A COAT OF MANY COLORS: THE RELIGIOUS NEUTRALITY DOCTRINE FROM *EVERSON* TO *HEIN*

Max Guirguis*

> *The attitude of government toward religion must, as this Court has frequently observed, be one of neutrality. Neutrality is, however, a coat of many colors.*[1]

Few areas of constitutional jurisprudence are more fraught with difficulties than the Establishment Clause, where the United States Supreme Court has long labored to fashion a workable standard. One such difficulty is in setting clear boundaries between church and state as constitutionally mandated, while simultaneously allowing religious institutions to perform some public functions for the benefit of society and its members. This delicate balance, which the Court has striven to maintain in its Establishment Clause decisions, found expression in the principle of religious neutrality. What this meant, in theory, was that government should be neither hostile nor indulgent toward religion. In practice, however, neutrality proved to be a rather elusive ideal that underwent substantial modification to acquire its present meaning and will continue to change in the future as the Establishment Clause remains an unsettled area that needs considerable work, especially with regard to cooperative church–state relations.

This Article seeks to contribute to an understanding of how the neutrality principle has evolved over the course of a century and how this gradual evolution ultimately yielded a more relaxed definition of neutrality. More specifically, it explores the complex institutional interplay between government and religion to

 Associate Professor of Political Science, Shepherd University. Ph.D., Auburn University, 2001; M.S., Long Island University, 1994; B.S., New Jersey City University, 1992.

1. *Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

contend and find that the Supreme Court has come to abandon its formerly restrictive approach to church–state cooperation in favor of a more permissive norm. Toward this end, this Article traces the development of the neutrality principle and review the relevant caselaw. As this Article progresses, it highlights some of the precedent-setting cases and discuss the insights and reservations expressed by Supreme Court Justices and legal scholars on the use of public funds for sectarian purposes. Against this framework of analysis, this Article draws two basic conclusions. One is that the Court has traditionally interpreted the Establishment Clause in a highly strict and forceful manner to forbid the government from providing even nonpreferential direct aid to religion. The second is that the Court has all but rejected as unduly restrictive the 1971 *Lemon*[2] test to allow for a wider scope of government aid to sectarian bodies under the Establishment Clause. The upshot of this accommodationist trend, as amply attested by recent judicial decisions, is that Jefferson's once-impregnable "wall of separation"[3] no longer poses a serious obstacle to government aid of religion or to religious presence in the public sphere.

I. THE SUPREME COURT'S EARLIEST APPROACH TO NEUTRALITY

Religious neutrality has a long and checkered history of development that dates back to the late nineteenth century. It can be traced to the 1899 Supreme Court case of *Bradfield v. Roberts*,[4] the first of two preincorporation Establishment Clause cases that delineated church–state boundaries. In 1897, pursuant to a law promulgated by Congress, the Commissioners of the District of Columbia agreed to fund the construction of a new building in Providence Hospital, a nonprofit healthcare organization owned and operated by the Sisters of Mercy order of Roman

2. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

3. Ltr. from Thomas Jefferson, U.S. Pres., to the Danbury Baptist Ass'n (Jan. 1, 1802). The phrase "wall of separation" came to popular use in the twentieth century and has appeared twenty-five times in Supreme Court opinions to refer to the command of religious neutrality set forth in the Establishment Clause. *See e.g. Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1946) (noting that "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'").

4. 175 U.S. 291 (1899).

Catholic nuns.[5] Under the terms of the agreement, two-thirds of the beds in the new facility would be reserved for indigent patients referred to the hospital by the city, which would also subsidize the care given to these patients, subject to congressional appropriations.[6] Naming the United States Treasurer as the defendant, Joseph Bradfield and other Washington, D.C. residents challenged the agreement under the Establishment Clause to enjoin the use of federal funds for the hospital project.[7] The unprecedented question raised by this litigation, which presented itself time and again in different contexts in future cases, was whether the Establishment Clause precluded the federal government from aiding a religiously affiliated provider of social services, such as a hospital, orphanage, or retirement home.[8]

The district court ruled in favor of the plaintiffs, but the court of appeals reversed, and the case ultimately went before the United States Supreme Court. Rejecting the Establishment Clause claim, the Court unanimously upheld the constitutionality of the contract between the city commissioners and the directors of the hospital to erect a new building for the benefit of the indigent residents of the District of Columbia.[9] In reaching its decision, the Court focused on the nature of the organization and the services it provided rather than on the "individuals who compose the corporation under its charter."[10] Because the services rendered were secular, the Court deemed it "wholly immaterial" that the hospital was affiliated with a religious society.[11] The fact that the Catholic Church exercised control over the management did not "alter the legal character of the corporation" or "the specific and limited object of its creation."[12] The Court went on to conclude that the granting of federal funds to finance a hospital

5. *Id.* at 292.

6. *Id.* at 294.

7. *Id.* at 292.

8. The *Bradfield* decision was confined to a hospital run by a religious organization, but the Court indicated that its ruling could be applied in other contexts by referring to the hospital as a "nonsectarian and secular corporation," despite being in charge of "members of a monastic order or sisterhood of the Roman Catholic Church." *Id.* at 298, 292.

9. Although Providence Hospital was administered by the Roman Catholic Church, Joseph Bradfield and his co-litigants failed to provide any evidence that "its hospital work is confined to members of that church." *Id.* at 298.

10. *Id.*

11. *Id.*

12. *Id.* at 298–299 (internal quotation marks omitted).

project to serve the public at large did not constitute an establishment of religion because caring for the sick or tending to the infirm is not a religious activity in any meaningful sense.[13]

Bradfield established that government aid to church-affiliated nonprofit organizations that perform secular community services is constitutionally permissible, so long as the public funds are not used for sectarian purposes.[14] Though clear and inexorable, *Bradfield*'s reasoning was more contextual than doctrinal. The Court was content in ruling on the given facts without undertaking an elaborate construction of the Establishment Clause. Nor did the Court consider the meaning and scope of the Clause in its second preincorporation case, *Quick Bear v. Leupp*,[15] which was another victory for sectarian institutions—the Catholic Indian Missions.[16]

At issue in *Quick Bear* was the proposed use of a federal trust fund that was created by Congress to advance the economic and educational growth of the Sioux Nation and held in a federal account under the trusteeship of the Secretary of the Interior.[17] When some Sioux Indians sought to use the funds to send their children to Catholic schools on Indian reservations, Congress declared that the cash payments would be withheld, whereupon the tribe sued the federal officials administering the fund.[18]

---

13. *Id.* at 299–300. *See* Leonard F. Manning, *Aid to Education—Federal Fashion*, 29 Fordham L. Rev. 495, 513 (1961) (noting that *Bradfield* elucidated the principle that "a religious establishment is not synonymous with an establishment of religion").

14. Timothy S. Burgett emphatically contends that the rationale underlying the *Bradfield* decision has long been abandoned. *See* Timothy S. Burgett, *Government Aid to Religious Social Services Providers: The Supreme Court's "Pervasively Sectarian" Standard*, 75 Va. L. Rev. 1077, 1078 n. 5 (1989) (claiming that "its analysis [is] completely divorced from that of modern [E]stablishment [C]lause jurisprudence"). However, both the Burger and Rehnquist Courts have cited *Bradfield* as providing support for the constitutionality of public aid to religiously affiliated organizations. *See Hunt v. McNair*, 413 U.S. 734, 742–743 (1973) (stating that under *Bradfield*, among other precedents, "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected"); *see also Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (noting approvingly that "in the [*Bradfield*] Court's view, the giving of federal aid to the hospital was entirely consistent with the Establishment Clause").

15. 210 U.S. 50 (1908).

16. *Constitutional Debates on Freedom of Religion: A Documentary History* 138 (John J. Patrick & Gerald P. Long, eds., Greenwood Press 1999) (explaining that neither *Bradfield* nor *Quick Bear* "produced a comprehensive analysis of the meaning of the [E]stablishment [C]lause").

17. *Quick Bear*, 210 U.S. at 51–52.

18. *Id.* at 50.

Deciding the case favorably to the Sioux, the Supreme Court carefully drew a distinction between the "public moneys of the United States" and the "'tribal funds,' which belong to the Indians themselves."[19] Since the federal government was but a trustee of the funds, the Court reasoned, Congress could not deny the Sioux Indians from using "their own money to educate their children in the schools of their own choice."[20] Conceivably, the Court could have reached a different disposition had Congress directly appropriated the federal funds to the religious institutions. Critics of the *Quick Bear* decision, however, maintain that the Court merely made a "distinction without much difference" because so-called "treaty funds" are virtually indistinguishable from any other public funds levied by taxation.[21]

Writing for a unanimous Court, Chief Justice Fuller used the term "establishment" only once and in a cursory manner,[22] yet it could be inferred from the analysis that he sanctioned the expenditure of the tribal trust fund on parochial education because "the owners of the fund" made the school choices and the government did not "act in a sectarian capacity."[23] Further, it would not be an overreading of the decision to say that the Court found no constitutional breach because the funds went to the religious schools indirectly as a result of the beneficiaries' private choices rather than directly as a result of government policy. As will be evident from the subsequent discussion, this same rationale, or a slight variant thereof, has come to form the basis for the Supreme Court's accommodationist approach to aid cases as the twentieth century approached conclusion, bringing Establishment Clause exposition almost full circle.

II. THE ESTABLISHMENT CLAUSE INCORPORATED AND EXPLICATED

It was not until 1947 that the Supreme Court discussed the historical purposes and functions of the Establishment Clause in the epoch-making case of *Everson v. Board of Education of the*

19. *Id.* at 77.
20. *Id.* at 81.
21. Eustace Cullinan, *The White House and the Vatican: The Legal Aspects*, 38 ABA J. 471, 474 (June 1952).
22. *Quick Bear*, 210 U.S. at 82.
23. *Id.* at 81.

Township of Ewing.[24] In fact, prior to *Everson*, the Supreme Court had not even explained what "establishment of religion" meant.[25] The case involved an unsuccessful challenge to a New Jersey statute that authorized "local school districts to make rules and contracts for the transportation of children to and from schools."[26] A narrowly divided Court found no constitutional defects in the state law, or the reimbursement program based thereon, because the law was "passed to satisfy a public need" and the program paid the "bus fares of all school children, including those who attend parochial schools."[27]

Everson stands out as a milestone in constitutional history for incorporating the Establishment Clause into the Due Process Clause of the Fourteenth Amendment, thereby making it applicable to the states, just as if the text of the First Amendment was modified to read: "Neither Congress nor the states shall make any law respecting an establishment of religion."[28] Incorporation was a logical and vital step because prior to incorporation, the states were able to commit, with impunity, what was a cardinal sin for the federal government—a fact that limited the effectiveness, if not defeated the purpose, of various constitutional interdictions.[29] As expected, the Clause's incorporation opened the litigation floodgates because most of the public-aid programs were state-administered, and most of the public-funding restrictions were state-imposed.[30] This slew of cases, in turn, gave federal courts ample opportunities to examine the

24. 330 U.S. 1 (1947).

25. *Id.* at 29 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting). "This case forces us to determine squarely for the first time what was 'an establishment of religion' in the First Amendment's conception . . . ." *Id.*; *see also* Roald Mykkeltvedt, *Tension between the Religion Clauses of the First Amendment:* Mozert v. Hawkins County Public Schools, 56 Tenn. L. Rev. 693, 697 (1989) (stating that "the *Everson* Court formulated the first general exposition of that previously dormant provision").

26. *Everson*, 330 U.S. at 3.

27. *Id.* at 6.

28. *See id.* at 16, 18 (evaluating the New Jersey law through the First Amendment).

29. A glaring example of the preincorporation denial of federally guaranteed rights and liberties at the hands of the states is that of Samuel Green, a former slave who was sentenced to ten years in prison for owning a copy of *Uncle Tom's Cabin* in violation of a Maryland law that criminalized the mere possession of the anti-slavery novel. William McKee Evans, *Open Wound: The Long View of Race in America* 137 (U. of Ill. Press 2009).

30. *See* Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 Wm. & Mary L. Rev. 771, 816 (2001) (noting that "*Everson* began the Court's serious nonestablishment work," which focused on "state financing of Catholic schools" and "religious exercises").

question of public aid to religion and, in the process, chart the contours of the Establishment Clause.

Another notable contribution of *Everson* to First Amendment jurisprudence is that the Court used it to articulate, for the first time, a clear and coherent conception of "neutrality" as the tone and tenor that should characterize the government's relation to religion.[31] Speaking for a five-Justice majority, Justice Hugo Black determined that the State of New Jersey had remained neutral with respect to religion because it did "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[32] In making this determination, Justice Black likened the busing of students to other neutral public services such as policing, fire protection, and sewage disposal, which are "separate and so indisputably marked off from the religious function."[33] Therefore, Justice Black concluded, to exclude certain groups "because of their faith, or lack of it, from receiving the benefits of public welfare legislation,"[34] would be to violate the First Amendment that "requires the state to be a neutral in its relations with groups of religious believers and non-believers."[35]

Paradoxically, the dissent disagreed with the Court's holding but fully supported its reading and understanding of the Establishment Clause.[36] The particular source of the dissent's vexation was that Justice Black presented a convincing case for a finding of unconstitutionality using strong separationist language only to reach an accommodationist result.[37] The four dissenters were

---

31. *See* Daan Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 Md. L. Rev. 352, 356 (1986) (stating that the *Everson* Court drew a "fine line between permissible accommodation and impermissible endorsement of religion").

32. *Everson*, 330 U.S. at 18.

33. *Id.* at 17–18.

34. *Id.* at 16 (emphasis removed).

35. *Id.* at 18.

36. *See id.* at 28–63 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting) (explaining how the reasoning should have resulted in the opposite conclusion).

37. The following separationist statement became one of the most cited quotations from Justice Black's decision, which nonetheless upheld the state aid program:

> The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.

Id. at 15 (majority) (internal quotation marks omitted).

puzzled because Justice Black's expansive historical analysis and lucid constitutional interpretation of the Clause's objectives and strictures, which they heartily approved, produced a patently incongruous outcome.[38] In an acerbic dissent, Justice Jackson captured this sentiment by jibing that Justice Black's opinion was "utterly discordant with its conclusion" and castigating the majority for "its failure to apply the principles it avow[ed]."[39] It should thus be noted that while the nine Justices were sharply divided over the fate of the contested transportation program, they seemed in unison in viewing the Establishment Clause not only as binding on the states, but also as erecting a wall of separation between church and state.[40]

Although Justice Jackson might have been correct in his critical observations, the majority opinion's mixed rhetoric or seeming ambivalence was emblematic of the tightrope that the Court had to walk on after *Everson* to harmonize the conflicting views of its accommodationist and separationist wings that emerged with the incorporation of the two religion clauses in the 1940s.[41] The majority, per Justice Black, adopted a stance of "benevolent neutrality" based on an interpretation that the First Amendment prescribes that "State power is no more to be used so as to handicap religions, than it is to favor them."[42] The four-Justice minority, led by Justice Rutledge, on the other hand, adopted a stance of "strict neutrality" based on an interpretation that the First Amendment's purpose "was to create a complete

38. Jay Alan Sekulow, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions* 228 (Sheed & Ward 2006) (noting that "[Justice] Black's interpretation of the Establishment Clause seemed to allow no aid to religion whatsoever, and adopted Jefferson's wall metaphor as its true intent").

