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INTRODUCTION

Throughout his presidency, George W. Bush has vowed to help faith-based organizations compete for federal funds.[1] In early 2001, President Bush committed his administration to a faith-based plan that would improve government funding for religious groups that provide secular social services, such as "curbing crime, conquering addiction, strengthening families and neighborhoods, and overcoming poverty."[2] The President promised that the plan would be "one of the most important initiatives that [his] administration not only discusses, but implements."[3] President Bush has argued that in the past, faith-based organizations have been "discriminat[ed] against" when seeking federal funds.[4] Through faith-based initiatives, the Bush administration hopes to increase the efforts of charitable organizations by

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1 Shortly after taking office, President Bush announced his intention to help faith-based organizations. *See* Exec. Order No. 13,199, 66 Fed. Reg. 8499, 8499 (Jan. 29, 2001) (establishing the White House Office of Faith-Based and Community Initiatives (OFBCI) in order "to enlist, equip, enable, empower, and expand the work of faith-based" groups). In 2003, President Bush "continu[ed] to urge Congress" to help faith-based groups receive federal funds. Sheryl Gay Stolberg, *Senate Passes Version of Religion Initiative*, N.Y. TIMES, Apr. 10, 2003, at A24.

2 Exec. Order No. 13,199, 66 Fed. Reg. at 8499.

3 Remarks on Signing Executive Orders with Respect to Faith-Based and Community Initiatives, 1 PUB. PAPERS 26, 26 (2001).

4 Jennifer Loven, *Bush Helps Religious Groups Get Contracts*, CHI. SUN-TIMES, Dec. 13, 2002, at 5.

permitting religious groups to receive federal funds on an equal basis as secular social service providers. The plan permits such funding while allowing the faith-based groups to maintain their religious character and identity. The faith-based plan does not intend to favor religious organizations; rather, it simply seeks to have faith-based and secular social service groups "compete on a level playing field" for federal funds.[5]

Under the faith-based plan, religious social service groups can receive federal aid in two ways. First, the government can indirectly fund religious groups by issuing vouchers to needy individuals who then decide where to direct the aid.[6] Here, the government aid *indirectly* reaches religious institutions because the individual, not the government, decides where to spend the aid.[7] Second, faith-based programs can also receive federal funds in the form of *direct* grants to help the organizations run their social services.[8] Government funding for religious social service groups has been criticized for blurring the line between church and state and violating the Establishment Clause of the First Amendment.[9]

Recent Establishment Clause case law, however, suggests the constitutionality of voucher-style funding for religious institutions. In *Zelman v. Simmons-Harris*,[10] the United States Supreme Court upheld an Ohio school voucher program.[11] Under the program, the state provides needy families with vouchers, and the families privately decide whether or not to use the aid on a religious school.[12] According to the Court, school voucher programs that comply with two main conditions will not violate the Establishment Clause. First, the pro-

5 Exec. Order No. 13,199, 66 Fed. Reg. at 8499.

6 Scott M. Michelman, *Faith-Based Initiatives*, 39 HARV. J. ON LEGIS. 475, 475 (2002).

7 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 649–55 (2002) (describing school vouchers as indirect aid because the government funds are first routed to individual families).

8 Michelman, *supra* note 6, at 475.

9 *See, e.g.*, Michelman, *supra* note 6, at 475, 487–92 (explaining that the faith-based plan has been "[c]riticized for weakening the separation between church and state" and arguing that direct aid will be found unconstitutional by the Supreme Court); Alexis Peters, Note and Comment, *The Office of Faith-Based and Community Initiatives: Why the Establishment Clause Prevents Religious and Public Social Service Providers from Competing on a "Level Playing Field,"* 23 WHITTIER L. REV. 1173, 1174, 1207–10 (2002) (arguing that the OFBCI violates the Establishment Clause because it provides direct federal aid).

10 536 U.S. 639 (2002).

11 *Id.* at 662–63.

12 *Id.* at 645–46.

gram must be "neutral in all respects toward religion."[13] Second, it must be a "program of true private choice."[14] Although *Zelman* suggests how the Court would treat voucher-style faith-based initiatives, the constitutionality of directly funded religious groups is less clear and more controversial.

Given the outcome in *Zelman*, the constitutionality of the faith-based plan may similarly turn on whether it too needs to abide by the Court's two benchmarks of neutrality and true private choice. Both before and after the *Zelman* decision, some have suggested that the Court would only uphold an *indirectly* funded faith-based program that fulfills these conditions.[15] This Note will examine whether the Court's analysis in *Zelman* and other relevant cases requires religious social service groups to be indirectly funded by the government. In Part I, the analysis centers on the origins and legislative history of the faith-based plan, and demonstrates the similarities between school vouchers and faith-based initiatives. Part II examines the Court's Establishment Clause jurisprudence, and determines where *Zelman* fits into the Court's case law. Part III briefly discusses the implications of *Zelman* on religious institutions that receive indirect or voucher-style funding. Part IV analyzes the more difficult issue of where *Zelman* and other recent Supreme Court cases have left the future of *directly* funded programs. This Part also examines how current Supreme Court Justices would treat such programs. Ultimately, this Note predicts that the current Court will narrowly uphold both directly and indirectly funded faith-based initiatives.

I. THE ORIGINS AND LEGISLATIVE HISTORY OF THE FAITH-BASED PLAN

The likely impact of the school vouchers decision on the future of faith-based initiatives can reasonably be anticipated because of the strong similarities between the two. In fact, school aid cases like *Zelman* have been referred to as the "closest analogy" to determining

13 *Id.* at 653.

14 *Id.*

15 *See* David G. Savage, *New School of Thought: Vouchers Are Constitutional When Issued to Individuals Instead of Religious Groups*, 88 A.B.A. J. 34, 34 (2002) (arguing that *Zelman* suggests faith-based initiatives are constitutional "so long as the money flows through individuals, not directly to religious groups"); Elbert Lin et al., Developments in Policy, *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183, 204–05 (2002) (predicting before the *Zelman* decision that "a faith-based social welfare program would need to provide secular options and route aid directly to individuals involved in the program, perhaps in the form of vouchers," and suggesting that "block grants to religious institutions [are] likely to garner the support of only four Justices").

whether the faith-based plan would be found constitutional.[16] For instance, the faith-based plan and school vouchers have similar origins and objectives. School voucher laws provide low-income families with a voucher, up to $2250 under the Ohio law, to use on either public or private schools, regardless of their religion.[17] In most programs, vouchers are available to children located in school districts that the state has determined are failing its students.[18] If a family resides in such a district, the vouchers are distributed to parents based on financial need.[19] The parents then decide where to direct the tuition aid.[20] Since the families can use the vouchers for public or private schools, these programs do not openly favor religious schools over secular ones.[21] To ensure evenhandedness, the Ohio voucher law provides tutorial aid for the children that wish to remain in the public schools.[22]

These voucher programs emerged as an attempt to bolster struggling educational systems by offering low-income families additional schooling options.[23] In *Zelman*, the Court recognized that "Cleveland's public schools have been among the worst performing public schools in the Nation."[24] The Court explained that "[o]nly 1 in 10 ninth graders could pass a basic proficiency examination" and "[m]ore than two-thirds of high school students either dropped or failed out before graduation."[25] Hence, school voucher laws were passed to improve educational opportunities.[26]

The faith-based plan emerged from similar beginnings and with a common purpose. Federal funding for religious social service groups

16 Lin et al., *supra* note 15, at 200.

17 *Zelman*, 536 U.S. at 645–46.

18 The Ohio voucher law applied to school districts that "are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent." OHIO REV. CODE ANN. § 3313.975(A) (Anderson 2002).

19 *Zelman*, 536 U.S. at 645–46.

20 *Id.* at 645.

21 *See id.* at 653–54.

22 *Id.* at 645.

23 *Id.* at 643–47.

24 *Id.* at 644.

