comment cannot be read, especially after *Zobrest* (not to mention *Witters*, *Mueller*, and *Agostini*) as essential to the reasoning of *Allen*.

fixed secular content." *Post*, at 28.

A concern for divertibility, as opposed to improper content, is misplaced not only because it fails to explain why the sort of aid that we have allowed is permissible, but also because it is boundless– enveloping all aid, no matter how trivial– and thus has only the most attenuated (if any) link to any realistic concern for preventing an "establishment of religion." Presumably, for example, government-provided lecterns, chalk, crayons, pens, paper, and paintbrushes would have to be excluded from religious schools under respondents' proposed rule. But we fail to see how indoctrination by means of (*i.e.*, diversion of) such aid could be attributed to the government. In fact, the risk of improper attribution is *less* when the aid *lacks* content, for there is no risk (as there is with books), of the government inadvertently providing improper content. See *Allen*, *supra*, at 255–262 (Douglas, J., dissenting). Finally, *any* aid, with or without content, is "divertible" in the sense that it allows schools to "divert" resources. Yet we have "'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.'" *Regan*, 444 U. S., at 658 (quoting *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973)).

It is perhaps conceivable that courts could take upon themselves the task of distinguishing among the myriad kinds of possible aid based on the ease of diverting each kind. But it escapes us how a court might coherently draw any such line. It not only is far more workable, but also is actually related to real concerns about preventing advancement of religion by government, simply to require, as did *Zobrest*, *Agostini*, and *Allen*, that a program of aid to schools not provide improper content and that it determine eligibility and allocate the aid on a permissible

basis.[11]

C

The dissent serves up a smorgasbord of 11 factors that, depending on the facts of each case "in all its particularity," *post*, at 11, could be relevant to the constitutionality of a school-aid program. And those 11 are a bare minimum. We are reassured that there are likely more.[12] See *post*, at 19, 22. Presumably they will be revealed in future cases, as needed, but at least one additional factor is evident from the dissent itself: The dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded. Compare *post*, at 1, 6, 36, 37, 45, n. 27, with *Agostini*, *supra*, at 233–234; *Bowen*, 487 U. S., at 617, n. 14; *Amos*, 483 U. S., at 339–340, n. 17. As JUSTICE O'CONNOR explained in dissent in *Aguilar*: "It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit." 473 U. S., at 429. While the dissent delights in the perverse chaos that all these factors produce, *post*, at 34; see also *post*, at 2, 19–20, the Constitution becomes unnecessarily clouded, and legislators, litigants, and lower courts groan, as the history of this case amply demonstrates. See Part I–B, *supra*.

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

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[11] JUSTICE O'CONNOR agrees that the Constitution does not bar divertible aid. See *post*, at 22–23 (opinion concurring in judgment). She also finds actual diversion unproblematic if "true private-choice" directs the aid. See *post*, at 6. And even when there is not such private choice, she thinks that some amount of actual diversion is tolerable and that safeguards for preventing and detecting actual diversion may be minimal, as we explain further, *infra*, at 34–36.

[12] It is thus surprising for the dissent to accuse us of following a rule of "breathtaking . . . manipulability." *Post*, at 36, n. 19.

that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. *Post*, at 19–22, 28–29, 33, 38–41. But that period is one that the Court should regret, and it is thankfully long past.

There are numerous reasons to formally dispense with this factor. First, its relevance in our precedents is in sharp decline. Although our case law has consistently mentioned it even in recent years, we have not struck down an aid program in reliance on this factor since 1985, in *Aguilar* and *Ball*. *Agostini* of course overruled *Aguilar* in full and *Ball* in part, and today JUSTICE O'CONNOR distances herself from the part of *Ball* with which she previously agreed, by rejecting the distinction between public and private employees that was so prominent in *Agostini*. Compare *post*, at 23–25, 29 (opinion concurring in judgment), with *Agostini*, *supra*, at 223–225, 234–235. In *Witters*, a year after *Aguilar* and *Ball*, we did not ask whether the Inland Empire School of the Bible was pervasively sectarian. In *Bowen*, a 1988 decision, we refused to find facially invalid an aid program (although one not involving schools) whose recipients had, the District Court found, included pervasively sectarian institutions. See 487 U. S., at 636, 647, 648 (Blackmun, J., dissenting). Although we left it open on remand for the District Court to reaffirm its prior finding, we took pains to emphasize the narrowness of the "pervasively sectarian" category, see *id*., at 620–621 (opinion of the Court), and two Members of the majority questioned whether this category was "well-founded," *id*., at 624 (KENNEDY, J., joined by SCALIA, J., concurring). Then, in *Zobrest* and *Agostini*, we upheld aid programs to children who attended schools that were not only pervasively sectarian but also were primary and secondary. *Zobrest*, in turning away a challenge based on the pervasively sectarian nature of Salpointe Catholic High School, emphasized the presence of private choice and the absence of government-provided sectarian content. 509