39. *Everson*, 330 U.S. at 19, 25 (Jackson, J., dissenting).

40. The Court's inconsistent positions in *Everson* complicated its Establishment Clause jurisprudence and made it harder to reach consensus in future aid cases. *See* John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. Pitt. L. Rev. 83, 86 (1986) (stating that "*Everson* created a dilemma when it simultaneously adopted two different and incompatible conceptions of Establishment Clause neutrality—a separationist conception prohibiting aid to religion and an accommodationist conception allowing religious participation in secular governmental programs of general social benefit").

41. *See e.g. Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause seven years before the Establishment Clause's incorporation in *Everson*).

42. *Everson*, 330 U.S. at 18. Although the term "benevolent neutrality" was coined by Chief Justice Burger more than two decades after *Everson* in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970), it very appropriately characterizes *Everson*'s holding because it describes the same nonadversarial government policy that Justice Black seemed to advocate.

and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[43] The tension between these two competing interpretations remains largely unresolved, although the Court has generally backed away from strict neutrality as its composition grew more conservative in the four decades since the end of the Warren Court in 1969.[44]

A second point of contention, which required another balancing act, was the proper role of the judiciary vis-à-vis the political institutions in the federal scheme. The tension here was not within the Court, but rather between popular will (as expressed by elected representatives) and constitutional constraints, which the federal judiciary is often called upon to resolve.[45] Loath to disturb the decisions of the local school board, the majority assumed a restraintist position to preserve a policy that concededly served the "public's interest in the general education of all children."[46] The dissent, on the other hand, focused on the constitutional status of the policy almost to the exclusion of the public purpose it served based on the central premise that judicial review could, indeed should be exercised to invalidate any appropriations act that contravenes the Establishment Clause, however beneficial it may be.[47]

---

43. *Everson*, 330 U.S. at 31–32 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting).

44. Though often accused of suppressing religion for its invariably strict separationism, the Warren Court was merely trying to adapt constitutional interpretation to an increasingly pluralistic society with diverse religious beliefs. *See* Bernard Schwartz, *The Warren Court: A Retrospective* 23, 270, 347 (Oxford U. Press 1996) (arguing that the Warren Court drew on the political theory of pluralistic democracy).

45. This policy debate has not been confined to judicial tribunals; it has long been waged in academic circles, too. For instance, Richard Albert is of the opinion that the question of "whether Establishment Clause neutrality should be strict or benevolent is a decision better left to the people through the legislature, with the check of judicial review to ensure that neutrality—however defined by the people—remains the rule." Richard Albert, *Popular Will and the Establishment Clause: Rethinking Public Funding to Religious Schools*, 35 U. Mem. L. Rev. 199, 206 (2005). In contrast, Karl Schock maintains that "permissive accommodation places the power of constitutional interpretation almost entirely in the hands of the legislature," which in turn "breeds discrimination" and ultimately causes the religion "clauses to lose their constitutional force." Karl Schock, Student Author, *Permissive Discrimination and the Decline of Religion Clause Jurisprudence: The Wearing out of the Joints*, 77 U. Colo. L. Rev. 229, 230, 237–238 (2006).

46. *Everson*, 330 U.S. at 6.

47. *Id.* at 52–53 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting). Although Justice Rutledge agreed with the majority's interpretation of the Establishment Clause and recognized the purpose of the contested statute, he submitted that the Court should

III. THE PATH TO LEMON v. KURTZMAN

The spate of state aid to religion cases that followed *Everson* enabled the Supreme Court to further develop its burgeoning theory of neutrality. Building on *Everson*'s doctrinal foundation, the Court gradually established a set of criteria for determining when government action had crossed the line of neutrality.[48] The earliest Establishment Clause standard was enunciated in the 1963 case of *Abington School District v. Schempp*,[49] in which the Court struck down the officially sanctioned daily Bible reading and the recitation of the Lord's Prayer in public schools.[50] The Court had no choice but to adopt a separationist posture regarding prayer and Bible-reading, which, unlike public funds, are inherently religious in character.[51] So while state-sponsored aid may escape First Amendment scrutiny when used to support the secular educational functions of sectarian schools, state-sanctioned prayer or Bible verse recitation cannot because it is decidedly a religious exercise that has no secular rationale.[52]

The State argued in defense that student participation in the morning prayer was voluntary as directed by statute, but the Court dismissed this argument by simply noting that absence from the opening exercises did not change the exercises' religious purpose and effect—the two controlling factors that the government must heed.[53] Writing for a near-unanimous Court, Justice Clark articulated a two-part test for determining a statute's constitutionality under the Establishment Clause.

---

not have deferred to the state legislators: "Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small." *Id.*

48. *See* David Felsen, Student Author, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 Am. U. L. Rev. 395, 399–401 (1989) (arguing that since recognizing neutrality as a "central purpose" of the Establishment Clause in *Everson*, the Supreme Court has been trying different "doctrinal viewpoints" to "achieve the goal of neutrality between government and religion").

49. 374 U.S. 203 (1963).

50. *Id.* at 223; *see* David M. Ackerman et al., *The Law of Church and State in the Supreme Court* 22 (Nova Science Publishers, Inc. 2003) (affirming that "[n]ot until *Abington School District v. Schempp* in 1963 did the Court first distill a test to help it ferret out [E]stablishment [C]lause violations").

51. The Supreme Court had already struck down school prayer a year earlier in *Engel v. Vitale*, 370 U.S. 421, 435–436 (1962).

52. *Schempp*, 374 U.S. at 223–224.

53. *Id.* at 222.

The test may be stated as follows: what is the purpose or primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[54]

Subsequent decisions added reinforcement and clarity to *Schempp*'s definition of neutrality. In *Board of Education v. Allen*,[55] for instance, the Court upheld a textbook loan program supplying textbooks free of charge to both public and nonpublic students in grades seven through twelve, recognizing that "religious schools pursue two goals, religious instruction and secular education."[56] Noting that "the line between state neutrality to religion and state support of religion is not easy to locate,"[57] the Court found the statute neutral because the textbooks were secular, the parochial schools were incidental beneficiaries, and all students qualified for assistance.[58] Later that same year, in *Epperson v. Arkansas*,[59] the Court used the *Schempp* dual "purpose and effect" test to strike down a state law that criminalized the teaching of evolution as an unconstitutional attempt to give an advantage to a religious doctrine.[60] Though not an aid case, *Epperson* is still relevant to our inquiry for elucidating that government action becomes more constitutionally questionable when "tailored to the principles or prohibitions

54. *Id.*
55. 392 U.S. 236 (1968).
56. *Id.* at 245.
57. *Id.* at 242.
58. *Id.* at 243–248.
59. 393 U.S. 97 (1968).
60. *Id.* at 106–107. Oddly enough, the *Epperson* decision was interpreted very differently by both sides of the evolution debate. Evolutionists saw it as the death knell for creationism and the final engagement with anti-evolutionists. Creationists, on the other hand, thought it was premised on the Court's determination that the Arkansas law was not neutral because it favored creationism. This, in turn, led them to assume that the requisite neutrality would be accomplished by implementing balanced treatment statutes that mandated the teaching of both theories in public schools. *See* Edward J. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion* 257–258 (rev. ed., Basic Books 2006). In 1987, the Court resolved any ambiguity surrounding *Epperson* by striking down a Louisiana equal treatment statute (the Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act). *Edwards v. Aguillard*, 482 U.S. 578, 596–597 (1987).

of any religious sect or dogma."[61] The Court had little trouble determining that the state legislature was acting out of religious motivation because it sought to eliminate rather than illuminate a commonly accepted, albeit controversial, scientific theory.[62] Writing for a unanimous Court, Justice Fortas provided profound insight into the proper attitude of government toward religion in a modern, pluralistic society as he addressed the constitutional status of the state's ban.

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.[63]

A third determinant, whether there was an "excessive government entanglement" of the state in religious affairs, was articulated by the Burger Court two years later in *Walz v. Tax Commission of the City of New York*.[64] The case involved a challenge to a statutory tax exemption for real property owned by religious organizations.[65] In a self-assigned majority opinion, Chief Justice Burger found the exemption neutral under *Schempp*'s secular purpose and effect test, since it was "not aimed at establishing, sponsoring, or supporting religion," nor had the effect of doing so.[66] The Chief Justice went on to suggest that the Court should also assure that the "end result" of the law "is not an excessive government entanglement with religion."[67] His legal argument for a third determinant was that, although the purpose of the Establishment Clause is to keep religious and secular institutions apart, "[n]o perfect or absolute separation is really possible,"[68] as taxing or exempting religious property "occasions

61. *Epperson*, 393 U.S. at 106.
62. *Id.* at 109.
63. *Id.* at 103–104.
64. 397 U.S. at 674–675.
65. *Id.* at 666.
66. *Id.* at 674.
67. *Id.*
68. *Id.* at 670.

some degree of involvement with religion."[69] Therefore, the constitutional question before the Court "is inescapably one of degree"[70] rather than absolute separation. The granting of the property tax exemption, Chief Justice Burger concluded, served to reduce the interaction between government and religion, compared to the only other alternative.[71]

The following year, the Supreme Court combined *Walz*'s excessive entanglement prong with *Schempp*'s purpose and effect prongs to produce the tripartite *Lemon* test, so named after the seminal case of *Lemon v. Kurtzman*.[72] In this otherwise unremarkable parochial-school-aid case, Chief Justice Burger formulated what turned out to be the longest lasting (and most restrictive) of all Establishment Clause standards.[73] The object of the *Lemon* test evidently was to determine when government policy or legislation had impermissibly established religion.[74] Under the test, for a law to pass constitutional muster, it must meet three conditions: (1) it must have an underlying "secular legislative purpose"; (2) it must not have the "primary effect" of advancing or inhibiting religion; and (3) it "must not foster an excessive government entanglement with religion."[75] If a law fails one part of the test, it has failed the whole test and must be struck down as violative of the Establishment Clause.[76]

Although each of the three prongs has to be independently satisfied, the question of constitutionality is always one of

69. *Id.* at 674.

70. *Id.*

71. Here is how Chief Justice Burger explained that the exemption option is considerably closer to the ideal of nonestablishment: "Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.*

72. 403 U.S. at 602.

73. Since its enunciation in 1971, the *Lemon* test has been the target of much criticism, but served as the primary Establishment Clause test during the Burger Court era and remains in use, albeit less frequently, to this day. *See* Penny J. Meyers, Student Author, Lemon *Is Alive and Kicking: Using the* Lemon *Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 Val. U. L. Rev. 231, 243 (1999) ("The *Lemon* test has the longest tenure of all Establishment Clause tests. Despite the efforts to sink it, the *Lemon* test remains afloat."); *see also infra* pt. IV (discussing *Lemon*'s legacy and impact on Establishment Clause jurisprudence).

74. *Lemon*, 403 U.S. at 614–615.

75. *Id.* at 612–613 (internal quotation and citation marks omitted).

76. *Stone v. Graham*, 449 U.S. 39, 40–41 (1980).

degree.[77] For instance, a law may possess a religious purpose and still be constitutional provided it also has a legitimate secular or civic purpose so that the religious purpose is neither preeminent nor exclusive.[78] Likewise, a law is not unconstitutional if it has the indirect or incidental effect of promoting religion so long as its principal or primary effect is to further some legitimate governmental interest.[79] Finally, the entanglement prong is not violated unless the institutions of church and state are more entangled than is necessary for government to serve its otherwise legitimate interests in adopting the law.[80] It should be added that the excessive entanglement prong serves to protect religious institutions from extensive government monitoring but does not deny them the right to engage in civic dialogues or to have input in public policy issues.[81]

---

77. *Walz*, 397 U.S. at 674.

78. The secular-purpose test is *Lemon*'s lowest hurdle and is satisfied by the showing of a bona fide secular purpose, even in the presence of a religious purpose. *See* Joseph M. McMillan, Student Author, Zobrest v. Catalina Foothills School District*: Lowering the Establishment Clause Barrier in School-Aid Controversies*, 39 St. Louis U. L.J. 337, 359 (1994) (asserting that "in virtually all school-aid cases . . . the secular purpose prong of the *Lemon* test did not represent a significant obstacle"); *see also* Celine Abramschmitt, *The Same-Sex Marriage Prohibition: Religious Morality, Social Science, and the Establishment Clause*, 3 FIU L. Rev. 113, 170–171 (2007) (stating that "[a] religious purpose in the law can stand so long as it is neither preeminent nor exclusive").

79. The term "primary" indicates that a law can have the incidental or collateral effect of promoting religion and still be constitutional because an ancillary effect, by definition, is neither dominant nor paramount. *See* David E. Fitzkee & Linell A. Letendre, *Religion in the Military: Navigating the Channel between the Religion Clauses*, 59 A.F. L. Rev. 1, 10 (2007) (stating that "many laws that provide aid to religious organizations for otherwise valid reasons have an indirect or secondary effect of promoting religion. But such indirect assistance is permissible under the 'effects prong,' as long as the primary effect of the law is to further some legitimate governmental interest.").

80. Chief Justice Burger stated that the objective of the third prong was to "'prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.'" *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (quoting *Lemon*, 403 U.S. at 614). *See* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 350 (1986) (stating that "'excessive entanglement' means that the institutions of church and state are more entangled than they need to be in order for government to accomplish its otherwise legitimate purposes in the program or policy at issue").

81. Paulsen, *supra* n. 80, at 346 (contending that while "the entanglement test comes perilously close to suggesting that religious groups and individuals are not entitled to the same civil and political rights as others," it should be recognized that the "[E]stablishment [C]lause limits government, not religion. The clause makes explicit limitations on government power to act. It does not grant government an affirmative power to expunge the potentially explosive presence of religious views from public and political life.") (emphasis removed).