25 *Id.*

26 Other voucher programs emerged under comparable conditions. The Florida Opportunity Scholarship Program was passed in response to a deficient public education system. In Florida, the graduation rates were "one of the worst in the nation, at just below sixty percent." Suzanne Hansen, *School Vouchers: The Answer to a Failing Public School System*, 23 HAMLINE J. PUB. L. & POL'Y 73, 86 (2001).

is not unique to the Bush administration.[27] The President himself has recognized that "America has a long tradition of accommodating and encouraging religious institutions when they pursue public goals."[28] The federal government has funded orphanages and hospitals that have religious identities, and Lyndon Johnson's Great Society funded faith-based organizations such as the Salvation Army and Catholic Charities.[29] The President has promoted the recent resurgence of funding for religious organizations in an attempt to combat problems that continue to frustrate the American people. In early 2001, President Bush established the White House Office of Faith-Based and Community Initiatives (OFBCI) to help execute the faith-based plan.[30] In announcing the OFBCI, President Bush explained that "there are still deep needs and real suffering in the shadow of America's affluence" as problems like addiction, abandonment, "gang violence, domestic violence, mental illness and homelessness" still plague the country.[31]

Faith-based and community programs can be effective tools in addressing these problems. Religious and community institutions are "often well-situated to provide necessary social services in poverty-stricken areas" because the institutions are "based in the community" and have ties to the neighborhood.[32] In *Freedom from Religion Foundation, Inc. v. McCallum*,[33] the Seventh Circuit recognized that "[t]he success of Alcoholics Anonymous is evidence that Christianity can be a valuable element in a program treating addiction."[34] Even those that challenge the constitutionality of the OFBCI have conceded that "[i]t is virtually indisputable that faith-based organizations have had an exemplary record of community service."[35]

Ultimately, the faith-based plan and school vouchers were founded for similar purposes: to increase the quality of services that they respectively supply. Just as school vouchers arose as a response to failing educational systems, President Bush's faith-based plan emerged to respond to the nation's continuing struggle with addic-

27 David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 560 (2002).

28 Commencement Address at the University of Notre Dame in Notre Dame, Indiana, 1 PUB. PAPERS 551, 554 (2001).

29 Lin et al., *supra* note 15, at 186.

30 Exec. Order No. 13,199, 66 Fed. Reg. 8499, 8499 (Jan. 29, 2001).

31 Remarks on Signing Executive Orders with Respect to Faith-Based and Community Initiatives, *supra* note 3, at 26.

32 Cole, *supra* note 27, at 567.

33 324 F.3d 880 (7th Cir. 2003).

34 *Id.* at 882.

35 Peters, *supra* note 9, at 1196.

tion, poverty, and homelessness. Furthermore, the two respond to their respective problems in the same manner. They provide low-income families and the nation's needy with religious alternatives for schooling and social services.

In addition, proponents of school vouchers and the faith-based plan often face similar legal challenges and use similar legal arguments to defend the constitutionality of their programs. As mentioned earlier, the most obvious objection to both school vouchers and the faith-based plan is that they violate the Establishment Clause of the First Amendment. In response, both programs emphasize that as long as the aid is provided neutrally and is used to promote secular purposes, such as education and social services, the funding will not infringe upon the Constitution. As a result of these strong similarities, the legal community has understandably predicted that the *Zelman* decision reveals how the Supreme Court would view the constitutionality of the faith-based plan.[36]

The initiative, however, has encountered some political setbacks. The faith-based plan was initially a bipartisan project to improve the overall capacities of charitable organizations. In fact, during the 2000 presidential campaign, Democratic nominee Al Gore promoted a similar initiative. Unfortunately, the faith-based plan has become deeply embedded in partisan politics. A spokesman for Senator Joseph Lieberman explained that "[i]nstead of working to build a common-ground coalition, the White House allowed extremists in the House [of Representatives] to hijack the faith-based initiative and pursue a partisan, polarizing course."[37]

As a result of this partisan divide, the Bush administration has struggled to push a bill called the Charity Aid, Recovery, and Empowerment Act (CARE) through Congress.[38] The Bush administration had originally intended to use the CARE bill to implement the faith-based plan.[39] In addition to encouraging charitable donations, the

36 *See, e.g.*, 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, 993 (2003) (arguing that "*Zelman* virtually guarantees that vouchers will play a central role in the ongoing debate over the role of faith-based organizations in government-financed social service"); David G. Savage, *Leap of Faith: Outcome of School Vouchers Case Could Tell Fate of Bush's Faith-Based Initiatives*, 88 A.B.A. J. 29, 29 (2002) (predicting that the Court's treatment of school vouchers in *Zelman* will influence how the Court regards the faith-based plan).

37 Dana Milbank, *Bush Legislative Approach Failed in Faith Bill Battle: White House Is Faulted for Not Building a Consensus in Congress*, WASH. POST, Apr. 23, 2003, at A01.

38 *See* Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. (2002); Stolberg, *supra* note 1, at A24.

39 Stolberg, *supra* note 1, at A24.

CARE bill had a provision that provided "explicit protections for groups with religious names or religious icons in their literature."[40] This provision prohibited discrimination against religious groups and was aimed at increasing the ability of such groups to vie for government funding.[41] In the spring of 2003, proponents of the faith-based plan agreed to remove religious elements from the CARE bill in order to ease its passage.[42] While the bill still included incentives to encourage charitable donations, the provision offering specific protection to religious groups was cut.[43] This "watered-down" version of the CARE bill was overwhelmingly passed in the Senate by a vote of ninety-five to five.[44] On September 17, 2003, the House of Representatives almost unanimously passed the Charitable Giving Act, an equivalent to the weakened CARE bill.[45]

Despite this legislative setback, the faith-based initiative is still alive. Although the Bush administration struggled to pass legislative measures, it has consistently used Executive Orders to implement elements of the faith-based plan. For instance, President Bush established the OFBCI through Executive Order.[46] Also, after Congress delayed passing elements of the faith-based plan, President Bush issued another Executive Order in December 2002.[47] This Order banned discrimination against religious organizations and gave such groups equal protection when seeking federal funds.[48] The Bush administration has suggested that it will continue to use Executive Orders and other measures to implement the provisions that were cut from the CARE bill.[49] Since the faith-based plan continues to be implemented through government action, its constitutionality remains subject to intense debate.

However, Congress's political decision to pass a "watered-down" version of the CARE bill does not imply that the faith-based plan is unconstitutional. Proponents of the faith-based initiative can rely on

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40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *See* Charitable Giving Act of 2003, H.R. 7, 108th Cong. (2003) (passing with only thirteen representatives voting against it).

46 Exec. Order No. 13,199, 66 Fed. Reg. 8499, 8499 (Jan. 29, 2001).

47 Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

48 *Id.* at 77,141–42.

49 Carl Hulse, *With Tussles, House Renews a Job Program*, N.Y. TIMES, May 9, 2003, at A26; *see also* Editorial, *The War at Home*, N.Y. TIMES, Apr. 20, 2003, § 4, at 8 (explaining that "administration aides were assuring reporters that what went out in the legislature was being reinstated through executive order").

recent Supreme Court cases, such as *Zelman*, to argue that the plan would be found constitutional. Although the faith-based plan has struggled politically, the Court's recent Establishment Clause jurisprudence may resurrect the initiative by demonstrating its constitutionality.

II. THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

In order to fully understand the Court's ruling in *Zelman* and its likely impact on the faith-based plan, this Note will first analyze how the Court has developed its Establishment Clause jurisprudence. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[50] The Amendment has been interpreted in a variety of ways. "Separationists" contend that the Amendment requires a "strict separation" between the government's actions and any support of religious activities.[51] Referring to the frequently quoted phrase in a Thomas Jefferson letter, strict separationists call for a "wall of separation" between the government and religious groups.[52]

On the other hand, the "accommodationist" view argues that the Amendment does not require such a strict dividing line.[53] This view proposes that while the Amendment sought to prevent the establishment of a national religion, it was not intended to preclude all interaction between church and state.[54] According to the accommodationist position, the essence of the Establishment Clause is to prevent the government from "us[ing] its authority and resources to support one religion over another, or religion over nonreligion."[55] Accommoda-

50 U.S. CONST. amend. I.

51 *See* Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 315 (2000) (mentioning the separationist position and other interpretations of the Establishment Clause).

52 Ashley M. Bell, Comment, *"God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions*, 50 AM. U. L. REV. 1273, 1281–82 (2001).

53 *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 687–88 (1992) (arguing that "the principle of accommodation" between government and religion "is consistent with the requirements of the Religion Clauses"); Peters, *supra* note 9, at 1179–80 (explaining the basic elements of the accommodationist position).

54 *See* McConnell, *supra* note 53, at 688 (distinguishing between "[a]ccommodations of religion" and "the establishment of religion").

55 *Id.*

tionists argue that the First Amendment compels the government to treat religious organizations neutrally.[56]

The Court's treatment of the Establishment Clause has been inconsistent over the years. This Part will analyze the changes that have occurred. It will evaluate the Court's oft-criticized, three-prong test from *Lemon v. Kurtzman*[57] and the modifications to this test. This Part will also analyze the Court's treatment of government aid to religious social welfare groups and to religious schools.

A. *The Early Cases: Moving from "a Wall of Separation"*[58] *to "a Blurred, Indistinct, and Variable Barrier"*[59]

One of the Court's earliest interpretations of the Establishment Clause was in *Everson v. Board of Education.*[60] In *Everson,* the Court addressed a New Jersey law that reimbursed parents with children in public and religious schools for the costs of bus transportation to their schools.[61] Although the Court upheld the New Jersey law and permitted an indirect benefit to flow to families in religious schools, the Court strongly emphasized the importance of keeping church and state separate. Justice Black's interpretation of the Clause revealed the separationist view:

> 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. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly,

56 *See, e.g.,* Vernadette Ramirez Broyles, *The Faith-Based Initiative, Charitable Choice, and Protecting the Free Speech Rights of Faith-Based Organizations,* 26 HARV. J.L. & PUB. POL'Y 315, 336 (explaining that "[t]he Establishment Clause requires government to be neutral—not hostile—toward religion and religious expression"); Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers,* 46 EMORY L.J. 1, 20–41 (1997) (arguing for the neutrality principle, rather than the separationist view, in government relations with religion).