U. S., at 13. *Agostini*, in explaining why the aid program was constitutional, did not bother to mention that pervasively sectarian schools were at issue,[13] see 521 U. S., at 226–235, a fact that was not lost on the dissent, see *id.*, at 249 (opinion of SOUTER, J.). In disregarding the nature of the school, *Zobrest* and *Agostini* were merely returning to the approach of *Everson* and *Allen*, in which the Court upheld aid programs to students at pervasively sectarian schools. See *post*, at 8–9, 20 (SOUTER, J., dissenting) (noting this fact regarding *Everson*); *Allen*, 392 U. S., at 251–252 (Black, J., dissenting); *id.*, at 262–264, 269–270, n. (Douglas, J., dissenting).

Second, the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. See *supra*, at 10. If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.

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

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[13] Nor does JUSTICE O'CONNOR do so today in her analysis of Jefferson Parish's Chapter 2 program.

Resources of Ore. v. *Smith*, 494 U. S. 872, 887 (1990) (collecting cases). Yet that is just what this factor requires, as was evident before the District Court. Although the dissent welcomes such probing, see *post*, at 39–41, we find it profoundly troubling. In addition, and related, 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. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *Widmar* v. *Vincent*, 454 U. S. 263 (1981).

Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Cf. *Chicago* v. *Morales*, 527 U. S. 41, 53–54, n. 20 (1999) (plurality opinion). Although the dissent professes concern for "the implied exclusion of the less favored," *post*, at 1, the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." See generally Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992). Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt* v. *McNair*, 413 U. S., at 743, it coined the term "pervasively sectarian"– a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools. See *post*, at 20–21, 39–41

(SOUTER, J., dissenting).

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.

III

Applying the two relevant *Agostini* criteria, we see no basis for concluding that Jefferson Parish's Chapter 2 program "has the effect of advancing religion." *Agostini*, *supra*, at 234. Chapter 2 does not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content. Nor does Chapter 2 define its recipients by reference to religion.

Taking the second criterion first, it is clear that Chapter 2 aid "is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, *supra*, at 231. Aid is allocated based on enrollment: "Private schools receive Chapter 2 materials and equipment based on the per capita number of students at each school," *Walker*, 46 F. 3d, at 1464, and allocations to private schools must "be equal (consistent with the number of children to be served) to expenditures for programs under this subchapter for children enrolled in the public schools of the [LEA]," 20 U. S. C. §7372(b). LEA's must provide Chapter 2 materials and equipment for the benefit of children in private schools "[t]o the extent consistent with the number of children in the school district of [an LEA] . . . who are enrolled in private nonprofit elementary and secondary schools." §7372(a)(1). See App. to Pet. for Cert. 87a (Dis-

trict Court, recounting testimony of head of Louisiana's Chapter 2 program that LEA's are told that "for every dollar you spend for the public school student, you spend the same dollar for the non-public school student'"); §§7372(a)(1) and (b) (children in private schools must receive "equitable participation"). The allocation criteria therefore create no improper incentive. Chapter 2 does, by statute, deviate from a pure per capita basis for allocating aid to LEA's, increasing the per-pupil allocation based on the number of children within an LEA who are from poor families, reside in poor areas, or reside in rural areas. §§7312(a)–(b). But respondents have not contended, nor do we have any reason to think, that this deviation in the allocation *to* the LEA's leads to deviation in the allocation among schools *within* each LEA, see §§7372(a)–(b), and, even if it did, we would not presume that such a deviation created any incentive one way or the other with regard to religion.