This framework, as conceived by Chief Justice Burger, was meant to prevent "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[82] With its precise formula and clear-cut analysis, the *Lemon* test was created in an attempt to integrate and streamline the dense and confusing web of Establishment Clause precedents. In the words of Chief Justice Burger, it encompassed "the cumulative criteria developed by the Court over many years."[83] Little did the moderate conservative anticipate that the new test he helped create would be applied in so rigid a fashion, as if it were an end in itself, to reach consistent separationist outcomes.[84] Toward the end of his tenure, Chief Justice Burger would express regret that the Court had veered from the intent of the *Lemon* test by applying it in a thoughtless, formulaic manner without giving due consideration to the "concerns that underlie" the Establishment Clause.[85] Yet despite the repeated frontal assaults, the *Lemon* test has survived for four decades and remains the benchmark to gauge whether a particular government activity violates the Establishment Clause,[86] largely owing to the support of devotees such as Justice Lewis Powell, who once lauded *Lemon* as "the only coherent test a majority of the Court has ever adopted."[87]

---

82. *Lemon*, 403 U.S. at 612 (quoting *Walz*, 397 U.S. at 674).

83. *Id.*

84. See Chief Justice Burger's short but pointed dissent in *Aguilar v. Felton*, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting) (cautioning that "the Court's obsession with the criteria identified in *Lemon v. Kurtzman* has led to results that are 'contrary to the long-range interests of the country'") (citations omitted).

85. *Wallace v. Jaffree*, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting). Burger charged that "the Court's extended treatment of the 'test' of *Lemon v. Kurtzman* suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues." *Id.* (citation omitted). He went on to emphasize that the Court's "responsibility is not to apply tidy formulas by rote; [its] duty is to determine whether the statute or practice at issue is a step toward establishing a state religion." *Id.*

86. *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1054–1055 (9th Cir. 2007). The Supreme Court itself has applied the *Lemon* test in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 314 (2000) and *McCreary Co. v. ACLU of Kentucky*, 545 U.S. 844, 846 (2005), thereby affirming its vitality and dispelling doubts about its demise. In fact, in *McCreary County*, the Court specifically "declin[ed] the invitation" of petitioners to abandon *Lemon*'s purpose test, preferring to leave the three-tiered standard intact. *Id.* at 863; *see supra* n. 73 (comparing the *Lemon* test as used during the Burger Court and today).

87. *Jaffree*, 472 U.S. at 63 (Powell, J., concurring).

IV. THE SOUR LEGACY OF LEMON

From its inception in 1971 until the mid-1980s, the *Lemon* test served as the primary tool of analysis in different types of Establishment Clause cases, from parochial school aid, to public school prayer, to religious displays on government property. While the Burger Court (1969–1986) was generally more conservative than the Warren Court, it exhibited more or less the same degree of activism in the area of church–state relations because its ideological balance had not shifted sufficiently to the right to retrench the liberal legacy it inherited. With the liberal-leaning bloc still in control, the Burger Court utilized the *Lemon* test to strike down a variety of church-friendly policies and overt religious exercises. The separationist trend pervaded the Supreme Court's Establishment Clause jurisprudence throughout the 1970s and well into the 1980s as the Court toughened its application of the *Lemon* test in a series of cases involving public funding of parochial education.

One of the earliest cases in which the Court employed the *Lemon* analysis was *Committee for Public Education v. Nyquist*.[88] This case involved a New York maintenance and repair program for parochial schools as well as a tuition assistance (or tax-deduction) program for parents.[89] Despite having secular legislative purposes, neither program withstood scrutiny under the effect prong because the Court deemed the advancement of religion an inevitable consequence of the economic incentives.[90] The Court took yet a more restrictive view of aid in *Meek v. Pittenger*,[91] holding that even secular aid to religious institutions should be withheld if it could be diverted to religious purposes.[92] In *Stone v.*

88. 413 U.S. 756 (1973). *Nyquist* was decided along with *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), in which the Court invalidated a financial aid program that reimbursed nonpublic schools for costs of state-mandated services. *Id.* at 482.

89. *Nyquist*, 413 U.S. at 763–764.

90. *See* Walter Dellinger, *Constitutionality of Awarding Historic Preservation Grants to Religious Properties*, http://www.justice.gov/olc/doi.24.htm (Oct. 31, 1995) (stating that "the prohibition on public funding of facilities used for religious activity applies even where the government's purpose in funding those facilities is concededly secular").

91. 421 U.S. 349 (1975).

92. *Id.* at 365–366. "[T]he use of wholly neutral, secular instructional material and equipment by church-related schools contributes to religious instruction because the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence." *Mueller v. Allen*, 463 U.S. 388, 414 (1983) (Marshall, Brennan, Blackmun & Stevens, JJ., dissenting) (quoting *Meek*, 421 U.S. at 366)

Graham,[93] another key separationist decision, the Court struck down a Kentucky statute that required the posting of a copy of the Ten Commandments in public school classrooms for the absence of a secular purpose.[94] It made no constitutional difference, the Court stressed, that the sacred text was posted rather than recited, or that the displays were purchased with private donations.[95] Nor did the Court find merit in the supposed secular purpose stated in the Kentucky law, which was to acknowledge and underscore the impact of the Ten Commandments on American law and society, because the "[p]osting of religious texts on the wall serves no such educational function."[96]

The concept of neutrality underlying all of these separationist decisions, which originally emerged under the Warren Court, can be characterized as "secular neutrality" for emphasizing secularism as the guiding principle of state policy toward public education.[97] Much like its predecessor, the Burger Court sought to confine state support to parochial schools mainly to transportation assistance, although *Everson*'s child benefit theory had left open the possibility of other forms of aid.[98] As will

(internal quotation marks omitted). *See* Joseph P. Viteritti, *Reading* Zelman*: The Triumph of Pluralism, and Its Effects on Liberty, Equality, and Choice*, 76 S. Cal. L. Rev. 1105, 1115 (2003) (explaining that "[t]he concept of divertibility, later converted to the principle of 'nondivertibility' and its implicit requirement of complete separation, was translated into judicial doctrine in *Lemon*").

93. 449 U.S. 39 (1980).

94. *Id.* at 42–43. Worthy of note in the *Stone* case is the Court's clarification that failing one prong of *Lemon* is sufficient to declare a law unconstitutional: "If a statute violates any of these three principles, it must be struck down under the Establishment Clause." *Id.* at 40–41.

95. *Id.* at 42.

96. *Id.* The Court suggested that the whole Bible and not only the Ten Commandments could be "integrated into the school curriculum," so long as it is not taught in a devotional or doctrinal manner: "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.*

97. The Warren Court viewed the Establishment Clause as a prohibition against virtually all forms of state aid to and support for religion, or to borrow the simple eloquence of one legal scholar, "as a constitutional mandate for public secularism, proscribing even the most tenuous linkages of the state with religion." Travis Robertson, Student Author, *The Faith-Based Standard: A Review and Prospective Analysis of Establishment Clause Developments in Light of* Americans United v. Prison Fellowship Ministries, 39 U. Toledo L. Rev. 525, 545 (2008).

98. *See* Thomas C. Berg, *Anti-Catholicism and Modern Church–State Relations*, 33 Loy. U. Chi. L.J. 121, 151–152 (2001) (stating that "the Burger Court, in a series of decisions in the 1970s beginning with *Lemon v. Kurtzman*, severely limited government aid to religious elementary and secondary schools and their students"). Berg adds that the

be elaborated below, the Court's new conservative wing insisted that this distinctly secular and narrow approach to neutrality was repressive of—rather than impartial to—religion. Opponents of secular neutrality, then and now, see the very term as a misnomer because it reflects a worldview that is fundamentally at odds with religion, the reason why conservative Justices have denounced the application of the *Lemon* test as "an unjustified hostility toward religion."[99]

Perhaps the last high watermark for separationism was reached in 1985 when the Court decided three Establishment Clause cases, employing a strict reading of the *Lemon* test and declaring the challenged practices unconstitutional. The first was *Wallace v. Jaffree*,[100] the famous moment-of-silence case. At issue was a state law that not only mandated a daily "period of silence 'for meditation or voluntary prayer'"[101] but also "authorized teachers to lead 'willing students' in a prescribed prayer to 'Almighty God.'"[102] Applying the first prong of the *Lemon* test, the Court struck down the Alabama statute that had as its sole purpose "return[ing] voluntary prayer to our public schools," as the bill's sponsor had candidly testified.[103] Justice Stevens, writing for a 6–3 majority, concluded that while students do enjoy a protected right "to engage in voluntary prayer during an appropriate moment of silence,"[104] the official endorsement of such religious activities "is not consistent with the established

---

Burger Court was reluctant to "extend[ ] . . . aid beyond transportation assistance" despite the promise of *Everson*. *Id.* at 152.

99. *Co. of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., Rehnquist, C.J., White & Scalia, JJ., concurring in the judgment and dissenting in part) (internal quotation marks omitted), also discussed *infra* n. 107. *See also Aguilar*, 473 U.S. at 420 (Burger, C.J., dissenting) (chastising the majority for "exhibit[ing] nothing less than hostility toward religion and the children who attend church-sponsored schools"); *infra* n. 107 and accompanying text (discussing the language Justice Burger used in his dissenting Establishment Clause opinions).

100. 472 U.S. at 38.

101. *Id.* at 40.

102. *Id.*

103. *Id.* at 43. It should be stated that the Court invalidated the Alabama law under *Lemon* because of the provision that allowed teachers to pray with students rather than the moment of silence, which was not accompanied by audible prayer. *See* Paulsen, *supra* n. 80, at 344 (noting that "[t]he Court made clear that most moment-of-silence laws are constitutional").

104. *Jaffree*, 472 U.S. at 59.

principle that the government must pursue a course of complete neutrality toward religion."[105]

Chief Justice Burger and Justices White and Rehnquist filed separate dissenting opinions. Chief Justice Burger lambasted the majority for turning the *Lemon* test into "a rigid caliper capable of resolving every Establishment Clause issue."[106] His dissent echoed the view held by nearly all self-identified evangelical Christians who believed that the mechanical application of the *Lemon* test inherently discriminated against religion rather than satisfied the ideal of neutrality.[107] While Chief Justice Burger stopped short of condemning the *Lemon* test, Justice Rehnquist went further to suggest that the Court should discard *Lemon*'s secular-neutrality analysis and focus instead on favoritism toward one religious sect over another or the establishment of a national church.[108] His proposal was based on the contention that, historically, "nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion."[109] Expressing appreciation for Justice Rehnquist's "explication of the history of the Religion Clauses," Justice White invited the Court to "reassess [its] cases dealing with these Clauses, particularly those dealing with the Establishment Clause."[110]

Also worthy of note is Justice O'Connor's concurring opinion for her attempt to steer the Court away from the strict application of the *Lemon* test without forsaking it.[111] As a compromise, Justice O'Connor proposed an "endorsement test," which was essentially an alternative interpretation of *Lemon*'s most

105. *Id.* at 60.

106. *Id.* at 89 (Burger, C.J., dissenting).

107. "To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion." *Id.* at 85. *See supra* n. 99 and accompanying text (discussing Chief Justice Burger's distaste with the Court's tendency to invoke rigid tests).

108. *Jaffree*, 472 U.S. at 113 (Rehnquist, J., dissenting).

109. *Id.* Justice Rehnquist's accommodationist contentions and long-held view that the "wall of separation" metaphor was based on "bad history" and "should be frankly and explicitly abandoned" gave indication of the direction in which the Court was bound to advance under his Chief Justiceship. *Id.* at 107.

110. *Id.* at 91 (White, J., dissenting).

111. *Id.* at 67–84 (O'Connor, J., concurring in the judgment); *see* Welton O. Seal, Jr., *"Benevolent Neutrality" toward Religion: Still an Elusive Ideal after* Board of Education of Kiryas Joel v. Grumet, 73 N.C. L. Rev. 1641, 1657 (1995) (stating that "Justice O'Connor was not prepared to abandon the *Lemon* test completely").

significant part, the "primary effect."[112] Under the Supreme Court's application of the effect prong, only a secular law that *incidentally* advanced religion could escape constitutional condemnation.[113] A law that had a legitimate secular purpose but nonetheless still had the primary effect of advancing religion was deemed unconstitutional, which made the second prong the hardest to pass.[114] This is especially true in school aid programs, as public funding is "normally . . . thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[115]

The endorsement test was initially developed by Justice O'Connor in her concurrence in *Lynch v. Donnelly*,[116] the Court's

112. Justice O'Connor wanted to bridge the insurmountable "primary effect" hurdle yet without sacrificing "all aspects of the *Lemon* test," so she proposed the endorsement test as a revision of the *Lemon* test that needed to be "reexamined and refined." *Jaffree*, 472 U.S. at 68–69 (O'Connor, J., concurring in the judgment) (demonstrating Justice O'Connor's belief that the endorsement test would provide a more in-depth approach to the *Lemon* test).

113. *Nyquist*, 413 U.S. at 775 (asserting that "an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law"). As express and emphatic as it may be, this statement carries with it a great deal of controversy because the Court in *Nyquist* and its progeny could not agree on how the *Lemon* test ought to be applied or on what constitutes an incidental benefit. The "incidental benefits" theory, which has its origin in *Everson*, is an essential ingredient of the *Lemon* test. *See* Kyron Huigens, *Science, Freedom of Conscience, and the Establishment Clause*, 13 U. Puget Sound L. Rev. 65, 70 (1989) (noting that "the purpose and effect tests of *Lemon* are an outgrowth of the 'incidental benefits' theory promulgated in *Everson v. Board of Education*"). On the doctrinal level, the *Lemon* test was supposed to embody the "incidental benefits" theory. In practice, however, the Court eviscerated the theory by adhering to a strict reading of *Lemon* and introducing the concept of divertibility. *See supra* n. 92 and accompanying text (discussing the restrictive ruling from *Meek*, 421 U.S. at 349); *infra* n. 160 and accompanying text (highlighting the Court's major shift from *Lemon* in its ruling for *Agostini v. Felton*, 521 U.S. 203 (1997)). Thus, no-aid separationism dominated the Court's Establishment Clause jurisprudence in the 1970s and into the 1980s. The endorsement test was Justice O'Connor's remedy for the rigorous application and inconsistent results of the *Lemon* test. *See Co. of Allegheny*, 492 U.S. at 632 (O'Connor, J., concurring in part and concurring in the judgment) (maintaining that the "endorsement test 'provides a standard capable of consistent application and avoids the criticism levelled [sic] against the *Lemon* test'") (quoting Tanina Rostain, Student Author, *Permissible Accommodations of Religion: Reconsidering the New York* Get *Statute*, 96 Yale L.J. 1147, 1160 (1987)).

114. *See* Jon Veen, Student Author, *Where Do We Go from Here? The Need for Consistent Establishment Clause Jurisprudence*, 52 Rutgers L. Rev. 1195, 1206–1207 (2000) (explaining that some scholars have criticized the second prong because it is particularly nebulous, susceptible to "subjective value judgments," and is "never passable" whenever there is a religious purpose behind government action).