57 403 U.S. 602 (1971).

58 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

59 *Lemon,* 403 U.S. at 614.

60 330 U.S. 1 (1947).

61 *Id.* at 3.

> participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[62]

The Court explained that the "wall [between church and state] must be kept high and impregnable" and that it "could not approve the slightest breach."[63] Despite this separationist language, the Court's decision ultimately demonstrated that the Establishment Clause requires the government to treat religious groups neutrally: "That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[64] While the *Everson* Court erected a "wall" between church and state, it also found that neutral treatment of religious groups does not impregnate or breach that wall.

The *Everson* decision adopted some separationist principles mixed with a hint of the accommodationist theory. The Court, however, moved closer to an accommodationist interpretation of the Establishment Clause in several of its subsequent decisions. In *Board of Education v. Allen,*[65] the Court upheld a New York law that permitted school districts to loan secular textbooks to all students, irrespective of their enrollment at a religious or public school.[66] The *Allen* Court recognized that while the law primarily benefited students and parents, it also conferred a benefit on religious schools because it would "make it more likely that some children choose to attend a sectarian school."[67] The Court suggested that some support of religious organizations is constitutional, and it found that the benefit in this case did not amount to "an unconstitutional degree of support for a religious institution."[68]

In *Lemon v. Kurtzman,* the Court continued to move away from a strict separationist view of the Establishment Clause. In fact, by *Lemon* the Court had significantly distanced itself from the "wall" metaphor that it adopted twenty-four years earlier in *Everson.*[69] The Court now admitted that "total separation [between church and state] is not pos-

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62 *Id.* at 15–16.
63 *Id.* at 18.
64 *Id.*
65 392 U.S. 236 (1968).
66 *Id.* at 243, 248.
67 *Id.* at 243–44.
68 *Id.*
69 Peters, *supra* note 9, at 1180.

sible in an absolute sense."[70] Rather, the Court explained that "[s]ome relationship between government and religious organizations is inevitable."[71] The Court even went so far as to state "that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[72]

Here, the Court also formalized the three-prong *Lemon* test that it would struggle to apply in interpreting the Establishment Clause for the next twenty-five years. In analyzing the constitutionality of aid to religious groups, the Court officially identified the following three criteria: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[73] Although the Court rejected the strict "wall" imagery, it used this three-prong test to strike down Pennsylvania and Rhode Island statutes.[74] The Pennsylvania statute reimbursed private schools for the costs of "teachers' salaries, textbooks, and instructional materials in specified secular subjects."[75] The Rhode Island statute permitted the state to directly pay "teachers in nonpublic elementary schools a supplement of 15% of their annual salary."[76] Both statutes passed the Court's "purpose" test, as the Court found that it would not question the statutes' stated intentions to improve secular education in schools.[77] The Court, however, found that both statutes, which mainly benefit nonpublic schools, foster an "excessive entanglement between government and religion."[78] While the aid programs were found unconstitutional, the Court's language demonstrated that it would not interpret the Establishment Clause as erecting an insurmountable "wall" between church and state.

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70 Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

71 *Id.*

72 *Id.*

73 *Id.* at 612–13 (citations omitted). The Court had previously applied these three requirements in its Establishment Clause cases; however, it formalized the test in *Lemon*. *See* Jamie Steven Kilberg, Note, *Neutral and Indirect Aid: Designing a Constitutional School Voucher Program Under the Supreme Court's Accommodationist Jurisprudence*, 88 GEO. L.J. 739, 746–47 (2000) (explaining that the Court's "purpose" and "effects" prongs were applied in the Court's *Allen* decision, while the "excessive entanglement" prong was first used in *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970)).

74 *Lemon*, 403 U.S. at 606–07.

75 *Id.*

76 *Id.* at 607.

77 *Id.* at 613.

78 *Id.* at 613–14, 620–22.

Two years after *Lemon*, the Court again used its three-prong test to strike down aid to religious schools in *Committee for Public Education and Religious Liberty v. Nyquist*.[79] *Nyquist* represents a critical case in the Court's Establishment Clause jurisprudence because opponents of school vouchers often refer to it as evidence that vouchers are unconstitutional.[80] The New York law that the Court struck down provided direct money grants to nonpublic schools for maintenance and repair, and it provided tuition reimbursements to parents with children in nonpublic elementary and secondary schools.[81] In applying the *Lemon* test, the Court did not question the secular purpose of either part of the statute.[82] However, it found that the law had the unconstitutional effect of advancing religion by distinguishing between public and nonpublic schools and only providing aid for the *non*public schools.[83] The *Nyquist* Court distinguished its decision from the laws that it upheld in *Everson* and *Allen* by explaining that those laws involved a "class of beneficiaries [that] included *all* schoolchildren, those in public as well as those in private schools."[84] Consequently, the unconstitutional aid in *Nyquist* can easily be distinguished from the aid in school voucher programs and faith-based initiatives. Unlike the funding for the faith-based plan, the aid in *Nyquist* was not distributed neutrally to public and nonpublic schools.

Another distinguishing feature in the *Nyquist* decision is that the New York law did not include a secular content restriction for the aid.[85] A law with a secular content restriction specifically explains that government funds may only be used for secular purposes. The *Nyquist* Court recognized that "some forms of aid may be channeled to the secular without providing direct aid to the sectarian."[86] The Court, however, found that both the direct maintenance-and-repair grants[87] and the tuition reimbursements[88] failed to ensure that government aid would be restricted to secular functions.

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79 413 U.S. 756 (1973).

80 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 661–62 (2002) (challenging the Ohio school voucher law, the state taxpayers argued that the Supreme Court should rely on *Nyquist*; however, the Court distinguished between Ohio's constitutional voucher program and the unconstitutional law at issue in *Nyquist*).

81 *Nyquist*, 413 U.S. at 762–64.

82 *Id.* at 773.

83 *Id.* at 783.

84 *Id.* at 782 n.38.

85 *Id.* at 774, 782–83.

86 *Id.* at 775.

87 *Id.* at 774.

88 *Id.* at 782–83.

These early Establishment Clause cases reveal that the Court is willing to accept at least some interaction between government and religion. While the *Nyquist* decision in many ways suggests a relatively strict view of the Establishment Clause, it also hints at the importance of neutral treatment for public and private schools and the value of secular content restrictions.

B. Problems in Applying Lemon *and the Emergence of the Endorsement and Coercion Tests*

Shortly after *Nyquist*, the Court addressed a state statute that provided both textbook loans and loans for instructional material and equipment to nonpublic schools in *Meek v. Pittenger*.[89] The Court found that state loans for instructional material and equipment to "pervasively sectarian" schools were unconstitutional.[90] According to the Court, "pervasively sectarian" institutions are those organizations whose "secular activities cannot be separated from its sectarian ones."[91] The *Meek* Court had to reconcile its decision to reject loans of instructional material with the *Allen* decision, which permitted textbook loans. As a result, the *Meek* Court upheld the statute's textbook loans while simultaneously denying the loans for other instructional material.[92] In so doing, the Court created an unusual distinction between a constitutional loan of textbooks to "pervasively sectarian" schools and an unconstitutional loan of other instructional material to these same schools.[93]

One possible explanation for the Court's distinction was that the textbooks were loaned to students, while the instructional material was given directly to the private schools.[94] This distinction, however, fell apart when the Court rejected a law that provided instructional equipment to families, and not schools, in *Wolman v. Walter*.[95] In *Wolman*, the Court continued to treat instructional material differently

89 421 U.S. 349, 365–66 (1975). The instructional material included maps, charts, periodicals, photographs, films, sound recordings, projection equipment, and laboratory equipment. *Id.* at 354–55.

90 *Id.* at 366.

91 Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976).

92 *Meek*, 421 U.S. at 362, 372–73.

93 David S. Petron, Note, *Finding Direction in Indirection: The Direct/Indirect Aid Distinction in Establishment Clause Jurisprudence*, 75 NOTRE DAME L. REV. 1233, 1240–42 (2000).

94 *Id.* at 1240–41.

95 433 U.S. 229, 251, 255 (1977); *see also* Petron, *supra* note 93, at 1241 (explaining that in *Wolman* the Court rejected the distinction between direct aid to private schools and indirect aid to students).

than textbooks, regardless of whether the instructional-material loans were given to individual families or directly to the schools.[96] The confusing distinction between textbooks and other instructional material suggests that the Court struggled to apply the *Lemon* test in these cases.