Chapter 2 also satisfies the first *Agostini* criterion. The program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof. §7372; see §7353(a)(3). We therefore have no difficulty concluding that Chapter 2 is neutral with regard to religion. See *Agostini*, *supra*, at 225–226. Chapter 2 aid also, like the aid in *Agostini*, *Zobrest*, and *Witters*, reaches participating schools only "as a consequence of private decisionmaking." *Agostini*, *supra*, at 222. Private decisionmaking controls because of the per capita allocation scheme, and those decisions are independent because of the program's neutrality. See 521 U. S. at 226. It is the students and their parents– not the government– who, through their choice of school, determine who receives Chapter 2 funds. The aid follows the child.

Because Chapter 2 aid is provided pursuant to private choices, it is not problematic that one could fairly describe Chapter 2 as providing "direct" aid. The materials and

equipment provided under Chapter 2 are presumably used from time to time by entire classes rather than by individual students (although individual students are likely the chief consumers of library books and, perhaps, of computers and computer software), and students themselves do not need to apply for Chapter 2 aid in order for their schools to receive it, but, as we explained in *Agostini*, these traits are not constitutionally significant or meaningful. See *id.*, at 228–229. Nor, for reasons we have already explained, is it of constitutional significance that the schools themselves, rather than the students, are the bailees of the Chapter 2 aid. The ultimate beneficiaries of Chapter 2 aid are the students who attend the schools that receive that aid, and this is so regardless of whether individual students lug computers to school each day or, as Jefferson Parish has more sensibly provided, the schools receive the computers. Like the Ninth Circuit, and unlike the dissent, *post*, at 22, we "see little difference in loaning science kits to students who then bring the kits to school as opposed to loaning science kits to the school directly." *Walker*, *supra*, at 1468, n. 16; see *Allen*, 392 U. S., at 244, n. 6.

Finally, Chapter 2 satisfies the first *Agostini* criterion because it does not provide to religious schools aid that has an impermissible content. The statute explicitly bars anything of the sort, providing that all Chapter 2 aid for the benefit of children in private schools shall be "secular, neutral, and nonideological," §7372(a)(1), and the record indicates that the Louisiana SEA and the Jefferson Parish LEA have faithfully enforced this requirement insofar as relevant to this case. The chief aid at issue is computers, computer software, and library books. The computers presumably have no pre-existing content, or at least none that would be impermissible for use in public schools. Respondents do not contend otherwise. Respondents also offer no evidence that religious schools have received

software from the government that has an impermissible content.

There is evidence that equipment has been, or at least easily could be, diverted for use in religious classes. See, *e.g.*, App. 108a, 118a, 205a–207a. JUSTICE O'CONNOR, however, finds the safeguards against diversion adequate to prevent and detect actual diversion. *Post*, at 27, 33 (opinion concurring in judgment). The safeguards on which she relies reduce to three: (1) signed assurances that Chapter 2 aid will be used only for secular, neutral, and nonideological purposes, (2) monitoring visits, and (3) the requirement that equipment be labeled as belonging to Chapter 2.[14] As to the first, JUSTICE O'CONNOR rightly places little reliance on it. *Post*, at 27. As to the second, monitoring by SEA and LEA officials is highly unlikely to prevent or catch diversion.[15] As to the third, compliance

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[14] Many of the other safeguards on which JUSTICE O'CONNOR relies are safeguards against improper content, not against diversion. See *post*, at 27, 28–29 (opinion concurring in judgment). Content is a different matter from diversion and is much easier to police than is the mutable use of materials and equipment (which is one reason that we find the safeguards against improper content adequate, *infra*, at 36–37). Similarly, the statutory provisions against supplanting nonfederal funds and against paying federal funds for religious worship or instruction, on which JUSTICE O'CONNOR also relies, *post*, at 27, are of little, if any, relevance to diversion– the former because diversion need not supplant, and the latter because religious schools receive no funds, 20 U. S. C. §7372(c)(1).