115. *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

116. 465 U.S. at 688–689 (O'Connor, J., concurring).

first religious holiday display case, and further discussed a year later in her concurring opinion in *Jaffree*.[117] Under this test, which was intended to make the *Lemon* test more acceptable,[118] the conventional purpose and effect inquiries would be combined in a single inquiry that places emphasis on the issue of government endorsement of religion.[119] In practical terms, when evaluating a law or practice touching religion, the Court would try to determine first, "whether the government intends to convey a message of endorsement or disapproval of religion,"[120] and second, "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion]."[121] The underlying rationale, as Justice O'Connor explained in *Lynch*, is that religion-based inclusion and exclusion of certain groups or individuals impermissibly "make religion relevant, in reality or public perception, to status in the political community."[122]

By refocusing constitutional concern on the statute's actual impact rather than its purpose and effect in abstract terms, the endorsement test was meant to recast rather than repudiate the *Lemon* test that had come under increasing criticism.[123] Moreover, Justice O'Connor sought to give the *Lemon* test a new lifeline by partially dispensing with its tripartite analysis so as to afford the government some leeway to accommodate religion yet without imposing an undue burden on nonadherents or relegating

---

117. *Jaffree*, 472 U.S. at 68–69.

118. *See* Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 Duke J. Gender L. & Policy 561, 607 (2007) (stating that "[a]s *Lemon* proved dissatisfying to more and more Justices, the 'endorsement test'—in reality, a gloss on *Lemon*—became a more palatable alternative to some").

119. *See* Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 Brandeis L.J. 603, 615 (2003) (explaining that "the endorsement test flipped the priorities of *Lemon* from a concern with substantive neutrality to a focus on purposive neutrality").

120. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

121. *Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring in the judgment).

122. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

123. Unlike the *Lemon* test, the endorsement test employs a reasonable observer standard to resolve the controversy before the Court. *Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring in the judgment). Although the endorsement test rests on good principle in theory, Paula Abrams persuasively argues that, in practice, the subtleties that the "objective observer" is expected to notice are hardly obvious to a layperson's eye. *See* Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 Lewis & Clark L. Rev. 1537, 1548 (2010) (jesting that Justice O'Connor's observer "probably has been to law school" and "sound[s] a great deal like a Supreme Court [J]ustice").

them to outsiders.[124] Though a promising compromise between separationist and accommodationist interests, the endorsement test found little applicability beyond religious display jurisprudence.[125]

The other two 1985 cases, *School District of Grand Rapids v. Ball*[126] and *Aguilar v. Felton*,[127] were companion actions decided the same day less than a month after *Jaffree*. Both cases dealt with similar government-funded programs that benefited nonpublic schoolchildren, where understaffed parochial schools had enlisted the help of public school teachers to provide remedial instruction to "educationally deprived children from low-income families."[128] Public school employees in both cases were compensated with public funds for the services they rendered in parochial schools, but *Aguilar*'s shared time program had an additional element: a monitoring system to ensure that the instructional services are not used as a conduit for religious inculcation.[129] A

124. To avoid imposing an undue burden on nonadherents and religious minorities, the endorsement test requires the trier of fact to determine whether state action "sends a message to nonadherents that they are outsiders, not full members of the political community." *Lynch*, 465 U.S. at 688. *See* Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 Ga. L. Rev. 489, 545 n. 330 (2004) (stating that "[t]he Endorsement Test has the potential to seriously address the impact of religious establishments, or alleged religious establishments, on religious minorities").

125. Setting aside the *Lemon* test, a plurality of the Court came to adopt the endorsement test in its next religious display case, *County of Allegheny*, 492 U.S. at 573. Despite the absence of consensus over the constitutional status of the holiday displays, four Justices agreed that "[t]he requirement of neutrality inherent in the *Lemon* formulation does not require a relentless extirpation of all contact between government and religion." *Id.* at 576. *See* W. Cole Durham Jr. & Robert T. Smith, *Religion and the State in the United States at the Turn of the Twenty-first Century*, in *Law and Religion in the 21st Century: Relations between States and Religious Communities* 79, 97 (Silvio Ferrari & Rinaldo Cristofori, eds., Ashgate Publ'g Co. 2010) (contending that "[a]s a practical matter, the *Lemon* test probably made most sense in the context of assessing financial aid; the endorsement test was more helpful in cases assessing use of religious symbols in public settings"). Justice Kennedy, however, expressly stated that the endorsement test was a "most unwelcome[ ] addition to [the Court's] tangled Establishment Clause jurisprudence." *Co. of Allegheny*, 492 U.S. at 668 (Kennedy, J., Rehnquist, C.J., White & Scalia, JJ., concurring in the judgment in part and dissenting in part). Instead, Justice Kennedy proposed his own alternative to the *Lemon* test, the coercion test, which recognizes coercion as "the sole touchstone of an Establishment Clause violation." *Id.* at 660. The Court applied the coercion test in lieu of the *Lemon* test in the graduation prayer case of *Lee v. Weisman*, 505 U.S. 577, 591–592 (1992).

126. 473 U.S. 373 (1985).

127. 473 U.S. 402.

128. *Id.* at 404.

129. *Id.* at 406–407.

closely divided Court found that the two programs operated outside the permissible bounds of the Establishment Clause—the Grand Rapids program because it advanced religion, and the New York City program because it inevitably entailed an "excessive entanglement of church and state" in the administration of benefits.[130]

If we could point to one school aid case that bitterly split the Court into two ideological camps and sealed the fate of *Lemon*, it would be *Aguilar v. Felton*. Like the four dissenters, many parents, school administrators, and public officials saw the *Aguilar* decision as unsettling and unseemly, not only because New York City had many sectarian schools that benefited from the invalidated program,[131] but also because of the strain it inevitably placed on an already overextended public school system by making it harder for private schools to assist economically disadvantaged students.[132] The concerns expressed by the Court majority, such as the "ongoing presence of state personnel" in parochial schools or the "administrative cooperation" between the public and parochial school officials,[133] were feeble by comparison to the educational benefits of the program and did not resonate with the public.[134] After all, it was not a voluntary spiritual exercise that the Court invalidated, but rather a critical remedial program that had the dual secular purpose of helping low-performing students and easing growth pressures on public schools.[135] But while *Aguilar* might have been a setback for

130. *Id.* at 414.

131. *See id.* at 406 ("Of those students eligible to receive funds in 1981–1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools.").

132. Calling the *Aguilar* decision "tragic," Justice O'Connor lamented in dissent that there were 20,000 children in New York City alone whose educational needs would not be met because of the Court's condemnation of the auxiliary service program. *Id.* at 431 (O'Connor & Rehnquist, JJ., dissenting).

133. *Id.* at 413 (majority).

134. One way to avoid what the Court described as the "pervasive state presence in the sectarian schools receiving aid," *id.* at 403, was to set up mobile units outside the schools, but the problem was that "at least in some large cities, that could not be done logistically," not to mention the additional public expense and the difficulty of many to comprehend how this "interesting geographic distinction" could have "constitutional significance." Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 Cal. L. Rev. 5, 7, 11 (1987). *See also infra* n. 143 (discussing the lofty price of setting up mobile units).

135. *Aguilar*, 473 U.S. at 417 (Powell, J., concurring).

accommodationists, it heightened public and official exasperation with the strict separationism of the *Lemon* analysis, suggesting to the Court that it was perhaps time to take a new look at its neutrality theory, especially with respect to school aid.

V. NEUTRALITY REDEFINED

The leftward drift began to subside with the advent of the more conservative Rehnquist Court (1986–2005), when President Reagan elevated William Rehnquist to the Chief Justice position and appointed Antonin Scalia and Anthony Kennedy as Associate Justices.[136] Reagan's first appointment, Sandra Day O'Connor, was warmly welcomed but did not dramatically alter the balance of the Court because she was a center-right pragmatist who replaced Potter Stewart, a moderate conservative in his own right.[137] President George Bush Sr.'s two appointments, David Souter and Clarence Thomas, further shifted the Court's center of gravity to the right, although Justice Souter's centrist stances often neutralized Justice Thomas' vote.[138] By the end of 1991, with at least four reliable conservatives on the bench, accommodationists were hoping for a reversal of what they saw as three decades of misguided jurisprudence that reinforced the wall of separation between church and state.[139] The high hopes

136. Mark Tushnet, *The Warren Court as History: An Interpretation*, in *The Warren Court in Historical and Political Perspectives* 1, 33 (Mark Tushnet ed., U. Press of Va. 1993) (stating that the "substantive political agenda associated with the Warren Court, as an expression of a changing modern liberalism, was almost completely irrelevant by the mid-1980s").

137. Christopher E. Smith, *The New Supreme Court and the Politics of Racial Equality*, in *The Politics of Race: African Americans and the Political System* 278, 282 (Theodore Rueter, ed., M.E. Sharpe, Inc. 1995).

138. Justices Souter and Thomas were appointed a year apart in 1990 and 1991, respectively, to strengthen the conservative side of the Rehnquist Court. Unlike Justice Thomas, however, Justice Souter "proved to be anything but an ideological appointment" who gradually "shifted toward the liberal bloc of [J]ustices" as he "evolved into a more moderate, or even liberal, jurist." Scott P. Johnson, *The Judicial Career of Justice David H. Souter and His Impact on the Rights of Criminal Defendants*, 13 Wyo. L. Rev. 263, 263–264 (2013). Frustrated conservatives called on President Bush when he took office in 2001 not to repeat his father's mistake. *See* Robert Novak, *No More Souters*, http://townhall .com/columnists/robertnovak/2001/02/12/no_more_souters (February 12, 2001) (stating that "[i]t is impossible to measure the impact of the Souter fiasco on the Republican Party . . . [t]he conservative message to Bush the younger: No more Souters").

139. *See* Melvin I. Urofsky, *Religious Freedom: Rights and Liberties under the Law* 102 (ABC-CLIO 2002) (noting that "conservatives expected the Court would finally reverse thirty years of error and get America—and the Constitution—back on God's track").

did not fully materialize, as the Rehnquist Court rendered mixed decisions on the Establishment Clause, though it generally moved away from, and in some respects dismantled, the separationist framework it inherited.[140]

Those who were disappointed by the Rehnquist Court's mixed bag of outcomes were at least gratified by its school-aid rulings, where a consistent pattern of interpretation emerged. Prominent among the decisions in this area was the reversal of the hotly contested decision of *Aguilar v. Felton*. As previously noted, the *Aguilar* Court found an entanglement prong violation in a federally funded program that sent public schoolteachers into parochial schools to teach secular subjects.[141] To rectify the program's constitutional deficiencies and continue providing the much-needed auxiliary services, New York City Board of Education (NYCBOE) relocated the remedial classes to trailers outside the parochial schools.[142] Inasmuch as the cost of complying with the injunction was exorbitantly high, NYCBOE filed a motion in federal court seeking to overturn the injunction.[143] The district court denied the motion but the Second Circuit reversed, whereupon a coalition of taxpayers opposed to the program appealed to the Supreme Court. The new case was *Agostini v. Felton*.[144]

This time around, with a majority of the Justices committed to pursuing a more accommodationist course, the Court employed a more relaxed standard of review instead of the legalistic application of the *Lemon* test that had precipitated a host of separationist decisions.[145] A five-Justice majority upheld the contested program, finding no evidence to support the former presumption that the mere presence of public school teachers on parochial school premises, or the cooperation between state employees and parochial school officials, blurred the lines

140. *See id.* (stating that the Rehnquist Court "allowed some accommodation, but far from what those on the right demanded").

141. *Aguilar*, 473 U.S. at 426 (O'Connor & Rehnquist, JJ., dissenting).

142. *Id.* at 431.

143. Justice O'Connor pointed out in her majority opinion that "[s]ince the 1986–1987 school year, the Board has spent over $100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites." *Agostini*, 521 U.S. at 213; *see also supra* n. 134 (describing the logistical difficulties of creating a plan such as this).

144. 521 U.S. 203.

145. *Id.* at 218–219.

between church and state.[146] Declaring *Aguilar* "no longer good law,"[147] the Court held per Justice O'Connor that it shall "no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment."[148]

The importance of *Agostini* is not so much in validating a popular supplementary instructional program as it is in beginning the groundbreaking work of redefining neutrality, which ultimately changed the landscape of Establishment Clause jurisprudence.[149] In propounding a new definition of neutrality, Justice O'Connor compared the current case and several school-aid precedents, such as *Committee for Public Education v. Nyquist*,[150] where a state aid program was found infirm because it disbursed grants directly to students; *Witters v. Washington Department of Services for Blind*,[151] where a visually impaired person was allowed to use a state vocational scholarship to attend a Christian college; and *Zobrest v. Catalina Foothills School District*,[152] where a parochial high school student was allowed to use a state-employed sign language interpreter. What set *Nyquist* apart from *Witters* and *Zobrest* was that its aid program offered financial assistance directly to religious schools rather than indirectly through the needy students who qualified for it.[153] Based on this distinction, Justice O'Connor went on to conclude that an aid program is constitutionally sound, even if it benefits religious institutions, so long as the benefits reach the institutions "as a result of the genuinely independent and private choices of aid recipients."[154]

It is noteworthy that the *Agostini* Court invoked the *Lemon* test only in passing to discredit the application of the third

146. *Id.* at 234.
147. *Id.* at 218.
148. *Id.* at 234.
149. *Agostini* has been described as the Supreme Court's "most important case involving Catholic schools since the landmark 1971 ruling in *Lemon v. Kurtzman*." Charles J. Russo et al., Agostini v. Felton *and the Delivery of Title I Services in Catholic Schools*, 1 Catholic Educ. 263, 263 (1998).
150. 413 U.S. 756.
151. 474 U.S. 481 (1986).
152. 509 U.S. 1 (1993).
153. *Nyquist*, 413 U.S. at 762.
154. *Agostini*, 521 U.S. at 245 (quoting *Witters*, 474 U.S. at 487).

element by itself.[155] Having decided to define neutrality anew, the Court set aside the *Lemon* test without expressly laying it to rest, presumably because it still had some applicability in other Establishment Clause contexts.[156] Whatever intent Justice O'Connor might have had, *Agostini* clearly signaled that the secular neutrality theory that had largely prevailed hitherto was finally in eclipse. One could even say that *Agostini* charted a new path in the Court's school-aid jurisprudence that is incompatible, if not irreconcilable, with the *Lemon* test. Based on *Agostini*, the inquiry consists of three questions: (1) whether the program "give[s] aid recipients any incentive to modify their religious beliefs or practices in order to obtain [program] services";[157] (2) whether "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";[158] and (3) whether "the aid reaches such schools as a consequence of private decision-making."[159] These relaxed requirements represented a serious departure from *Lemon*, under which a government aid program could be deemed to have the effect of advancing religion "even if the aid is wholly

155. *See* Jennifer D. Dougherty, Agostini v. Felton*: Sanctioning a Trend in the Accommodation of Educational Services for Underprivileged and Disabled Children*, 29 Seton Hall L. Rev. 1008, 1035 (1999) (stating that "the Court did not utilize *Lemon* in the *Agostini* analysis except to demonstrate that the Court disavowed the 'excessive entanglement' prong as a separate analysis"). It can be inferred from Justice O'Connor's carefully crafted opinion that she did not utilize the restrictive *Lemon* test in order to effect the "significant change" she saw necessary, which was to allow all students the same access to public resources, regardless of their schools' affiliation. *Agostini*, 521 U.S. at 237 (concluding that "Establishment Clause law has significantly changed since . . . *Aguilar*") (internal quotation marks omitted). *See* Doug Roberson, *The Supreme Court's Shifting Tolerance for Public Aid to Parochial Schools and the Implications for Educational Choice:* Agostini v. Felton*, 117 S. Ct. 1997 (1997)*, 21 Harv. J.L. & Pub. Policy 861, 862 (1998) (stating that "the Supreme Court's decision in *Agostini* was a victory for the equal access of religious citizens, particularly parochial-school students, to generally available government benefits").