These struggles continued as individual Justices adopted different methods for applying the *Lemon* test and interpreting the Establishment Clause. In *Lynch v. Donnelly*,[97] Justice O'Connor wrote "separately to suggest a clarification of [the Court's] Establishment Clause doctrine."[98] In *Lynch*, the Court found that the Establishment Clause was not violated when a municipality displayed "a crèche, or Nativity scene, in its annual Christmas display."[99] The *Lynch* Court further moved away from Jefferson's "wall" metaphor, as it explained that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[100] In her concurrence, Justice O'Connor suggested that when interpreting the Establishment Clause, the Court should focus on whether government action endorses religion:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two main ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community. Disapproval sends the opposite message. . . . Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.[101]

Justice O'Connor argued that the Court should apply an endorsement test to both the "purpose" and "effects" prongs of its *Lemon* analysis.[102] She first explained that "[t]he proper inquiry under the purpose prong of *Lemon* . . . is whether the government *intends* to convey a message of endorsement or disapproval of religion."[103] Turning to the "effects" prong, Justice O'Connor similarly argued that

96 *Wolman*, 433 U.S. at 238, 250–51.
97 465 U.S. 668 (1984).
98 *Id.* at 687 (O'Connor, J., concurring).
99 *Id.* at 670–71; *see also id.* at 687.
100 *Id.* at 673.
101 *Id.* at 687–89 (O'Connor, J., concurring).
102 *Id.* at 690 (O'Connor, J., concurring).
103 *Id.* at 691 (O'Connor, J., concurring) (emphasis added).

"[w]hat is crucial is that a government practice not have the *effect* of communicating a message of government endorsement or disapproval."[104]

Justice O'Connor clarified the endorsement test in her concurring opinion in *Wallace v. Jaffree*.[105] In *Wallace*, she recognized that applying "the *Lemon* test has proved problematic" and she again advocated using the endorsement inquiry as a way to improve the Court's *Lemon* analysis.[106] Justice O'Connor explained that "[t]he relevant issue" under her test "is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the challenged practice] as a state endorsement" of religion.[107] Therefore, Justice O'Connor's endorsement test "is based on an informed and reasonable observer's perception of the [government] practice."[108] The Court has adopted Justice O'Connor's endorsement test and relied on her *Lynch* concurrence in several Establishment Clause cases.[109] For instance, in *County of Allegheny v. American Civil Liberties Union*, a majority of the Court explained: "In recent years, we have paid particularly close attention to whether the challenged governmental practice has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."[110]

Justice Kennedy, however, has strongly rejected the endorsement test and suggested that the Court apply a different approach when interpreting the Establishment Clause. Writing separately in *County of Allegheny*, Justice Kennedy argued that the endorsement test was "a recent, and . . . most unwelcome, addition to [the Court's] tangled Establishment Clause jurisprudence."[111] He further explained that

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104 *Id.* at 692 (O'Connor, J., concurring) (emphasis added).

105 472 U.S. 38, 67–84 (1985) (O'Connor, J., concurring).

106 *Id.* at 68–70 (O'Connor, J., concurring).

107 *Id.* at 76 (O'Connor, J., concurring).

108 Lisa Langendorfer, Comment, *Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence*, 33 U. RICH. L. REV. 705, 711 (1999).

109 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 654–55 (2002) (using language from Justice O'Connor's endorsement test to uphold a school voucher program); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (plurality opinion) (using the endorsement test to strike down a Texas statute that exempted religious periodicals from sales tax); *Wallace*, 472 U.S. at 60–61 (applying Justice O'Connor's endorsement test in finding that a moment of silence for meditation or voluntary prayer is unconstitutional); *see also* Langendorfer, *supra* note 108, at 712–14 (discussing the Supreme Court cases that have used Justice O'Connor's endorsement test).

110 *County of Allegheny*, 492 U.S. at 592.

111 *Id.* at 668 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Justice O'Connor's test was "flawed in its fundamentals and unworkable in practice."[112] Instead, Justice Kennedy suggested a narrower view of what constitutes establishment of religion:

> [G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."[113]

Under Justice Kennedy's coercion test, noncoercive action will only violate the Establishment Clause when it is substantial: "Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."[114]

Lemon represents one of the Court's first attempts to determine when neutral support of religion crosses over to the unconstitutional establishment of religion. However, the *Lemon* test proved to be difficult to apply and occasionally resulted in incoherent distinctions, like the one between textbooks and instructional material.[115] *Lemon* continued to decay as some Justices advocated strikingly different approaches to applying the test, and at least one Justice, Chief Justice Rehnquist, suggested that it should be abandoned altogether.[116]

C. Bowen v. Kendrick: *A Precursor to the Faith-Based Initiative?*

In *Bowen v. Kendrick*,[117] the Court examined a faith-based social welfare program similar to the one now sponsored by President Bush.

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112 *Id.* at 669 (Kennedy, J., concurring in the judgment in part and dissenting in part).

113 *Id.* at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

114 *Id.* at 662 (Kennedy, J., concurring in the judgment in part and dissenting in part).

115 Wolman v. Walter, 433 U.S. 229, 238, 250–51 (1977).

116 *See* Wallace v. Jaffree, 472 U.S. 38, 108–13 (1985) (Rehnquist, J., dissenting) (arguing that the *Lemon* test "has no basis in the history of the [First A]mendment, is difficult to apply and yields unprincipled results"). Several legal scholars have noted that the *Lemon* test has faded in importance. *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 535 (2d ed. 2003) (recognizing that "the Court has not formally renounced the *Lemon* test, but has relied on it less and less in recent cases"); McConnell, *supra* note 53, at 685–86 (noting that "it is increasingly evident that the *Lemon* test is largely irrelevant or indeterminate when applied to most serious establishment issues").

117 487 U.S. 589 (1988).

In *Bowen*, the Court upheld "a federal grant program that provides funding for services relating to adolescent sexuality and pregnancy."[118] The Adolescent Family Life Act (AFLA) supplied federal grants to public or nonprofit private organizations that provided such services.[119] In upholding a facial challenge to the law, the Court's analysis again focused on the effects of the Act. The Court first explained that the Establishment Clause does not restrain the government from using religious institutions to solve social problems: "Nothing in our previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems."[120] The Court argued that it "has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."[121] Like President Bush, the *Bowen* Court recognized "the long history of cooperation and interdependency between governments and charitable or religious institutions."[122]

However, the Court also noted that despite this long history, government funding can have the impermissible effect of advancing religion.[123] In *Bowen*, the Court did not find an improper effect because the funds were provided neutrally and without reference to religion: "The AFLA defines an 'eligible grant recipient' as a 'public or nonprofit private organization.'"[124] The Court further explained that it would not presume that "religiously affiliated AFLA grantees [were] not capable of carrying out their functions under the AFLA in a lawful, secular manner."[125] In upholding the program, the Court demonstrated that it would not presume that religious recipients would use the aid on religious activities.

Although *Bowen* appears to be definitive case law supporting the faith-based plan, the decision does not guarantee the constitutionality of modern faith-based initiatives.[126] The Court only held that the AFLA did not *on its face* violate the Establishment Clause.[127] The possibility remained open that an *as applied* challenge to the Act would

118 *Id.* at 593.
119 *Id.*
120 *Id.* at 607.
121 *Id.* at 609.
122 *Id.*
123 *Id.*
124 *Id.* at 608.
125 *Id.* at 612.
126 Lin et al., *supra* note 15, at 199–200.
127 *Bowen*, 487 U.S. at 593.

prevail.[128] While *Bowen* demonstrates that a facial challenge to the faith-based initiative would likely fail, it does not reveal how an as applied challenge would be decided.[129] The dearth of other relevant case law on government funding for faith-based social welfare groups and the limited reach of the *Bowen* holding has compelled legal commentators to turn to religious school aid cases for "further guidance."[130] These cases represent the "closest analogy" as to how the Court would treat the faith-based plan.[131]

D. The "Closest Analogy": Government Aid to Religious Schools

Although the Court's early decisions recognize that the Establishment Clause permitted *some* interaction between church and state, they nonetheless reveal that the Court was hesitant to permit federal funding of religious institutions. However, starting with *Mueller v. Allen*[132] in 1983, and continuing with a string of religious school aid cases, the Court began to demonstrate a more accepting view of government aid to religion.

In *Mueller*, the Court upheld a Minnesota law that permitted taxpaying families with children in public, private, or religious schools to deduct the expenses for "tuition, textbooks, and transportation" when "computing their state income tax."[133] In upholding the law, the Court relied on two main factors that would become benchmark considerations for indirect aid cases.[134] First, the Court distinguished its decision from *Nyquist* by emphasizing that the state assistance was provided neutrally to "*all* parents," regardless of whether the children attended public schools, nonreligious private schools, or religious private schools.[135] The Court found that such neutral aid to "a broad spectrum of citizens is not readily subject to challenge under the Es-

128 Lin et al., *supra* note 15, at 198–200.

129 *Id.* at 200.

130 *Id.*

131 *Id.*

132 463 U.S. 388 (1983).

133 *Id.* at 388–91.

134 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 653–55 (2002) (upholding a school voucher program because the program fulfilled the benchmarks of neutrality and private choice); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3, 9–10 (1993) (applying the same two factors in permitting a school district to pay for a sign-language interpreter to assist a disabled student attending a religious school); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 482, 487–88 (1986) (relying on neutrality and private choice in upholding disability aid provided to a blind person studying to become a minister at a Christian college).