[15] The SEA director acknowledged as much when he said that the SEA enforces the rule against diversion "as best we can," only visits "[o]ne or two" of the private schools whenever it reviews an LEA, and reviews each LEA only once every three years. App. 94a–95a. When asked whether there was "any way" for SEA officials to know of diversion of a Chapter 2 computer, he responded, "No, there is no way." *Id*., at 118a.

Monitoring by the Jefferson Parish LEA is similarly ineffective. The LEA visits each private school only once a year, for less than an hour and a half, and alerts the school to the visit in advance. *Id*., at 142a,

with the labeling requirement is haphazard, see App. 113a, and, even if the requirement were followed, we fail to see how a label prevents diversion.[16] In addition, we agree with the dissent that there is evidence of actual diversion and that, were the safeguards anything other than anemic, there would almost certainly be more such

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151a–152a, 182a–183a. The monitoring visits consist of reviewing records of equipment use and of speaking to a single contact person. Self-reporting is the sole source for the records of use. *Id*., at 140a. In the case of overhead projectors, the record appears to be just a sign-out sheet, and the LEA official simply checks whether "the recordation of use is attempted." *Id*., at 143a. The contact person is not a teacher; monitoring does not include speaking with teachers; and the LEA makes no effort to inform teachers of the restrictions on use of Chapter 2 equipment. *Id*., at 154a–155a. The contact person also is usually not involved with the computers. *Id*., at 163a. Thus, the contact person is uninvolved in the actual use of the divertible equipment and, therefore, in no position to know whether diversion has occurred. See *id*., at 154a. Unsurprisingly, then, no contact person has ever reported diversion. *Id*., at 147a. (In *Agostini*, by contrast, monitors visited each classroom– unannounced– once a month, and the teachers received specific training in what activities were permitted. 521 U. S., at 211–212, 234.) The head of the Jefferson Parish LEA admitted that she had, and could have, no idea whether Chapter 2 equipment was being diverted:

"Q: Would there be any way to ascertain, from this on-site visit, whether the material or equipment purchased are used not only in accordance with Chapter 2 plan submitted, but for other purposes, also?

"A: No.

"Q: Now, would it be your view that a church-affiliated school that would teach the creation concept of the origin of man, that if they used [a Chapter 2] overhead projector, that would be a violation . . . ?

"A: Yes.

"Q: Now, is there any way, do you ever ask that question of a church-affiliated school, as to whether they use it for that purpose?

"A: No." App. 144a, 150a–151a.

See *id*., at 139a, 145a, 146a–147a (similar).

[16] In fact, a label, by associating the government with any religious use of the equipment, exacerbates any Establishment Clause problem that might exist when diversion occurs.

evidence. See *post*, at 38, 42–46.[17] In any event, for reasons we discussed in Part II–B–2, *supra*, the evidence of actual diversion and the weakness of the safeguards against actual diversion are not relevant to the constitutional inquiry, whatever relevance they may have under the statute and regulations.

Respondents do, however, point to some religious books that the LEA improperly allowed to be loaned to several religious schools, and they contend that the monitoring programs of the SEA and the Jefferson Parish LEA are insufficient to prevent such errors. The evidence, however, establishes just the opposite, for the improper lending of library books occurred– and was discovered and remedied– before this litigation began almost 15 years ago.[18] In other words, the monitoring system worked. See *post*, at 32 (O'CONNOR, J., concurring in judgment). Further, the violation by the LEA and the private schools was minor and, in the view of the SEA's coordinator, inadver-

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[17] JUSTICE O'CONNOR dismisses as *de minimis* the evidence of actual diversion. *Post*, at 29–31 (opinion concurring in judgment). That may be, but it is good to realize just what she considers *de minimis*. There is persuasive evidence that Chapter 2 audiovisual equipment was used in a Catholic school's theology department. "[M]uch" of the equipment at issue "was purchased with Federal funds," App. 205a, and those federal funds were, from the 1982–1983 school year on, almost certainly Chapter 2 funds, see *id.*, at 210a; cf. *id.*, at 187a, 189a. The diversion occurred over seven consecutive school years, *id.*, at 206a–207a, and the use of the equipment in the theology department was massive in each of those years, outstripping in every year use in other departments such as science, math, and foreign language, *ibid.* In addition, the dissent has documented likely diversion of computers. *Post*, at 45.