156. Justice O'Connor did not explain why she would not wholly abandon the *Lemon* test, but it might well be that she shared a view that Justice Scalia articulated four years earlier, using very colorful language: "Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993).

157. *Agostini*, 521 U.S. at 232.

158. *Id.* at 231.

159. *Id.* at 222.

secular in character and is supplied to the pupils rather than the institutions."[160]

By the time the Court decided *Agostini*, school voucher approval was just around the jurisprudential corner. With the *Lemon* test out of the way, which was the hurdle that school choice programs were unlikely to climb,[161] a new constitutional argument emerged pointing to the possible judicial affirmation of such programs. If the government could use public funds to help needy students attending parochial schools, then why not give parents government-issued school vouchers to send their children to the school of their choice as an alternative to sending them to a failing public school? Either way, the argument went, the money would neither be defined by religion, nor would it go directly to the service providers.[162] This was the momentous issue that the Court tackled in the precedent-setting case of *Zelman v.*

160. *Wolman v. Walters*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part). The Burger Court adopted a no-aid approach under *Lemon* based on the premise that even "secular, nonideological and neutral" aid "can be diverted to religious purposes." *Meek*, 421 U.S. at 357, 365 (internal quotation and citation marks omitted). This was the rationale underlying the denial of aid in *Meek*. *See supra* n. 92 (discussing the role of divertibility in the Court's reasoning). Abandoning the logic of *Meek* and overturning *Aguilar* and *Ball*, the *Agostini* Court set the stage for a doctrinal shift by removing the focus of its analysis from the potential benefit to religion, or the church–state interaction, and placing it on the evenhanded distribution of funding, notwithstanding the possibility that religion may ultimately benefit from the government subsidy. *See* Roger J.R. Levesque, *Dangerous Adolescents, Model Adolescents: Shaping the Role and Promise of Education* 57 (Springer 2002) (maintaining that in *Agostini* "the Court focused on whether the aid was made available on a neutral basis to both religious and secular beneficiaries, and whether the beneficiaries made private choices as to the aid's religious/non-religious destination. The focus on choice is significant . . . [as] the decision to use those funds for religious purposes cannot be attributed to the state and thus does not amount to direct aid by the state").

161. *See* Peter M. Kimball, *Opening the Door to School Choice in Wisconsin: Is* Agostini v. Felton *the Key?* 81 Marq. L. Rev. 843, 868 (1998) (conjecturing that "employ[ing] the *Lemon* test under the Court's traditional approach, the [Wisconsin] Choice Program will likely fail under the primary effects inquiry"). Earlier in his piece, the author indicates that "Wisconsin has broken new ground by permitting religious and nonreligious schools to participate in a school voucher program." *Id.* at 844.

162. *See* Keith Syler, Student Author, *Parental Choice v. State Monopoly: Mother Knows Best—A Comment on America's Schools and Vouchers*, 68 U. Cin. L. Rev. 1331, 1352 (2000) (explaining that *Agostini* contributed significantly to the "voucher debate" by invalidating the "former understanding that all direct government aid to the function of religious schools is unconstitutional," and by creating the new wisdom that "[w]hen aid is allocated on the basis of neutral criteria that neither favor nor disfavor religion, and is made to both religious and secular beneficiaries on a non-discriminatory basis, there is no financial incentive for recipients to change their religious beliefs . . . and the program passes muster"). Writing in 2000, Syler was prescient enough then to foresee the imminent approval of school vouchers.

Simmons-Harris,[163] five years after *Agostini*. *Zelman* was the most anticipated decision of the 2001–2002 term.[164]

The facts of the case are straightforward. In 1996, the Ohio legislature adopted the Cleveland school voucher plan to assist low-income parents who were averse to sending their children to some of the worst public school districts in the State but could not afford private schooling.[165] The voucher payments could be (and were) applied to religious school tuition.[166] A local resident challenged the program the same year, but it took several years for the case to make it through the lengthy appeals process to the United States Supreme Court.[167] In a split decision that was hailed by school-choice advocates, the Supreme Court upheld the voucher program, finding that it was one of "true private choice"[168] and "neutral in all respects toward religion."[169]

Writing for the Court, Chief Justice Rehnquist reasoned that the Ohio voucher program was constitutionally innocuous because it merely provided underprivileged families with better educational opportunities for their children without favoring religiously affiliated schools over secular schools.[170] Unlike the *Nyquist* program whose "'function' was 'unmistakably to provide desired financial support for nonpublic, sectarian institutions,'"[171] and "provided direct money grants to religious schools,"[172] the "Ohio program is entirely neutral"[173] because the aid to religious schools is a result of the parents' "own genuine and independ-

163. 536 U.S. 639 (2002).

164. Paul E. Peterson, *After* Zelman v. Simmons-Harris, *What Next?* in *The Future of School Choice* 1 (Paul E. Peterson, ed., Hoover Inst. Press 2003).

165. *Zelman*, 536 U.S. at 644–645.

166. *Id.* at 645. Cleveland's voucher program was actually the first in the country to include religious schools. Milwaukee instituted the nation's first voucher program but did not originally include religious schools. Amy Hanauer, *Cleveland School Vouchers: Where the Students Go* 2 (Policy Matters Ohio 2002) (available at http://www.policymattersohio.org/wpcontent/uploads/2011/09/WhereStudentsGo.pdf).

167. *Zelman*, 536 U.S. at 648.

168. *Id.* at 653.

169. *Id.*

170. *Id.* at 653–654. In upholding the program, Chief Justice Rehnquist explained: "the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause." *Id.* at 650.

171. *Id.* at 661 (quoting *Nyquist*, 413 U.S. at 783) (emphasis removed).

172. *Id.*

173. *Id.* at 662.

ent private choice."[174] Chief Justice Rehnquist concluded that since the program was not conceived to aid religious schools, any "advancement of a religious mission" was "incidental," and "the Establishment Clause was not implicated."[175]

Despite the intense criticism, the *Zelman* decision was neither arbitrary nor vague. First, *Zelman* was not arbitrary because it was in harmony with the new neutrality theory pronounced in *Agostini*, which had already diluted the *Lemon* analysis as a limitation on government aid programs and, instead, made the principle of private choice "the only touchstone for channeling aid to religious schools."[176] Second, *Zelman* was not vague because it set two distinct criteria that must be met (and monitored) for a voucher program to be constitutionally valid, which can be dubbed *Zelman*'s twin requirements because of their inseparability.[177] Precisely stated, the satisfaction of constitutional neutrality under *Zelman* hinges on independent private decision-making and the availability of a genuine choice between religious and nonreligious schools.[178] The first requirement ensures that the public funds will reach a parochial school only as a result of the choice of a private person rather than a government actor.[179] The second requirement emphasizes equality between sectarian and secular education and ensures that neither will receive preferential treatment under a state voucher program.[180] It also affords parents an opportunity to make the choice that best suits their personal beliefs.

---

174. *Id.* at 652.

175. *Id.*

176. Linda Greenhouse, *Justices Approve U.S. Financing of Religious Schools' Equipment*, N.Y. Times, http://www.nytimes.com/2000/06/29/us/supreme-court-louisiana-case-justices-approve-us-financing-religious-schools.html (June 29, 2000).

177. Ira C. Lupu & Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 929 (2003) (asserting that because of *Zelman*, "a bright line now has been enshrined in the law of the Establishment Clause").

178. *Zelman*, 536 U.S. at 649, 654–655.

179. Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches That Engage in Partisan Political Speech?* 84 Ind. L.J. 447, 458 (2009) (stating as a matter of principle that "the element of private choice negates any finding of governmental sanction of religion through the indirect funding mechanism").

180. Joseph P. Viteritti, *The Last Freedom: Religion from the Public School to the Public Square* 209 (Princeton U. Press 2007) (stating that "the *Zelman* standard emphasizes the need for evenhandedness or neutrality in the treatment of secular and religious institutions").

With its emphasis on equality and choice, *Zelman* was widely viewed as a substantial nail in *Lemon*'s coffin,[181] marking the supersession of its long-dominant separationist paradigm by an alternative concept of neutrality. In his twenty-page majority opinion, Chief Justice Rehnquist made no reference to the *Lemon* test, evincing his intent to exclude it from the new analytical framework. It was Justice O'Connor who revisited *Lemon* by raising a question as to "how to apply the primary effects prong in indirect aid cases."[182] In so proceeding, she implicitly indicated that she would rather reinterpret the oft-criticized test than bury it. Her response to the question she put forth, however, did not offer any new explanations or arguments. She simply relied on the Court's reasoning to posit that the primary effect element is satisfied if the beneficiaries of the program are not defined by religion and have a genuine choice among religious and secular options.[183] Dismissing the concerns of the dissenting Justices as "alarmist claims,"[184] Justice O'Connor insisted that Cleveland's program was not dissimilar to other long-standing government programs that channel tax dollars into sectarian institutions that provide a variety of secular services, such as "public health, higher education, community development, housing, and social welfare."[185]

As the tiebreaker in a number of important five-to-four decisions,[186] Justice O'Connor drew all eyes when the Supreme

181. *See* Frank S. Ravitch, Locke v. Davey *and the Lose-Lose Scenario: What* Davey *Could Have Said, But Didn't*, 40 Tulsa L. Rev. 255, 255 (2004) (stating that *Zelman* "seemed to be the final nail in the coffin for any serious analysis of the effects of government funding programs under the Establishment Clause").

182. *Zelman*, 536 U.S. at 669 (O'Connor, J., concurring).

183. *Id.* (instructing lower courts to consider the two factors: "first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid").

184. *Id.* at 668.

185. Viteritti, *supra* n. 92, at 1112.

186. Undoubtedly expressing the view of many, Senator John Cornyn of Texas once observed that "'Justice O'Connor has been the pivot on most of the major decisions that were decided 5-4.'" The Washington Times, *Justice O'Connor Had Pivotal Role in Big Rulings*, http://www.washingtontimes.com/news/2005/jul/2/20050702-123921-2007r/ (July 2, 2005). *See also* Edward P. Lazarus, *A Swing Voter O'Connor Provides Judicial Barometer*, http://articles.orlandosentinel.com/2000-07-23/news/0007220026_1_oconnor-religion-undue-burden (July 23, 2000) (stating that "[a]s Justice Sandra Day O'Connor votes, so goes the [C]ourt").

Court heard *Zelman*. Much to the disappointment of separationists, however, Justice O'Connor's critical swing vote led to the Court upholding, rather than overturning, the voucher program. Indeed, separationists were about to experience more disappointment, as it soon turned out that *Zelman's* doctrinal logic extended well beyond school vouchers by opening up various cooperation possibilities between government and religious entities.

VI. THE IMPLICATIONS OF ZELMAN'S *NEUTRALITY STANDARD*

Apart from *Zelman*'s immediate effects, such as enhancing parental choice and creating more competition within school districts, it had far-reaching implications as federal courts utilized its neutrality analysis to examine other voucher-type social-service programs.[187] In other words, *Zelman* cleared the way for providing *indirect* government aid to religion through the private choice of eligible beneficiaries who could select between religious and nonreligious options.[188] Under *Zelman*, it is immaterial whether or not religion stands to benefit from the public aid so long as the funding scheme is constitutional, which allows the government to partner with religious groups to supply social services and solve social problems.[189] This partnership would not have been permissible under *Lemon* which, unlike *Zelman*,

187. *See Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 348 (1st Cir. 2004) (discussing impact of *Zelman* on Establishment Clause jurisprudence); *see also Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1013–1022 (9th Cir. 2009) (examining the case under the neutrality framework of *Zelman*).

188. Since the *Bradfield* decision of 1899, whenever tax money was given directly to a religiously affiliated institution, such as a healthcare facility, it was required to offer secular services to abide by constitutional limitations. No Supreme Court decision has yet allowed government to directly fund a sectarian social welfare organization that purposefully seeks to advance religion because the Establishment Clause categorically prohibits the "direct public funding" of religious organizations, unless they shed their religious character and provide secular services. *See Rosenberger v. U. of Va.*, 515 U.S. 819, 878 (1995) (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (stating that "[a]t the heart of the Establishment Clause stands the prohibition against direct public funding").

189. Justice Rehnquist's opinion in *Zelman* strongly suggested that such aid would be permissible because "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not the government, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652.

sought to keep the church and the state apart rather than achieve equality between religion and nonreligion.[190]

Having laid the foundation for funding private religious projects without violating the Establishment Clause, the *Zelman* decision increased the chances that "faith-based program" proponents could craft initiatives that would not violate the Establishment Clause.[191] The George W. Bush administration, which had urged the Supreme Court to accept Cleveland's school voucher case,[192] was quick to recognize and capitalize on the dramatic potential of *Zelman*'s favorable outcome.[193] The aggressive implementation of the Bush-led Faith-Based Initiative precipitated a wave of litigation and another landmark Supreme Court decision. Before proceeding further to discuss some of the leading cases, it is worth digressing a little to shed light on the main developments that led to the legal blowback.

In January 2001, only nine days after his inauguration, President Bush issued Executive Orders 13,198 and 13,199, which established the White House Office of Faith-Based and Community Initiatives (OFBCI) as the first step to fulfill his campaign pledge to facilitate faith-based participation in government-funded social-welfare programs.[194] His next order of business was to expand "charitable choice" programs, which were launched by his predecessor as part of the comprehensive welfare-reform legislation known as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.[195] But to the President's frustration, the Community Solutions Act

190. *See supra* pt. V (discussing how the concept of neutrality was redefined through changes in the Court after the *Lemon* decision and leading up to the *Zelman* decision).

191. Aaron Cain, Student Author, *Faith-Based Initiative Proponents Beware: The Key in* Zelman *Is Not Just Neutrality, but Private Choice*, 31 Pepp. L. Rev. 979, 1016 (2004).