135 *Mueller*, 463 U.S. at 397–98.

tablishment Clause."[136] Second, the Court also stressed that the state aid only reaches religious schools "as a result of numerous private choices of individual parents."[137] The Court upheld the law even though the majority of families that benefited from the aid had children in religious schools.[138] In determining constitutionality, the Court found that the actual ratio of religious school students to non-religious school students was not dispositive.[139] The Court explained that it would be "loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[140]

Following *Mueller*, the Court continued to demonstrate the importance of neutrality and private choice in indirect school aid cases. In *Witters v. Washington Department of Services for the Blind*,[141] the Court relied on neutrality and private choice to uphold disability aid provided to a blind person who was studying to become a minister at a private Christian college.[142] The Court noted that the government aid was provided neutrally to a class of recipients that are not defined by religion,[143] and that the law created "no financial incentive[s]" to direct the aid to religious schools.[144] Rather, the funding "ultimately flows to religious institutions . . . only as a result of the genuinely independent and private choices of aid recipients."[145]

Likewise, the Court produced a similar outcome in *Zobrest v. Catalina Foothills School District*.[146] Here, the Court permitted a school district to pay for a sign-language interpreter to assist a disabled student attending a religious school.[147] The government program "distribute[d] benefits neutrally to any child qualifying as 'disabled' under the IDEA, without regard" to whether the child attends a public, private, or religious school.[148] The government aid fulfilled *Mueller*'s second benchmark as well, because the program was not "skewed towards religion" and an "interpreter [would] be present in a secta-

136 *Id.* at 398–99.
137 *Id.* at 399.
138 *Id.* at 400–01.
139 *Id.* at 401.
140 *Id.*
141 474 U.S. 481 (1985).
142 *Id.* at 482, 487–88.
143 *Id.* at 488.
144 *Id.*
145 *Id.* at 487.
146 509 U.S. 1 (1993).
147 *Id.* at 3.
148 *Id.* at 10.

rian school only as a result of the private decision of individual parents."[149]

Mueller, *Witters*, and *Zobrest* reveal that the Court has become more receptive to government funding of religious institutions. Perhaps more importantly, the cases demonstrate that government aid to religious institutions will not violate the Establishment Clause when the aid is neutrally provided without reference to religion, and when it only reaches the religious institutions through the private choices of individual families. These cases adopted a view of the Establishment Clause that paved the way for the Court to uphold the use of school vouchers in *Zelman*.

E. Zelman *and the Court's Current Case Law*

In *Agostini v. Felton*,[150] the Court freely admitted that its approach to the Establishment Clause had "significant[ly] change[d]" over the years.[151] In light of these changes, the Court decided to redefine its weakened *Lemon* test. In reworking the test, the Court decided to focus on the "purpose" and "effects" prongs, and to place the entanglement inquiry into a broader "effects" category.[152] The *Agostini* Court maintained *Lemon*'s "purpose" prong and explained that it will continue to inquire whether "the government acted with the purpose of advancing or inhibiting religion."[153] The Court, however, named three criteria to fit within the expanded "effects" inquiry: the government aid must not (1) result in "governmental indoctrination;" (2) "define its recipients by reference to religion;" nor (3) create an "excessive entanglement" with religion.[154]

In *Agostini*, the Court considered whether New York City, pursuant to a congressionally mandated program, could send "public school teachers into parochial schools to provide remedial education to disadvantaged children."[155] Through Title I of the Elementary and Secondary Education Act, Congress permitted federal funds to be distributed to a local educational agency (LEA).[156] The LEAs would use the funds to provide remedial education to *all* disadvantaged chil-

149 *Id.*

150 521 U.S. 203 (1997).

151 *Id.* at 235–37 (alteration in original) (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992)).

152 *Id.* at 232–33.

153 *Id.* at 222–23.

154 *Id.* at 234.

155 *Id.* at 208–09.

156 *Id.* at 209.

dren, regardless of where they attended school.[157] The Board of Education of the City of New York struggled with how to provide the Title I services to private school students, many of whom were attending religious schools.[158] New York implemented a plan where public school teachers would provide the services to eligible students on private school premises during school hours.[159] As a result, public school teachers would often be teaching in private schools with religious affiliations.[160] The Court had evaluated this plan twelve years earlier and found that it violated the Establishment Clause in *Aguilar v. Felton*.[161]

The *Agostini* Court noted several reasons for now upholding the once-rejected program. First, the Court explained that it would no longer presume that public school teachers would promote religion simply because they "enter[ ] a parochial school classroom."[162] Second, the Court no longer believed that "all government aid that directly assists the educational function of religious schools is invalid."[163] Unlike *Witters* and *Zobrest*, where the aid was first distributed to individual families, the students under this program did not apply for the aid.[164] The Court, however, explained that it "fail[ed] to see how providing Title I services directly to eligible students results in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application."[165] Finally, the Court upheld the program because the services are provided neutrally and the aid to religious schools is subject to several safeguards.[166]

Although Justice O'Connor wrote the *Agostini* opinion that redefined the *Lemon* test, she only concurred in the Court's application of the new test in *Mitchell v. Helms*.[167] In the plurality opinion, the Court overturned its decisions in *Meek* and *Wolman* by upholding a per-capita-aid program that provided instructional material, such as computers, to both public and private schools based on the number of

157 *Id.*

158 *Id.* at 210.

159 *Id.* at 210–11. Previous plans to transport the children to public schools for after-school instruction failed because attendance was poor, and both the teachers and the children were tired. *Id.* at 210.

160 *Id.* at 211.

161 473 U.S. 402, 414 (1985).

162 *Agostini*, 521 U.S. at 226.

163 *Id.* at 225.

164 *Id.* at 228–29.

165 *Id.* at 229.

166 *Id.* at 232–35.

167 530 U.S. 793 (2000).

students in the schools.[168] The plurality opinion clearly focused its decision to uphold the law on a neutrality argument. The plurality explained that when the "religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude" that religious indoctrination has occurred.[169] The plurality also held that the per-capita-aid program was the equivalent to a program of true private choice.[170] The plurality even went so far as to permit government aid to be diverted to religious uses, as long as the content of the aid was not "impermissibly religious."[171]

The *Mitchell* plurality did not entirely clarify how the post-*Agostini* Court would apply its modified *Lemon* test to Establishment Clause cases. In *Zelman v. Simmons-Harris*,[172] the majority opinion more clearly differentiated between the types of Establishment Clause cases and demonstrated how the Court would treat those cases. The Court first recognized that the voucher law easily fulfilled the "purpose" prong of the *Agostini-Lemon* test: "There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."[173] Therefore, similar to the Court's other school aid cases, its analysis of the Ohio voucher law turned primarily on the "effects" prong of the test.[174]

In deciding whether the Ohio voucher law has the unconstitutional effect of advancing religion, the Court differentiated between two strains in its case law: "To answer [the effects] question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[175] For the direct aid cases, the Court mentioned *Mitchell*

168 *Id.* at 801 (plurality opinion).

169 *Id.* at 809 (plurality opinion).

170 *Id.* at 810–14, 829–31 (plurality opinion). However, Justice O'Connor's concurrence distinguishes between per-capita-aid programs and those that are routed first to individuals who then decide where to spend the aid. *Id.* at 842–44 (O'Connor, J., concurring); *see also infra* Part IV (analyzing Justice O'Connor's concurrence in *Mitchell*).

171 *Mitchell*, 530 U.S. at 820–25 (plurality opinion). Justice O'Connor also disagrees with the plurality's position on the divertibility of government aid. *Id.* at 840–44 (O'Connor, J., concurring).

172 536 U.S. 639 (2002).

173 *Id.* at 649.

174 *Id.*

175 *Id.* (citations omitted).

and *Agostini*.[176] On the other hand, *Mueller*, *Witters*, and *Zobrest* were named as examples of indirect or private choice cases.[177] Given this division, *Zelman* clearly fits within the category of private choice cases. Like the statutes at issue in *Mueller*, *Witters*, and *Zobrest*, the Court upheld the voucher law in *Zelman* because it fulfilled the two benchmarks of neutrality and private choice. The Ohio statute was "neutral in all respects toward religion," as the aid recipients were defined by need and their presence in a failing school district.[178] Moreover, the aid only reached religious schools after genuine and independent private decisions by the families holding the vouchers.[179]

In his dissent, Justice Souter criticized the majority opinion because school vouchers permit government aid to be used on religious instruction.[180] He explained that "[t]he money will . . . pay for eligible students' instruction in not only secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension."[181] However, the majority explained that the fear of government endorsement of religion is lessened in private choice programs. Applying language from Justice O'Connor's endorsement test, the Court explained:

> [W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. . . . Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.[182]

When private decisions determine where to direct the aid, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government."[183] Thus, indirect aid programs that offer recipients private choice avoid the appearance of impropriety.