[18] The coordinator of the Jefferson Parish LEA ordered the books recalled sometime in the summer or early fall of 1985, and it appears that the schools had complied with the recall order by the second week of December 1985. App. 162a, 80a–81a. Respondents filed suit in early December. This self-correction is a key distinction between this instance of providing improper content and the evidence of actual diversion. See n. 17, *supra*.

tent. See App. 122a. There were approximately 191 improper book requests over three years (the 1982–1983 through 1984–1985 school years); these requests came from fewer than half of the 40 private schools then participating; and the cost of the 191 books amounted to "less than one percent of the total allocation over all those years." *Id.*, at 132a–133a.

The District Court found that prescreening by the LEA coordinator of requested library books was sufficient to prevent statutory violations, see App. to Pet. for Cert. 107a, and the Fifth Circuit did not disagree. Further, as noted, the monitoring system appears adequate to catch those errors that do occur. We are unwilling to elevate scattered *de minimis* statutory violations, discovered and remedied by the relevant authorities themselves prior to any litigation, to such a level as to convert an otherwise unobjectionable parishwide program into a law that has the effect of advancing religion.

IV

In short, Chapter 2 satisfies both the first and second primary criteria of *Agostini*. It therefore does not have the effect of advancing religion. For the same reason, Chapter 2 also "cannot reasonably be viewed as an endorsement of religion," *Agostini*, *supra*, at 235. Accordingly, we hold that Chapter 2 is not a law respecting an establishment of religion. Jefferson Parish need not exclude religious schools from its Chapter 2 program.[19] To the extent that

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[19] Indeed, as petitioners observe, to require exclusion of religious schools from such a program would raise serious questions under the Free Exercise Clause. See, *e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); *Everson*, 330 U. S., at 16; cf. *Rosenberger*, 515 U. S. 819 (holding that Free Speech Clause bars exclusion of religious viewpoints from limited public forum).

Meek and *Wolman* conflict with this holding, we overrule them.

Our conclusion regarding *Meek* and *Wolman* should come as no surprise. The Court as early as *Wolman* itself left no doubt that *Meek* and *Allen* were irreconcilable, see 433 U. S., at 251, n. 18, and we have repeatedly reaffirmed *Allen* since then, see, *e.g.*, *Agostini*, *supra*, at 231. (In fact, *Meek*, in discussing the materials-and-equipment program, did not even cite *Allen*. See *Meek*, 421 U. S., at 363–366.) Less than three years after *Wolman*, we explained that *Meek* did not, despite appearances, hold that "all loans of secular instructional material and equipment inescapably have the effect of direct advancement of religion." *Regan*, 444 U. S., at 661–662 (internal quotation marks omitted). Then, in *Mueller*, we conceded that the aid at issue in *Meek* and *Wolman* did "resembl[e], in many respects," the aid that we had upheld in *Everson* and *Allen*. 463 U. S., at 393, and n. 3; see *id.*, at 402, n. 10; see also *id.*, at 415 (Marshall, J., dissenting) (viewing *Allen* as incompatible with *Meek* and *Wolman*, and the distinction between textbooks and other instructional materials as "simply untenable"). Most recently, *Agostini*, in rejecting *Ball*'s assumption that "all government aid that directly assists the educational function of religious schools is invalid," *Agostini*, *supra*, at 225, necessarily rejected a large portion (perhaps all, see *Ball*, 473 U. S., at 395) of the reasoning of *Meek* and *Wolman* in invalidating the lending of materials and equipment, for *Ball* borrowed that assumption from those cases. See 521 U. S., at 220–221 (Shared Time program at issue in *Ball* was "surely invalid . . . [g]iven the holdings in *Meek* and *Wolman*" regarding instructional materials and equipment). Today we simply acknowledge what has long been evident and was evident to the Ninth and Fifth Circuits and to the District Court.

The judgment of the Fifth Circuit is reversed.

It is so ordered.