192. Associated Press, *Administration Urges Justices to Hear School Voucher Cases*, http://www.deseretnews.com/article/849526/Administration-urges-justices-to-hear-school-voucher-cases.html (June 23, 2001).

193. A day after the *Zelman* decision came down, Secretary of Education Rod Paige hailed it and stated that it "adds momentum to two of President Bush's policy preferences: increasing education choices and options for parents and leveling the playing field for faith-based organizations to compete for federal dollars to run educational and community service programs." U.S. Dep't of Educ., *ED Review—July 5, 2002*, "Quote to Note," http://www2.ed.gov/news/newsletters/edreview/20020705.html#1 (July 5, 2002).

194. Elisabeth Divine Reid, Student Author, *Thou Shalt Honor the Establishment Clause: The Constitutionality of the Faith-Based Initiative*, 28 Hamline J. Pub. L. & Policy 431, 440–441 (2007).

195. *Id.* at 438–439.

of 2001, designed to strengthen the President's Faith-Based Initiative, passed the House but stalled in the Democrat-controlled Senate.[196] Congress never passed the Faith-Based Initiative.[197] Until President Bush left office in January 2009, the preexisting charitable choice programs remained the only significant feature of the Initiative etched into federal law.

When Congress blocked further attempts to enact the charitable choice expansion into law, President Bush instituted and advanced much of his faith-based agenda through executive orders and administrative policies.[198] On January 29, 2001, the Bush White House issued an executive order establishing "Executive Department Centers" to implement the Faith-Based Initiative in five executive departments: Justice, Labor, Education, Housing and Urban Development, and Health and Human Services.[199] Without congressional consent or guidance, the President signed two more executive orders on December 12, 2002, establishing centers in the Department of Agriculture and the Agency for International Development.[200] These centers ensured that sectarian social-service organizations were free to compete for federal contracts and vouchers from these departments.[201] Faith-based organizations (FBOs) soon had access to virtually all federally funded social-service programs, especially those that catered to crisis-prone or crisis-stricken populations such as unwed teen mothers, youthful offenders, substance addicts, prison inmates, and the homeless.[202] The

196. *Id.* at 442–443.

197. Daniel Burke, *Obama Says He Will Expand Bush's Faith-Based Program*, http://pewforum.org/Religion-News/Obama-says-he-will-expand-Bushs-faith-based-program.aspx (July 1, 2008).

198. Reid, *supra* n. 194, at 442–444.

199. *Id.* at 440–441.

200. *Id.* at 443.

201. For instance, the regulations issued by the United States Department of Education on the participation of faith-based organizations state at the outset that "religiously affiliated (or 'faith-based') organizations should be able to compete on an equal footing with other organizations for funding by the U[nited] S[tates] Department of Education." U.S. Dep't of Educ., *Regulations on the Participation of Faith-Based and Community Organizations in Department Programs*, http://www2.ed.gov/policy/fund/reg/fbci-reg.html (last modified June 14, 2006).

202. Associated Press, *Bush Focuses on Faith-Based Initiatives*, http://usatoday30.usatoday.com/news/washington/2004-06-01-faith-based_x.htm (June 1, 2004).

White House described these measures as "'a fresh start and bold new approach to government's role in helping those in need.'"[203]

Surveys showed that a sizable segment of the American populace supported the enhanced cooperation between government agencies and the faith community to promote public good. For instance, according to a February 2001 Pew survey, almost two-thirds of Americans were in favor of allowing religious organizations to use government funds to provide social services, and about half supported President Bush's decision to create the OFBCI.[204] A Pew report released in April 2001 showed that Americans supported FBO funding by a nearly three-quarters margin.[205] This level of support is hardly surprising given the high rates of religious participation among Americans.[206] That a public policy is popular, however, does not make it constitutional, especially one that seeks to forge a bond between church and state, as separationist groups vehemently argued.[207] It was only a matter of time before lawsuits were filed to bar the use of public funds for faith-based programs.

By 2003, constitutional challenges began making it to federal appellate courts. Of particular note is *Freedom from Religion Foundation v. McCallum*,[208] in which the Seventh Circuit imported many of the principles developed in *Zelman* into the charitable choice context. The case was brought by Freedom from Religion Foundation (FFRF), a Madison, Wisconsin-based

---

203. *Id.*

204. The Pew Research Ctr., *Faith-Based Funding Backed, but Church–State Doubts Abound* 1 (Pew Research Ctr. 2001) (available at http://www.people-press.org/files/legacy-pdf/15.pdf).

205. *Id.* at 8.

206. Forty percent of Americans attend weekly church services and seventy percent claim church membership. John G. Bruhn, *The Sociology of Community Connections* 181 (Kluwer Academic/Plenum Publishers 2005).

207. What amplified the concerns surrounding FBOs was the fact that they operated without sufficient monitoring mechanisms. As critics had anticipated, the lack of government oversight left the door open for arbitrary and improper practices. Such was the case with Joseph Hanas, who sought court-ordered drug treatment at the Inner City Christian Outreach Residential Program in Flint, Michigan. *Hanas v. Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 683, 688 (E.D. Mich. 2008). The Pentecostal staffers took away Hanas' rosary beads and prayer book, isolated him from his family, and prevented his priest from visiting him in an attempt to turn him away from his Catholic faith, which they disdainfully referred to as "witchcraft." *Id.* at 690. Hanas successfully sued the ministry for violating his religious freedom. *Id.* at 702.

208. 324 F.3d 880 (7th Cir. 2003).

church–state watchdog group,[209] against Faith Works Inc., a Milwaukee-based Christian rehabilitation center, which operated a transitional treatment facility for substance abusers.[210] The Christian halfway house was one of several publicly funded, private rehabilitation programs that parole violators could enroll in instead of going back to prison.[211] FFRF challenged Faith Works' program because it had a significant religious element.[212] The purpose of the lawsuit was to prevent Faith Works and its ilk from receiving and expending public funds to further a sectarian cause.[213]

Affirming the district court's ruling, the circuit court upheld the constitutionality of the arrangement between the Wisconsin Department of Corrections and Faith Works.[214] In a creative opinion by the esteemed Seventh Circuit Judge Richard A. Posner, the court drew a parallel between the challenged rehabilitation program and the school voucher program upheld by the Supreme Court in *Zelman*.[215] The school voucher and rehabilitation programs were constitutionally indistinguishable, Judge Posner reasoned, because both had secular alternatives,[216] the public monies were steered to the religious institutions as a result of a private choice rather than directly,[217] and the government's ends were secular regardless of the service provider's religious affiliation.[218] Further, the court rejected the petitioner's argument

209. Freedom from Religion Found., *About FFRF*, http://www.ffrf.org/about (accessed Nov. 7, 2013).

210. *McCallum*, 324 F.3d at 881.

211. *Id.*

212. Reid, *supra* n. 194, at 469 (explaining that the "Faith Works treatment was divided into four phases, all of which included religious themes").

213. *McCallum*, 324 F.3d at 881.

214. *Id.* at 884.

215. Upholding the Faith Works program, Posner wrote:

> A city does not violate the [E]stablishment [C]lause by giving parents vouchers that they can use to purchase private school education for their children, even if most of the private schools in the city are parochial schools—provided, of course, that the parents are not required to use the vouchers [for] a parochial school rather than [for] a secular[, private] school. The practice challenged in the present case is similar. The state in effect gives eligible offenders 'vouchers' that they can use to purchase a place in a halfway house, whether the halfway house is 'parochial' or secular.

Id. at 882 (citation omitted).

216. *Id.* at 882–883.

217. *Id.* at 882.

218. *Id.*

that the parole officers crossed the constitutional line when they recommended the Christian program to certain parolees because the record indicated that these suggestions were nonbinding and not motivated by the officers' religious convictions.[219]

That Faith Works program effectuated secular ends would not have sufficed to put Establishment Clause objections to rest.[220] Rather, what rescued the faith-based program from constitutional invalidation was the exercise of private choice in a manner akin but not identical to *Zelman*.[221] Admittedly, the public funds did not pass through the parolees' hands, but the fact remained that none of this money could be paid to the ministry if not for parolees' independent choices.[222] Consistent with this disposition (and the dicta of *Zelman*), one could safely conclude that a publicly funded Christian rehabilitation program based on mandatory referrals would not survive constitutional review.[223]

But what if a faith-based program is ostensibly voluntary yet has no secular alternatives? This was the question that the Eighth Circuit addressed in *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*,[224] another important appellate ruling that was also instructive as to the proper application of *Zelman*'s neutrality standard in noneducational settings. Dedicated to ensuring the separation of church and state, Americans United for Separation of Church and State (AU) challenged a state-financed sectarian prison program run by

219. "There is no evidence that in recommending Faith Works a parole officer will be influenced by his own religious beliefs." *Id.*

220. *See Schempp*, 374 U.S. at 294 (asserting that a state may not "employ religious means to reach a secular goal unless secular means are wholly unavailing"). *See also ACLU of Ga. v. Rabun Co. Chamber of Com.*, 698 F.2d 1098, 1111 (11th Cir. 1983) (reasoning that if the means employed were religious, then an "alleged secular purpose would not have provided a sufficient basis for avoiding conflict with the Establishment Clause").

221. Relying on *Zelman*, the Seventh Circuit considered private choice the determinative factor of constitutionality. The linchpin of the *Zelman* Court's holding was its finding that the contested program offered parents a genuine choice in selecting a school for their children. *See* Ira C. Lupu & Robert Tuttle, *Post-Script to "Sites of Redemption":* Zelman v. Simmons-Harris, *536 U.S. 639 (June 27, 2002)*, 18 J.L. & Pol. 537, 537 (2002) (stating that "[t]he *Zelman* opinion relies almost exclusively on a norm of intervening private choice as insulation between the state and religious institutions"). *See also* Cain, *supra* n. 191, at 1010 (stating that "throughout the *Zelman* opinion, the Court most often characterized the voucher program in terms of private choice alone").

222. *McCallum*, 324 F.3d at 882.

223. *Zelman*, 536 U.S. at 652.

224. 509 F.3d 406 (8th Cir. 2007).

Charles Colson,[225] a former Nixon aide who went into evangelical ministry after serving time for Watergate-related convictions.[226] Because the burden of proof falls on the party alleging the Establishment Clause violation,[227] AU mustered two arguments in support of its claims. First, it argued that Colson's program, InnerChange, was thoroughly Christian in its approach to rehabilitation.[228] Inmates had to participate in and perform a variety of religious exercises, such as Bible studies, church services, and counseling sessions, which were designed to prepare them for their return to society.[229] Second, AU argued that program participants received special perks and privileges that were unavailable to their peers.[230] Prison officials afforded preferential treatment to inmates who enrolled in InnerChange by providing better living quarters, greater privacy, more visits with family members, and special access to desirable facilities such as the computer room and the library.[231]

In affirming the lower court's holding, the Eighth Circuit struck down the contractual agreement between Iowa and Prison Fellowship Ministries as an establishment of religion, finding that the state funds were spent to advance religion because the faith-based program was "not available on a nondiscriminatory basis."[232] There were several controversial issues surrounding the program's implementation, but most troubling to the court were the direct aid from the State in absence of a "genuine and independent private choice" and the magnitude of the privileges granted to the Christian organization, as evident in the generous funding, access to prison facilities, and control of inmates.[233]

---

225. InnerChange describes itself as a program "'committed to Christ and the Bible.'" *Id.* at 413.

226. Washington Post, *Revisiting Watergate, The Watergate Story, Key Players: Charles Colson*, http://www.washingtonpost.com/wp-srv/onpolitics/watergate/charles.html (accessed Nov. 7, 2013).

227. *Ams. United*, 509 F.3d at 424.

228. InnerChange made no attempt to disguise its religious character, as the orientation materials distributed to participating inmates stated that it was a "Christian program, with a heavy emphasis on Christ and the Bible." *Id.* at 414 (internal quotation marks omitted).

229. *Id.* at 424.

230. *Id.*

231. *Id.*

232. *Id.* at 425.

233. *Id.* These findings were equally troubling to the district court, which considered them at length and concluded that the broad range of required activities made the

What further weakened the State's position was the revelation that the prison officials questioned the constitutionality of the InnerChange program at one point but used it anyway "due to budgetary constraints."[234]

Citing *Zelman* as the governing case, the circuit court set out three criteria that must be met for a government-funded, faith-based program to have constitutional sanction.[235] First, the funds must be "'allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and [be] made available to both religious and secular beneficiaries on a nondiscriminatory basis.'"[236] Second, the funds must pass to the religious entity "through the hands . . . of private citizens," whether literally or figuratively.[237] Third, the recipients must have genuine private choice, that is, they must be "free to direct the aid elsewhere."[238] It should be noted that the Eighth Circuit did not establish this tripartite framework; it merely distilled it from the *Zelman* decision to implement the definition of neutrality enunciated therein, and provide definitive guidance on how to cure the constitutional infirmities that could doom any faith-based program.[239]

Doubts over the constitutionality of faith-based social services lingered, pending a Supreme Court decision on the subject. The much-anticipated case was *Hein v. Freedom from Religion Foundation*,[240] which was the first direct challenge to President Bush's Faith-Based Initiative as well as the first faith-based partnership case to reach the Supreme Court. *Hein* was also the first Establishment Clause case of the newly constituted Roberts

program coercive: "For all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one of its penal institutions, giving the leaders of that congregation, i.e., InnerChange employees, authority to control the spiritual, emotional, and physical lives of hundreds of Iowa inmates." *Ams. United for Separation of Church & St. v. Prison Fellowship Ministries, Inc.*, 432 F. Supp. 2d 862, 933 (S.D. Iowa 2006). The district judge also found that, in comparison to other programs, the "level of religious indoctrination supported by state funds . . . in this case . . . is extraordinary." *Id.* at 939.

234. *Ams. United*, 509 F.3d at 416–417.

235. *Id.* at 424.

236. *Id.* at 425 (quoting *Mitchell v. Helms*, 530 U.S. 793, 813 (2000)).

237. *Id.* (citing *Mitchell*, 530 U.S. at 816).

238. *Id.*

239. *Id.*

240. 551 U.S. 587 (2007).