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176 *Id.*
177 *Id.*
178 *Id.* at 653.
179 *Id.* at 653–55.
180 *Id.* at 687 (Souter, J., dissenting).
181 *Id.* (Souter, J., dissenting).
182 *Id.* at 654–55.
183 *Id.* at 652.

Justice Souter questioned whether recipients actually had a genuine choice on where to use the vouchers because most of the private schools participating in the program were religious.[184] He also noted that "96.6% of all voucher recipients go to religious schools."[185] Justice Souter argued that "[t]here is . . . no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by families that apply for vouchers."[186] The majority refuted the claim that families lacked educational choices: "[Schoolchildren] may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school."[187] The majority further explained that the mere fact that most families who use the vouchers direct the aid toward religious schools does not affect the constitutionality of the law: "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[188] The majority's position is consistent with the Court's earlier decisions. As mentioned above, the *Mueller* Court held that the mere fact that more religious school students benefited from an aid program would not render it unconstitutional.[189]

Although *Zelman* had been predicted to be "the most important church-state case in the last half century,"[190] it conforms to several of the Court's earlier decisions and in many ways does not represent a "dramatic break from the past."[191] In distinguishing between the two categories of Establishment Clause cases, the Court suggested that future church-state debates will turn on the category under which the aid program falls.

III. The Impact on Indirectly Funded Programs

Both direct and indirect faith-based programs have the secular *purpose* of improving the quality and effectiveness of social services.

184 *Id.* at 703 (Souter, J., dissenting).
185 *Id.* (Souter, J., dissenting).
186 *Id.* at 707 (Souter, J., dissenting).
187 *Id.* at 655.
188 *Id.* at 658.
189 Mueller v. Allen, 463 U.S. 388, 401 (1983).
190 David G. Savage, *Supreme Court Takes Voucher Case*, L.A. Times, Sept. 26, 2001, at A28, *available at* 2001 WL 2521027.
191 *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring).

Therefore, in judging the constitutionality of the faith-based plan, the Supreme Court will likely, as in *Zelman*, focus on the "effects" prong of the *Agostini-Lemon* test. As mentioned earlier, the obvious implication from *Zelman* is that the Court will not find an impermissible effect when faith-based groups are funded in the form of vouchers.

Voucher-style funding for religious social service groups would similarly fit within the second category of Establishment Clause cases because such funding fulfills the benchmarks of neutrality and private choice. Like *Mueller*, *Witters*, *Zobrest*, and now *Zelman*, such a program could neutrally issue vouchers to aid beneficiaries. The aid recipients would be defined by neutral criteria, such as need, and not by religion. The aid recipients would then make a *private* decision whether or not to redeem their vouchers at a religious or nonreligious social service group. As long as the program provides recipients with a genuine opportunity to redeem the vouchers at either a religious or secular organization, it will not trample on the Establishment Clause. Such a program would not have the unconstitutional effect of advancing religion because the government aid is provided neutrally, and any aid that flows to religious social welfare groups would do so only as a result of the "independent decisions of private individuals."[192]

Federal appellate courts have already begun to use the reasoning in *Zelman* to uphold the constitutionality of religious programs that receive voucher-style funding. In *Freedom from Religion Foundation, Inc. v. McCallum*,[193] the Seventh Circuit found that state correctional authorities are permitted to fund Faith Works, a halfway house that incorporates religion in its treatment.[194] If convicted criminals are out on parole and violate the terms of their parole, the parole officers can recommend a specific halfway house for the offender.[195] The court found that while the state cannot require offenders to attend Faith Works, the parole officers can recommend it.[196] The court emphasized that the choice "*is* private" because "it is the offender's choice" whether or not to choose Faith Works.[197] In using the *Zelman* rationale, the court upheld the voucher-style funding: "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."[198]

192 *Id.* at 655.
193 324 F.3d 880 (7th Cir. 2003).
194 *Id.* at 882.
195 *Id.* at 881.
196 *Id.* at 882.
197 *Id.*
198 *Id.*

As demonstrated by the Seventh Circuit, programs that incorporate voucher-style funding and ensure true private choice will be upheld. According to the *Zelman* decision, the Supreme Court's commitment to uphold programs of true private choice "has remained consistent and unbroken."[199] The current case law reveals that the Court will similarly uphold faith-based initiatives that provide private choice through vouchers. Although such an implication appears to be a victory for President Bush's faith-based plan, this victory has been qualified. Some members of the legal community have argued that under *Mitchell* and *Zelman* the current Court would only uphold the faith-based plan if it received indirect or voucher-style funding.[200] According to these arguments, *directly* funded religious social service groups would offend the Establishment Clause.[201]

IV. THE IMPACT ON DIRECTLY FUNDED PROGRAMS

The legal future of *directly* funded faith-based initiatives will likely depend on the vote of one Justice. The current Court is strictly divided on its interpretation of the Establishment Clause. Justice Kennedy's coercion test reveals that he adopts an accommodationist view because, in general, he will only find an Establishment Clause violation when the government coerces its citizens to support religion or when noncoercive action substantially benefits religion.[202] Justice Kennedy has also explained that "[r]ather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society."[203] Justices Scalia, Thomas, and Chief Justice Rehnquist have also adopted an accommodationist position as they have demonstrated a tendency to uphold government aid to religious groups when the aid is provided neutrally.[204] On the other hand, Justices Ginsburg, Souter, Ste-

199 Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

200 *See supra* note 15 and accompanying text.

201 *See supra* note 15 and accompanying text.

202 *See* County of Allegheny v. ACLU, 492 U.S. 573, 659–63 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

203 *Id.* at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).

204 Cole, *supra* note 27, at 562. In *Mitchell*, Justices Thomas, Scalia, Kennedy, and Chief Justice Rehnquist explained that they have "consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality opinion). The tendency of these Justices to permit federal funding of religious institutions is evident in other cases as well. *See, e.g.*, *Zelman*, 536 U.S. at 643–63 (hold-

vens, and occasionally Justice Breyer have rejected most government aid for religious activities.[205] Although Justice Breyer joined Justice O'Connor's concurrence in *Mitchell* to uphold the instructional material loans, his dissent in *Zelman* represented a move back to the separationist block of Justices.[206]

The critical "swing" vote belongs to Justice O'Connor.[207] Although Justice O'Connor often aligns with the accommodationist block, her endorsement test reveals that she will be more skeptical of government aid to religious groups. In fact, Justice Kennedy has described the endorsement test as "reflect[ing] an unjustified *hostility* toward religion."[208] Justice O'Connor has demonstrated that her Establishment Clause analysis will require more than the narrower coercion test:

> An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the

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ing that families can use school vouchers on religious schools); Agostini v. Felton, 521 U.S. 203, 208–40 (1997) (holding that public school teachers can teach disadvantaged children in religious schools).

205 Cole, *supra* note 27, at 562. These Justices have often dissented in cases where religious groups receive federal aid. *See, e.g.*, *Zelman*, 536 U.S. at 686–717 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (permitting families to use school vouchers on religious schools); *Mitchell*, 530 U.S. at 867–913 (Souter, Stevens & Ginsburg, JJ., dissenting) (loaning computers and other instructional material to religious schools); *Agostini*, 521 U.S. at 255–60 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting) (providing remedial education for students in religious schools).

206 *See* Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 183–85 (2002) (explaining that Justice Breyer "dipped his toe in accommodationist waters in *Mitchell*, [but] he drew back from taking a plunge . . . in *Zelman*"); *see also Zelman*, 536 U.S. at 717–29 (Breyer, J., dissenting) (arguing against the constitutionality of the school voucher program); *Mitchell*, 530 U.S. at 836–67 (O'Connor & Breyer, JJ., concurring) (joining Justice O'Connor's concurrence, Justice Breyer found that the instructional material loans were constitutional).

207 *See e.g.*, Esbeck, *supra* note 56, at 33 (explaining that Justice O'Connor is the "swing vote" in direct aid cases); Savage, *supra* note 36, at 29 (correctly predicting that Justice O'Connor's vote would be the tiebreaker in the *Zelman* decision because her "views are decisive in nearly all the religion cases"); Langendorfer, *supra* note 108, at 725 (suggesting that "Justice O'Connor's vote will most likely remain the swing vote" in Establishment Clause debates); Lin et al., *supra* note 15, at 203 (referring to Justice O'Connor as the "swing Justice").

208 *County of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added).