Court.[241] The case was brought by FFRF against the directors of the OFBCI and its centers.[242] Although the plaintiff organization itself lacked taxpayer status, being a tax-exempt nonprofit, it asserted standing because its members, as federal taxpayers, had standing to sue in their own right.[243] The alleged injury was the use of tax money by executive agencies to organize conferences that promoted FBOs "as being particularly worthy of federal funding."[244]

The District Court for the Western District of Wisconsin dismissed the suit for lack of standing, noting that "the challenged activities were not exercises of congressional power sufficient to provide a basis for taxpayer standing," because "federal taxpayer standing is limited to Establishment Clause challenges to the constitutionality of exercises of congressional power under the taxing and spending clause of [Article] I, [Section 8]."[245] On appeal, however, the Seventh Circuit reversed the dismissal order, holding that, with respect to challenging Establishment Clause violations, the distinction between executive spending and congressional appropriations "cannot be controlling."[246] When the court of appeals rejected a request for an en banc review,[247] OFBCI officials petitioned the United States Supreme Court for writ of certiorari, which was granted on December 1, 2006.[248]

---

241. Steven G. Gey, *Life after the Establishment Clause*, 110 W. Va. L. Rev. 1, 1 (2007). The Roberts Court began its first session on October 3, 2005, four days after Judge John G. Roberts Jr. was confirmed as the 17th Chief Justice of the United Sates. *See* Linda Greenhouse, *A Ceremonial Start to the Session as the Supreme Court Welcomes a New Chief Justice*, http://www.nytimes.com/2005/10/04/politics/politicsspecial1/04roberts.html (Oct. 4, 2005); David Stout, *Roberts Confirmed on 78-to-22 Senate Vote*, N.Y. Times, http://www.nytimes.com/2005/09/29/world/americas/29iht-roberts.html (Sept. 30, 2005).

242. *Hein*, 551 U.S. at 594–595.

243. *Id.* at 596. "The only asserted basis for standing was that the individual respondents are federal taxpayers who are opposed to the use of Congressional taxpayer appropriations to advance and promote religion." *Id.* (internal quotation marks omitted).

244. *Id.* at 595 (internal quotation marks omitted).

245. *Id.* at 596 (internal quotation marks omitted).

246. *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 994 (7th Cir. 2006). The Seventh Circuit reversed in a 2–1 decision delivered by Judge Posner, who found little merit in some of the alleged violations but concluded that the complaint was "not entirely frivolous, for it portrays the conferences organized by the various Centers as propaganda vehicles for religion, and should this be proved one could not dismiss the possibility that the defendants are violating the [E]stablishment [C]lause." *Id.*

247. *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988 (7th Cir. 2006).

248. *Hein v. Freedom from Religion Found., Inc.*, 549 U.S. 1074, 1074 (2006).

A plurality of the Supreme Court overturned the circuit court's decision and held that presidential discretionary spending could not be challenged on Establishment Clause grounds based solely on taxpayer status.[249] Focusing on justiciability and placing great weight on stare decisis, the Court rejected the circuit court's expansive view that taxpayer standing under the Establishment Clause extended to Executive Branch expenditures that were neither authorized nor directed by Congress.[250] Justice Alito, writing for the plurality, declared that "the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing"[251] because it is "'too indeterminable, remote, uncertain and indirect.'"[252]

Key to Justice Alito's lead opinion was the 1968 case of *Flast v. Cohen*,[253] which the Seventh Circuit also cited as dispositive.[254] In *Flast*, a group of taxpayers complained that "federal funds appropriated under the [1965 Elementary and Secondary Education] Act were being used to finance instruction . . . in religious schools . . . in contravention of the Establishment and Free Exercise Clauses of the First Amendment."[255] The asserted basis for standing in *Flast*, as in *Hein*, was the plaintiffs' taxpaying status.[256] The Warren Court recognized the right of taxpayers to challenge the award of federal funds to religious institutions, provided two conditions are met: "(1) the challenged statute is an exercise of the legislature's taxing and spending powers; and (2) the statute exceeds specific constitutional limitations on those powers."[257] Because neither of the narrow

249. *Hein*, 551 U.S. at 593.

250. *Id.*

251. *Id.* at 599.

252. *Id.* at 600 (quoting *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 433 (1952)).

253. 392 U.S. 83 (1968).

254. *Chao*, 447 F.3d at 989.

255. *Flast*, 392 U.S. at 85–86.

256. *Id.* at 85.

257. *Booth v. Hvass*, 302 F.3d 849, 852 (8th Cir. 2003). Steven G. Gey acknowledges that "the usual rule [is] that taxpayers do not have standing to challenge the misuse of their tax dollars," but explains that the Supreme Court carved out an exception in *Flast* because "[o]ne of the most crucial aspects of the Establishment Clause is its prohibition of government funding of religious activity." Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 Hastings L.J. 1, 28–29 (2009). Gey believes that the Warren Court exercised good judgment in viewing "this function of the Establishment Clause as so

exceptions applied in *Hein*, Justice Alito turned down the "invitation to extend [*Flast*'s] holding to encompass discretionary Executive Branch expenditures," asserting that the Court "never found taxpayer standing under such circumstances."[258]

Another authoritative precedent that the *Hein* Court had to revisit was *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,[259] in which taxpayers challenged the donation of surplus federal government property worth more than half a million dollars to a sectarian higher-learning institution.[260] Dismissing the claim for lack of standing, the Burger Court held that taxpayer standing under the Establishment Clause was limited to expenditures arising under the Taxing and Spending Clause.[261] However restrictive its language was, *Valley Forge* did not overturn *Flast*, as it allowed taxpayers to continue to invoke the Establishment Clause to restrain both Congress from appropriating funds for religious use and the President from allocating appropriated funds toward religious ends.[262] But because *Valley Forge* involved the transfer

---

crucial that it required special, more lenient standing rules to permit citizens to challenge government funding of religious enterprises." *Id.* at 28. Roy Chamcharas, on the other hand, is of the opinion that "the Seventh Circuit improperly expanded Supreme Court precedent by permitting taxpayer standing in situations involving executive actions and use of general congressional funds" because "the Seventh Circuit is bound to follow the Supreme Court precedent." Roy Chamcharas, *Who's the Boss? Seventh Circuit Limits Executive Branch*, 2 Seventh Cir. Rev. 146, 164–165, 168 (2006) (available at http://www.kentlaw.edu/7cr/v2-1/chamcharas.pdf). So while conceding that "*Flast* was established as a narrow exception to the doctrine barring taxpayer standing," Chamcharas contends that "[e]xceptions should be construed narrowly" and not be allowed "to swallow the entire doctrine of taxpayer standing in the method that Judge Posner applied." *Id.* at 165.

258. *Hein*, 551 U.S. at 605, 609.

259. 454 U.S. 464 (1982).

260. *Id.* at 467–469. "The appraised value of the property at the time of conveyance was $577,500." *Id.* at 468.

261. *Id.* at 470. The Court found respondents' Establishment Clause challenge deficient because "the source of their complaint is not a congressional action" and the property transfer at issue "was not an exercise of authority conferred by the Taxing and Spending Clause of [Article] I, [Section] 8." *Id.* at 479–480.

262. *Id.* at 488–490. For a time, *Valley Forge* caused some confusion over Establishment Clause standing, prompting some to wonder about the extent to which it had eviscerated *Flast* and others to suggest that it had dealt a death blow to *Flast* until *Kendrick* resuscitated the doctrine of taxpayer standing, although it ended up blurring rather than defining its parameters. *See Standing in the Mud:* Hein v. Freedom From Religion Foundation, Inc., 42 Akron L. Rev. 1277, 1289 (2009) (stating that "[a]fter *Valley Forge*, there was reason to believe that the allowance for taxpayer standing was effectively dead even though *Flast* had not been overruled").

of real property pursuant to federal legislation,[263] it did not clarify whether taxpayer standing under the Clause was sufficient to challenge discretionary spending by the Executive Branch absent any congressional involvement. That was precisely the issue that *Hein* presented, which the 1988 case of *Bowen v. Kendrick*[264] did not squarely settle because it too concerned a challenge to the implementation of federal legislation by Executive Branch officials.[265]

The Seventh Circuit, however, read *Kendrick* to support taxpayer standing under the Establishment Clause, asserting that it involved no "expenditure of appropriated funds" nor a "challenge to the exercise of Congress'[ ] taxing and spending powers."[266] Further, the circuit court recognized *Kendrick* as binding precedent in *Hein* because the complaint that the *Kendrick* Court allowed to proceed "had been not about the statute itself, which said nothing about religion . . . but about the fact that in administering the statute the [E]xecutive [B]ranch had made grants to religious institutions."[267] The conclusion to be drawn, Judge Posner reasoned, was that federal taxpayers had

263. *Valley Forge*, 454 U.S. at 467. The Federal Property and Administrative Services Act of 1949 allowed federal agencies to transfer formerly used surplus real property to "nonprofit, tax-exempt educational institutions" that may be able to use it. *Id.*

264. 487 U.S. 589 (1988).

265. The *Kendrick* Court allowed pervasively sectarian institutions to directly receive federal grants under the Adolescent Family Life Act of 1982 (AFLA) for educational and counseling services aimed at reducing teen pregnancies. However, the Court presented a twofold rationale for this exception. First, if there is "any effect of advancing religion, the effect is at most 'incidental and remote.'" *Kendrick*, 487 U.S. at 607 (citing *Lynch*, 465 U.S. at 683). Second, the Court noted that "nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution." *Id.* at 608. Further, three distinct characteristics set *Kendrick* apart from *Hein*: (1) the public funding was direct; (2) the Executive Branch was acting pursuant to authorization from Congress; and (3) the grantees included both religious and nonreligious groups. *Compare id.* at 595–597 *with Hein*, 551 U.S. at 594–595 (detailing the provisions of the two Acts at issue).

266. *Chao*, 433 F.3d at 993. The circuit court read *Kendrick* as reaffirming *Flast* and consistent with *Valley Forge*, which required taxpayers to show, not "that a statute violated the [E]stablishment [C]lause," but rather "that a statute enacted pursuant to Congress'[ ] taxing and spending powers under Article I, [S]ection 8 had been necessary for the violation to occur." *Id.* While this condition was not exactly met in *Hein* due to the absence of a statutory program, the fact remains that "the conferences are funded by money derived from appropriations, which means from exercises of Congress'[ ] spending power rather than from, say, voluntary donations by private citizens." *Id.* at 994. After all, the alleged violation that gave rise to standing, whether in *Flast* or *Kendrick*, "was not completed until the [E]xecutive [B]ranch acted, but the taxpayers still had standing to challenge it." *Id.* at 993.

267. *Id.* at 992–993.

standing under the Establishment Clause to sue the Executive Branch for allegedly using its general operating budget to advance religion, notwithstanding that the Faith-Based Initiative was created by a series of executive orders without statutory authorization.[268]

Reversing the circuit court's ruling, Justice Alito found the court's reading of Establishment Clause standing requirements to be overbroad for two reasons. First, the circuit court sought to extend *Flast*'s reach into executive prerogatives when the *Flast* Court identified the Establishment Clause as a specific limitation on the congressional power to tax and spend under Article I, Section 8.[269] Second, the circuit court also misapplied *Kendrick* because the taxpayers there were allowed to sue an Executive Branch official (Secretary of Health and Human Services) for giving sectarian institutions access to federal grants under the Adolescent Family Life Act.[270] Those two precedents, Justice Alito explained, teach that standing under the Establishment Clause is predicated on either Congress' misuse of its taxing and spending power or the President's misuse of congressionally appropriated funds.[271] Because the administrators in the present case were neither acting pursuant to a legislative mandate nor deriving their funds from congressional appropriation, Justice Alito concluded that FFRF should be divested of standing to pursue its Establishment Clause claims.[272] Justices Scalia and Thomas, concurring only in the result, were in favor of overturning *Flast* as "wholly irreconcilable with the Article III restrictions on

268. *Id.* at 996–997. Following a detailed analysis of the relevant caselaw, the circuit court allowed taxpayer standing because the alleged constitutional violation has resulted in at least a "marginal or incremental cost to the taxpaying public." *Id.* at 994–995.

269. *Hein*, 551 U.S. at 596–597. Justice Alito determined that the Seventh Circuit erred in finding standing "even where 'there is no statutory program' enacted by Congress and the funds are 'from appropriations for the general administrative expenses, over which the President and other [E]xecutive [B]ranch officials have a degree of discretionary power.'" *Id.* at 597 (quoting *Chao*, 433 F.3d at 994).

270. *Id.* at 606–607. Justice Alito also determined that the Seventh Circuit was remiss in relying on *Kendrick* to find standing for overlooking "the Court's recognition that AFLA was 'at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers,' and that the plaintiffs' claims 'called into question how the funds authorized by Congress were being disbursed pursuant to the AFLA's statutory mandate.'" *Id.* at 607 (quoting *Kendrick*, 487 U.S. at 619–620) (emphasis removed).

271. *Id.* at 610–611.

272. *Id.* at 608–609.

federal-court jurisdiction,"[273] but Justice Alito declined to go that far as the particular facts of *Hein* differed materially from *Flast*'s.[274] So even if the Court were to choose between *Flast* and *Valley Forge*, *Hein* was not the case for making such choice.

Hein proclaimed that the Establishment Clause should not be construed to allow taxpayers to sue the Executive Branch for spending general treasury money on religious charitable-choice projects.[275] But while *Hein* contributed to our understanding of the standing doctrine under the Establishment Clause, it did not address the constitutionality of the Faith-Based Initiative per se or the permissible ambit of federal support for sectarian social-service programs under *Zelman*'s conceptualization of neutrality. Some critics averred that the Court dodged these central questions over a technicality, and one that would shield the President's support for religion from taxpayer challenge.[276] Similar concerns were echoed by the dissent. Justice Souter, writing for the four dissenters, charged that the controlling opinion was not grounded in "logic or precedent" because it presumed that an injury is justiciable if caused by the Legislative Branch but not if by the Executive Branch.[277] To Justice Souter, the executive–congressional distinction was vacuous because an alleged Establishment Clause violation should be amenable to judicial

273. *Id.* at 618 (Scalia & Thomas, JJ., concurring in the judgment).

274. *Id.* at 629. Justice Alito was reluctant to overturn *Flast* presumably because "[t]he question the court faced was not whether to follow *Flast*, but whether *Flast* extended beyond congressional expenditures specifically earmarked for the challenged program or activity." Bradley Thomas Wilders, Student Author, *Standing on Hallowed Ground: Should the Federal Judiciary Monitor Executive Violations of the Establishment Clause?* 71 Mo. L. Rev. 1199, 1213 (2006).

275. *Hein*, 551 U.S. at 593.

276. *See* Rochelle Bobroff, *The Early Roberts Court Attacks Congress'[ ] Power to Protect Civil Rights*, 30 N.C. C. L. Rev. 231, 253 (2008) (stating that "[i]n this case, the judiciary abdicated its role to ensure that the [E]xecutive [B]ranch complies with the Establishment Clause of the Constitution"); Joel Fifield, *No Taxation without Separation: The Supreme Court Passes on an Opportunity to End Establishment Clause Exceptionalism,* Hein v. Freedom From Religion Foundation, Inc., *127 S. Ct. 2553 (2007)*, 31 Harv. J.L. & Pub. Policy 1195, 1207 (2008) (regretting that "the general denial of taxpayer standing to challenge the constitutionality of government expenditures lives on as a peculiar anomaly" because "the Court missed an opportunity to bring much-needed consistency to taxpayer standing doctrine").

277. *Hein*, 551 U.S. at 637 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting). Saying he could "see no basis for this distinction in either logic or precedent," *id.*, Justice Souter went on to caution the Court that "if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away," *id.* at 640.

review so long as it is based upon government action of some sort.[278] In conclusion, Justice Souter decried the plurality's departure from the Framers' fundamental commitment to noninterference in the private realm of "religious liberty" by sanctioning "favoritism for religion."[279]

The *Hein* minimalist decision provoked more questions than it answered and left many conjecturing what the result might have been had the Supreme Court found standing for the institutional plaintiff.[280] Interestingly, both critics and supporters appeal to neutrality to support their respective positions.[281] One view maintains that, under the current neutrality theory, religious organizations that serve secular purposes are entitled to public funding so long as they abide by *Zelman*'s dual guidelines of private choice and multiple options.[282] This view, as discussed earlier, has already received the approval of some federal courts.[283]

The other side of the argument is that applying *Zelman* outside the education context by treating faith-based social services as school voucher plans is at best constitutionally questionable. While voucher programs vary by state, they are generally subject to reasonable state regulation. For instance, Indiana requires participating private schools to comply with the state's curricular standards, administer state tests, and assign A

278. *Id.* at 640–641.

279. *Id.* at 643.

280. Joel Fifield describes Justice Alito's opinion as a "classic example of 'judicial minimalism'" in that it "neither extends *Flast* nor overrules it." Fifield, *supra* n. 276, at 1206; *id.* at 1206 n. 85. *See* Brendan R. McNamara, Student Author, *Forceful Minimalism,* Hein v. Freedom From Religion Foundation, Inc., *and the Prudence of "Not Doing,"* 83 Wash. L. Rev. 287, 288 (2008) (praising Justice Alito's plurality opinion for "resolv[ing] the case in the best way" and using it as a model "to argue for judicial minimalism as a general method of adjudication").

281. *See* Valauri, *supra* n. 40, at 84 (recognizing one of the oddities of Establishment Clause analysis that "Justices on opposing sides of the same case have claimed neutrality as the basis for their divergent opinions").

282. *See* Cain, *supra* n. 191, at 1010 (describing the *Zelman* opinion's characterization of the voucher program in terms of private choice); Lupu & Tuttle, *supra* n. 221, at 537 (explaining the use of private choice throughout the *Zelman* opinion).

283. *See e.g. McCallum*, 324 F.3d at 882 (noting that the vouchers allowed the recipient to choose "the provider whose service he prefers"); *Prison Fellowship Ministries, Inc.*, 509 F.3d at 425–426 (finding a violation of the Establishment Clause because there was only one choice available to the inmates).

to F letter grades like their public counterparts.[284] Faith-based service providers, on the other hand, integrate faith in every aspect of their work. Their avowed mission is religious indoctrination, despite their public-funding status.[285] The presence of the "genuine and independent private choice"[286] does not alter the fact that FBOs are not eclectic in their approach to social services and are not expected, much less required, to utilize any secular scientific approaches.[287] It follows that using public funds to support FBOs is the constitutional equivalent of using a government grant to pursue theological education, which the Rehnquist Court denied as a "religious endeavor" less than two years after deciding *Zelman*.[288] Put differently, the President's Faith-Based Initiative was an impermissible expansion of *Zelman* because it allowed FBOs to fulfill their religious mission at the government's expense rather than to do the government's secular work.[289] These are the arguments that many disappointed court-watchers were hoping that *Hein* would validate or refute.[290]

---

284. Associated Press, *Indiana Voucher Program Lags Weeks before Debut*, http://posttrib.suntimes.com/news/6200616-418/indiana-voucher-program-lags-weeks-before-debut.html (updated Aug. 11, 2011).

285. Carl H. Esbeck, *Statement before the United States House of Representatives Concerning Charitable Choice and the Community Solutions Act*, 16 Notre Dame J.L. Ethics & Pub. Policy 567, 574 (2002).

286. *Zelman*, 536 U.S. at 652.

287. *See* Jill Goldenziel, *Administratively Quirky, Constitutionally Murky: The Bush Faith-Based Initiative*, 8 N.Y.U. J. Legis. & Pub. Policy 359, 361 (2005) (noting that "[a] state may not require an FBO to alter or modify its religious mission or character as a condition of its participation").

288. *Locke v. Davey*, 540 U.S. 712, 721 (2004). By a 7–2 vote, the Rehnquist Court upheld the State's denial of college scholarship money to students majoring in theology, finding that "training for religious professions and training for secular professions are not fungible." *Id. Locke* can be read as an exception to *Zelman* since the facial neutrality of the scholarship program and the wide array of secular and religious choices available to Mr. Davey did not satisfy *Zelman*'s criteria because he opted to study devotional theology with state funds. *Id.* at 719–720. As such, the *Locke* opinion can also be read as a bar to the expenditure of public funds at faith-based organizations despite the availability of secular alternatives. *Id.* at 726.

289. *Id.* at 721. Even if FBOs could not discriminate against any service recipient on the basis of religion, they still provided exclusively sectarian social services in their official ministerial capacity with public funds. *See* Goldenziel, *supra* n. 287, at 360 (stating that "Charitable Choice forbids [FBOs] to discriminate against potential service recipients on the basis of religion, religious belief, or a beneficiary's refusal to actively participate in any religious service").

290. This disappointment was augmented by the Court's failure to reach a consensus even on the secondary issue of standing. Thus, not only did the Court duck the main constitutional questions, but it also missed the chance to sensibly articulate its standing doctrine under the Establishment Clause. *See* Fifield, *supra* n. 276, at 1202 (stating that

It is uncertain whether the Supreme Court will revisit *Hein*, but what is certain is that the meaning and essence of neutrality will continue to evolve, whether due to personnel shifts on the Court or societal changes that will inevitably occur. The question, however, is in which direction? In other words, will the Court maintain or modify its current accommodationist position? A not-so-subtle clue can be found in Judge Posner's opinion in *Chao*.[291] In overturning the district court's ruling against FFRF, Judge Posner put forth an intriguing hypothetical:

> Suppose the Secretary of Homeland Security, who has unearmarked funds in his or her budget, decided to build a mosque and pay an Imam a salary to preach in it because the Secretary believed that federal financial assistance to Islam would reduce the likelihood of Islamist terrorism in the United States.[292]

Posner then suggested that such an "elaborate . . . subvention of religion would give rise to standing to sue on other grounds."[293] Although it was presented in support of an argument for taxpayer standing, the mosque hypothetical case highlights the difficulty that the Court may someday encounter if non-Christian religions were to take advantage of its accommodationist jurisprudence and carry forward their own visions and strategies. Should that happen, the Supreme Court might find itself at odds with its own permissive holdings.

VII. CONCLUSION

For over 150 years of this nation's history, the United States Supreme Court heard very few religion-clause cases until the Free Exercise and Establishment Clauses were applied to the states in 1940 and 1947, respectively. The interpretation of the Establishment Clause has continually evolved since its incorporation, as did the principle of neutrality embodied in it. The Vinson

---

the "Supreme Court in *Hein* neither fully embraced taxpayer standing, as the dissenters urged, nor wholly abandoned the doctrine, as Justices Scalia and Thomas suggested"). For a thorough discussion of the "opportunity costs" of the *Hein* decision, see Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 Cardozo L. Rev. 1009 (2011).

291. *Chao*, 433 F.3d at 994–995.

292. *Id.* at 994.

293. *Id.*

Court (1946–1953) merited the distinction of incorporating the Establishment Clause but left a hodgepodge of competing perspectives on neutrality, partly because it was ideologically polarized and partly because it was breaking new constitutional ground.[294] *Everson v. Board of Education* defined governmental neutrality in terms of nonfavoritism and nonhostility to religion, and mandated that government be impartial between religions, as well as between religion and nonreligion.[295] Aid in the form of busing subsidies, for instance, was considered "neutral" and not in violation of the Establishment Clause because it benefited all parents without unduly affording either religion or nonreligion a privileged status.[296]

Often viewed as a transition court, the Vinson Court did not get around to providing a comprehensive interpretation of the Establishment Clause. It was the Warren Court (1953–1969) with its distinctive ideological unity that further developed *Everson*'s neutrality theory, taking full advantage of the school-related Establishment Clause litigation that reached its docket. During the Warren era, the concept of neutrality quickly evolved into a general principle of noninvolvement, where government and religion were to maintain separate spheres and neither could tread in the other's domain.[297] Inherent in this vision of neutrality was the diligent enforcement of church–state separation, a hallmark of the Warren Court's jurisprudence.[298] Under this approach, different types of government support were treated as fungible, resulting in tighter constraints on aid to pervasively sectarian institutions.[299] In application, this meant that providing secular materials to parochial schools, even on a nonpreferential basis, would be deemed an Establishment Clause breach because the savings could be channeled into religious activities that would ineluctably support the school's overall mission.[300]

---

294. Lupu, *supra* n. 30, at 791.

295. *Everson*, 330 U.S. at 15–16.

296. *Id.* at 17.

297. Lupu, *supra* n. 30, at 794.

298. Paul G. Kauper, *The Warren Court: Religious Liberty and Church–State Relations*, 67 Mich. L. Rev. 269, 269 (1968).

299. Lupu, *supra* n. 30, at 794.

300. Judith C. Areen, *Public Aid to Nonpublic Schools: A Breach in the Sacred Wall?* 22 Case W. Res. L. Rev. 230, 237 (1971); Kauper, *supra* n. 298, at 284–285.

Surprisingly, the Burger Court (1969–1986) defined neutrality in more or less the same separationist terms as the Warren Court, as a bar on government involvement with traditional religions to ensure a secular state that is neither an ally nor an adversary of religion.[301] Although predominantly shaped by Presidents Nixon and Ford, the Burger Court carried forth the torch of separationism in a series of decisions following *Lemon v. Kurtzman*, the 1971 case that yielded the Court's most frequently used Establishment Clause standard. To the disappointment of Chief Justice Burger and most religious adherents, the rigorous application of the *Lemon* test undermined the benign neutrality he envisioned when he articulated the test, as evident from his spirited dissents and trenchant criticisms of the Court's later rulings.[302] Chief Justice Burger's conception of neutrality, which was not shared by the majority of his colleagues, was based on the fundamental principle of nonfavoritism rather than an abstract principle of separationism.[303] Two blocs of Justices emerged on the Court, with one seeking to preserve and the other to dismantle the Warren Court's separationist legacy. The conflict between the two blocs foreshadowed a significant retreat from the Warren-era activism, as the conservative bloc finally got the upper hand under the Rehnquist Court (1986–2005).

With a conservative, restraintist majority firmly in control, the Rehnquist Court handed down a number of major decisions that gradually transformed the definition of neutrality from regarding most forms of state aid as promoting religion to allowing aid to be disbursed to secular and religious institutions alike. In *Agostini v. Felton*, the Court formally adopted this accommodationist framework for neutrality analysis, which is predicated on evenhandedness or nondiscrimination between religion and nonreligion.[304] There was no constitutional reason for the Court not to approve school vouchers once it sanctioned nondiscriminatory aid.[305] Five years later, in *Zelman v. Simmons-Harris*, the Court found Cleveland's voucher program neutral

301. *See* Lupu, *supra* n. 30, at 795–796 (explaining that both state provision of materials and state monitoring of institutions would, by the inherent nature of state involvement, "constitute [ ] 'excessive entanglement'").

302. *See supra* nn. 84–85 (quoting Chief Justice Burger's dissenting opinions).

303. Valauri, *supra* n. 40, at 139.

304. 521 U.S. at 234–235.

305. *Id.* at 237, 239–240.

toward religion on the premise that the state funds did not go directly to the parochial schools, but rather to the parents who then decided between the secular and religious alternatives available to them.[306] In making this doctrinal transition, the Court pushed the *Lemon* test and its restrictive reading of neutrality to the outermost fringes of Establishment Clause interpretation, thus lowering the wall of separation between church and state.[307]

Zelman proved to be the Rehnquist Court's most far-reaching Establishment Clause decision. In addition to the direct effect of increasing parental educational options, the voucher system had the carryover effect of encouraging a proliferation of faith-based programs. The new neutrality guidelines pronounced in *Zelman* were adapted to other settings to allow sectarian organizations to accept public funding and offer a broad range of social services. As anticipated, separationist watchdog groups attacked the constitutionality of faith-based programs, contending that the use of government-provided funds for religious purposes violated the Establishment Clause. The lawsuits gave the federal judiciary occasion to set guidelines for the funding process to be consistent with *Zelman*'s neutrality requirements. First, the government must ensure that the individual beneficiaries have a real choice between secular and religious service providers so their decision can be truly voluntary.[308] Second, the money may not transfer directly from the public treasury into sectarian coffers, but may only reach the faith-based institutions indirectly through a private decision-maker.[309] A third guideline that ought to be followed to avoid a different type of Establishment Clause violation (i.e., religious coercion) is that FBOs must respect

306. 536 U.S. at 653.

307. *Id.* at 668–669 (O'Connor, J., concurring).

308. *Id.* at 649 (majority) ("Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.").

309. *Mitchell*, 530 U.S. at 816 ("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.'").

the participants' religious beliefs and not pressure them into recanting their faith or embracing another.[310]

The one Faith-Based Initiative case that reached the Supreme Court, *Hein v. Freedom from Religion Foundation*, did not produce any holdings or dicta with regard to the conduct and status of sectarian social-service programs. Rather, the more conservative Roberts Court focused on the doctrine of standing, holding that federal taxpayer status is an insufficient basis for suing Executive Branch officials over the alleged use of general funds in violation of the Establishment Clause.[311] For a taxpayer to contest government's monetary support of religion, the funds must be appropriated by Congress pursuant to its spending authority under Article I, Section 8.[312] In narrowing its interpretation of standing, the Court came under criticism for effectively closing the door on future Establishment Clause challenges to discretionary spending by the President, no matter how egregious or outrageous that spending may be.[313]

The Justices were deeply divided in *Hein*, as they were in *Agostini* and *Zelman*. In fact, the Supreme Court was rarely united on doctrinal matters in general, and on the neutrality doctrine in particular. The two wings of this or preceding Courts, if asked about their respective understandings of religious neutrality, would undoubtedly offer very different views, exemplifying Justice Harlan's truistic observation that religious neutrality is but "a coat of many colors."[314]

310. *Co. of Allegheny*, 492 U.S. at 671–673 (Kennedy, J., Rehnquist, C.J., White & Scalia, JJ., concurring in part and dissenting in part) (introducing Justice Kennedy's coercion test).

311. *Hein*, 551 U.S. at 593.

312. *Id.* at 606.

313. *Standing in the Mud*, *supra* n. 262, at 1278.

314. *Allen*, 392 U.S. at 249 (Harlan, J., concurring).