> religious liberty or respect the religious diversity of the members of our pluralistic political community.[209]

In addition, her highly critical concurrence of the plurality's opinion in *Mitchell* suggests that she will demand more of a direct aid program than the four accommodationist Justices.[210] Therefore, Justice O'Connor's vote is critical in predicting how the current Court would treat the constitutionality of a directly funded faith-based program.[211]

A. Justice O'Connor and Direct Government Aid

In light of the Court's emphasis on private choice in *Zelman*, it has been suggested that the faith-based plan will be constitutional "so long as the money flows through individuals, not directly to religious groups."[212] Although *Zelman* suggests the constitutionality of an indirectly funded program, it does not *require* such funding to be indirect. As explained above, the Court has emphasized two different strains in its Establishment Clause case law and has demonstrated that *Zelman* falls within the private choice category. Hence, *Zelman* should only be used to support other indirect aid or private choice programs. Using *Zelman* to suggest how the Court would treat a direct aid program would be overreaching the boundaries of the decision. Rather, the Court will focus on the first category of Establishment Clause cases, namely the direct aid cases, when determining the constitutionality of a directly funded faith-based program.

The *Zelman* Court named *Mitchell* and *Agostini* as examples of direct aid cases.[213] Several legal commentators have argued that Justice O'Connor's concurrence in *Mitchell* demonstrates that she would *only* uphold an indirect faith-based program that "route[s] aid directly to individuals involved in the program, perhaps in the form of vouchers."[214] These commentators suggest that direct faith-based initiatives would likely "garner the support of only four Justices," because Justice O'Connor would "*require* the aid [to] flow directly to individuals who would then make a choice about where to direct their money."[215]

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209 *Id.* at 627–28 (O'Connor, J., concurring in part and concurring in the judgment).

210 *See Mitchell*, 530 U.S. at 836–67 (O'Connor, J., concurring).

211 Michelman, *supra* note 6, at 487.

212 Savage, *supra* note 15, at 34.

213 *Zelman*, 536 U.S. at 649.

214 Lin et al., *supra* note 15, at 204–05; *see also* Michelman, *supra* note 6, at 487–92 (arguing that Justice O'Connor's concurrence in *Mitchell* reveals that she would uphold indirectly funded faith-based initiatives but reject a directly funded program).

215 Lin et al., *supra* note 15, at 204–05 (emphasis added); *see also* Michelman, *supra* note 6, at 487–92 (arguing that Justice O'Connor would "find an impermissible

Some of Justice O'Connor's language in her *Mitchell* concurrence *seems* to support this view. For instance, Justice O'Connor noted the Court's "continued recognition of the special dangers associated with direct money grants to religious institutions."[216] She later explained that "the most important reason for according special treatment to direct money grants is that th[is] form of aid falls precariously close to the original object of the Establishment Clause's prohibition."[217] The third strike against direct aid appeared later in the same paragraph where the Justice again recognized "the constitutionally suspect status of direct cash aid."[218]

In addition, Justice O'Connor rebuked the *Mitchell* plurality for overemphasizing the importance of neutrality and for "com[ing] close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges."[219] Justice O'Connor feared that the plurality had upheld the loans of instructional material solely because the aid was provided neutrally to both religious and secular schools.[220] She explained that "we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."[221] While Justice O'Connor recognized that "neutrality is important," she emphasized that "it is by no means the only 'axiom in the history and precedent of the Establishment Clause.'"[222]

Moreover, Justice O'Connor explained that private choice programs, which route funds first to individuals, eliminate some of the "dangers" of direct aid.[223] In her *Mitchell* concurrence, she criticized the plurality for "treat[ing] a per-capita-aid program the same as the true private-choice programs considered in *Witters* and *Zobrest*."[224] She argued that a direct per-capita-aid program comes much closer to government endorsement of religion:

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endorsement of religion" in directly funded faith-based initiatives); Savage, *supra* note 15, at 34 (explaining that Justice O'Connor "has frowned on direct government aid to religious institutions, but not to vouchers or tax credits that go to parents").

216 Mitchell v. Helms, 530 U.S. 793, 855 (2000) (O'Connor, J., concurring).

217 *Id.* at 856 (O'Connor, J., concurring).

218 *Id.* (O'Connor, J., concurring).

219 *Id.* at 837 (O'Connor, J., concurring).

220 *Id.* at 837–40 (O'Connor, J., concurring).

221 *Id.* at 839 (O'Connor, J., concurring).

222 *Id.* (O'Connor, J., concurring) (quoting Rosenberg v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 846 (1995) (O'Connor, J., concurring)).

223 *Id.* at 843 (O'Connor, J., concurring) (quoting *Rosenberg*, 515 U.S. at 842) (citation omitted).

224 *Id.* at 842 (O'Connor, J., concurring).

> In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. . . . Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the [per-capita-]aid program as *government* support for the advancement of religion. That the amount of aid received by the school is based on the school's enrollment does not separate the government from the endorsement of the religious message.[225]

Justice O'Connor contrasted the per-capita-aid program with a private choice program where the "endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid."[226] Combining Justice O'Connor's concerns with direct aid, her requirement for additional factors other than just neutrality, and her positive view of private choice programs, some commentators have assumed that she would *require* private choice through indirect funding.[227]

Such an assumption, however, would misinterpret and limit the Justice's position. While Justice O'Connor may find direct aid problematic, she does not find it *per se* unconstitutional. In order to understand her position on direct aid programs, a proper analysis will focus on her two stated reasons for writing separately in *Mitchell*. First, as already mentioned, she wrote separately to emphasize that the Court should rely on factors other than just neutrality in upholding aid programs. However, nowhere in the concurrence did Justice O'Connor *require* the additional factor to be private choice. Although she recognized that private choice programs have fewer problems than direct aid programs, she did not imply that *only* private choice programs will pass constitutional muster.

In *Zelman*, Justice O'Connor's concurrence demonstrated that an inquiry into whether an aid program provides genuine private choice is only *required* in indirect aid cases. In that case, Justice O'Connor explained that when addressing the question of "how to apply the primary effects prong in *indirect aid cases*," and not when the aid is given "directly to service providers," the Court will consider "whether beneficiaries of *indirect aid* have a genuine [private] choice among relig-

225 *Id.* at 842–43 (O'Connor, J., concurring).

226 *Id.* at 843 (O'Connor, J., concurring).

227 *See supra* notes 214–15 and accompanying text.

ious and nonreligious organizations."[228] Here, Justice O'Connor went to great lengths to demonstrate that the inquiry into private choice was only necessary in indirect aid cases. In addition, both *Agostini* and *Mitchell* dealt with aid programs that were not first routed to individuals, and neither Justice O'Connor nor the Court required private choice in either case.

B. Justice O'Connor and the Divertibility of Government Funds

The second stated reason for why Justice O'Connor wrote separately in *Mitchell* was that she disagreed with the plurality's opinion regarding the divertibility of government aid. The plurality avoided the divertibility problem by explicitly permitting government aid to be diverted toward religious activities as long as the aid was neutrally provided and the content of the aid was secular.[229] Justice O'Connor criticized this approach.[230] She explained that permitting diversion of funds toward religious objectives in direct aid programs could reasonably be perceived as government endorsement of religion.[231]

Justice O'Connor further noted that the plurality's position was contrary to the Court's previous cases.[232] She recognized that the *Bowen* Court remanded the case to determine "whether aid recipients had used the government aid to support their religious objectives."[233] She went on to explain that "[t]he remand would have been unnecessary if, as the plurality contends, actual diversion were irrelevant under the Establishment Clause."[234] In addition, Justice O'Connor explained that the plurality mistakenly relied on private choice cases, like *Witters* and *Zobrest*, to support its view that actual diversion of funds is permissible.[235] The diversion of funds is more acceptable in private choice cases because the concern with government endorsement is reduced when the aid reaches religious institutions as a result of private decisions by individuals.[236]

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228 Zelman v. Simmons-Harris, 536 U.S. 639, 669 (O'Connor, J., concurring) (emphasis added).

229 *Mitchell*, 530 U.S. at 820–25 (plurality opinion); *see also id.* at 912 (Souter, J., dissenting) (explaining that "[t]he plurality is candid in pointing out the extent of actual diversion . . . and equally candid in saying it does not matter").

230 *Id.* at 840 (O'Connor, J., concurring).

231 *Id.* at 842–44 (O'Connor, J., concurring).

232 *Id.* at 840–41 (O'Connor, J., concurring).

233 *Id.* (O'Connor, J., concurring).

234 *Id.* at 841 (O'Connor, J., concurring).

235 *Id.* at 841–42 (O'Connor, J., concurring).

236 *Id.* (O'Connor, J., concurring).

Thus, Justice O'Connor strongly contrasted direct per-capita-aid programs with indirect private choice programs to demonstrate the dangers of permitting actual diversion when direct aid is involved.[237] Although she suggested that a "reasonable observer" would perceive a per-capita-aid program as endorsing religion, she qualified her statement.[238] She explained that "*if* the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement."[239] However, *if* the school does not divert the aid to religious inculcation, then the reasonable observer would not perceive the government to have endorsed religion. Under Justice O'Connor's view, direct per-capita-aid programs can be constitutional when the program does not result in actual and substantial diversion of government aid. Therefore, Justice O'Connor does not require private choice in a government aid program; however, when the program is direct and lacks private choice, she will require that the aid is not substantially diverted to religious uses.

Justice O'Connor, however, will permit the *possibility* of diversion. In *Mitchell*, she explained that the Court should not "treat as constitutionally suspect any form of secular aid that might conceivably be diverted to a religious use."[240] Rather, Justice O'Connor argued that the Court will presume that religious institutions receiving government aid will abide by secular content restrictions and will only use the aid for secular purposes. For instance, in *Agostini*, where the services were required to be "secular, neutral, and nonideological," she explained that the Court "would presume that the instructors would comply with the program's secular restrictions."[241] Under Justice O'Connor's test, the party challenging the direct aid program must have hard evidence that the government aid was actually diverted toward religious uses.[242] She explained that in order "[t]o establish a

237 *See id.* at 842–43 (O'Connor, J., concurring).

238 *Id.* at 843 (O'Connor, J., concurring).

239 *Id.* (O'Connor, J., concurring) (emphasis added).

240 *Id.* at 855–56 (O'Connor, J., concurring).

241 *Id.* at 847 (O'Connor, J., concurring); *see also id.* at 859 (O'Connor, J., concurring) (explaining that the Court has "been willing to assume that religious school instructors can abide by [secular] restrictions when the aid consists of textbooks" and that the Court will make the same assumption when the aid is instructional materials and equipment); Agostini v. Felton, 521 U.S. 203, 226 (1997) (explaining that in *Zobrest* the Court would not presume that a sign-language interpreter would inculcate religion simply because she "enter[ed] a parochial school classroom").

242 *Mitchell*, 530 U.S. at 857 (O'Connor, J., concurring).

First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes."[243]

However, in *Mitchell*, Justice Thomas's plurality opinion revealed that there *was* evidence of actual diversion of funds toward religious uses.[244] Justice O'Connor also recognized that some diversion had occurred, but she found that the amount of diversion was de minimis: "I know of no case in which we have declared an entire aid program unconstitutional on Establishment Clause grounds solely because of violations on [a] minuscule scale."[245] Justice Thomas suggested that the evidence of diversion may have been more than de minimis:

> There is persuasive evidence that . . . audiovisual equipment [provided by the government] was used in a Catholic school's theology department. . . . The diversion occurred over seven consecutive school years, and the use of the equipment in the theology department was massive in each of those years, outstripping in every year use in other departments such as science, math, and foreign language.[246]

According to the dissent, some evidence also suggested that computers were being diverted toward religious uses.[247]

Justice O'Connor rejected the claims that substantial diversion of federal funds occurred in *Mitchell*. She explained that the plurality relied mainly on a chart showing that one religious school's theology department used audio-visual equipment.[248] However, "the chart d[id] not provide a breakdown identifying specific . . . usage" of government funds.[249] Justice O'Connor explained that without such evidence the Court should "assume that the school used its own equipment in the theology department and the [government] equipment elsewhere."[250] She stated that, more importantly, the evidence did not demonstrate that government aid "actually was diverted to religious education."[251] She also questioned whether the evidence relied on by the dissent "even prove[d]" that computers were "diverted to the school's religious mission."[252] According to Justice O'Connor, "[t]o find that actual diversion will flourish [in this case], one must

243 *Id.* (O'Connor, J., concurring).
244 *Id.* at 832–34 (plurality opinion).
245 *Id.* at 865 (O'Connor, J., concurring).
246 *Id.* at 833 n.17 (plurality opinion).
247 *Id.* at 910 (Souter, J., dissenting).
248 *Id.* at 864 (O'Connor, J., concurring).
249 *Id.* (O'Connor, J., concurring).
250 *Id.* (O'Connor, J., concurring).
251 *Id.* (O'Connor, J., concurring).
252 *Id.* at 865 (O'Connor, J., concurring).

presume bad faith on the part of the religious school officials."[253] She held that the Court should "presume that these school officials will act in good faith" and will abide by content restrictions.[254]

In general, given the suspect nature of direct aid, the amount of acceptable diversion toward religious uses in these programs should be strictly limited. Regardless of whether the aid in *Mitchell* was substantially diverted, a direct aid program should permit only the accidental diversion of funds or truly de minimis diversion. While the amount of diversion in *Mitchell* may have been too substantial, future direct aid programs, such as direct faith-based initiatives, should ensure that any diversion is virtually nonexistent.

C. *Justice O'Connor's Guidelines for Avoiding Government Endorsement*

While Justice O'Connor has demonstrated that she will not require private choice in all aid programs, she has also indicated that she will require some factors other than just neutrality when private choice is absent. She has named the following factors, some of which may overlap, to ensure that a government aid program is not "reasonably . . . viewed as an endorsement of religion":

> [The] aid [should be] allocated on the basis of neutral, secular criteria; the aid must be supplementary and cannot supplant non-Federal funds; no [government] funds ever reach the coffers of religious schools; the aid must be secular; any evidence of actual diversion is *de minimis*; and the program includes adequate safeguards.[255]

In *Mitchell*, Justice O'Connor relied on these factors to find that the direct aid program did "not have the impermissible effect of advancing religion."[256] Although she did not claim that these factors are "constitutional requirements," they at least provide guidelines on how both Justice O'Connor and the Court will treat aid programs when private choice is missing.[257]

Because directly funded faith-based programs can meet each of these factors, a majority of the Court would likely find them constitutional. First, under the faith-based plan, government aid would be neutrally allocated to both religious and nonreligious social service providers based on secular criteria, such as their location within a de-

253 *Id.* at 863 (O'Connor, J., concurring).

254 *Id.* at 863–64 (O'Connor, J., concurring).

255 *Id.* at 867 (O'Connor, J., concurring); *see also Agostini*, 521 U.S. at 210, 234–35 (referring to similar safeguards).

256 *Mitchell*, 530 U.S. at 867 (O'Connor, J., concurring).

257 *Id.* (O'Connor, J., concurring).

pressed area.[258] Second, a faith-based program could easily stipulate that government aid will only supplement non-federal funds. In *Mitchell*, Justice O'Connor noted that the federal statute specifically limited its funds to "supplement and not supplant funds from non-Federal sources."[259] Faith-based organizations are not currently dependent on only government funds, and there is no reason to believe that government aid will completely supplant its funds from other sources. Third, government aid could be kept separate from the coffers of religious institutions. Justice O'Connor has explained that such separation will be reinforced by the "supplantation restriction."[260] Fourth, the direct aid will have a secular content because it is merely financial aid.[261]

The fifth factor, which is to provide adequate safeguards, has multiple elements. The aid programs in *Mitchell* and *Agostini* used secular content restrictions and monitoring as safeguards. Likewise, the current faith-based plan imposes secular content restrictions by prohibiting "direct Federal assistance to support inherently religious activities, such as worship, religious instruction, or proselytization."[262] President Bush's Executive Order to install the OFBCI also explained that religious organizations should be available for government funds "so long as they achieve valid public purposes."[263] As mentioned above, Justice O'Connor and the Court presume that religious organizations receiving government funds will be able to comply with these secular content restrictions.

In addition, a faith-based program could easily set up a monitoring system wherein religious organizations receive visits from supervisors who strictly ensure that government funds are not being diverted to religious uses. In *Agostini*, the Court found that "[t]here is no sug-

258 However, while faith-based initiatives are not *supposed* to favor religious service providers, the President has publicly stated that he would "look first to faith-based programs" when providing funds. Remarks on Signing Executive Orders with Respect to Faith-Based and Community Initiatives, *supra* note 3, at 26. In order for faith-based initiatives to be found constitutional, the government would have to avoid such favoritism.

259 *Mitchell*, 530 U.S. at 861 (O'Connor, J., concurring).

260 *Id.* at 848–49 (O'Connor, J., concurring).

261 Michelman, *supra* note 6, at 487.

262 Exec. Order No. 13,279, 67 Fed. Reg. 77,141, 77,142 (Dec. 12, 2002); *see also* Community Solutions Act of 2001, H.R. 7, 107th Cong. (2001) (applying a similar restriction on the uses of the federal aid).

263 Exec. Order No. 13,199, 66 Fed. Reg. 8499, 8499 (Jan. 29, 2001); *see also* Commencement Address at the University of Notre Dame in Notre Dame, Indiana, *supra* note 28, at 554 (explaining that the "[g]overnment should never fund the teaching of faith, but it should support the good works of the faithful").

gestion in the record . . . that unannounced monthly visits of public supervisors are insufficient to prevent or detect inculcation of religion by public employees."[264] The Court further held that such a system would not result in the excessive entanglement of government and religion because it has upheld state programs that impose "far more onerous burdens on religious institutions than the monitoring system at issue here."[265] Content restrictions and monitoring ensure that the programs will not divert government funds to advance religion. Because directly funded faith-based programs can abide by these factors, Justice O'Connor and a majority of the Supreme Court will likely uphold their constitutionality.

Some legal commentators argue that even with these safeguards, any government aid provided directly to religious social service providers will inevitably advance the organizations' religious messages because they are "pervasively sectarian" institutions.[266] These arguments contend that the religious messages are too intertwined with the organizations' activities and cannot effectively be separated.[267] The Court, however, has moved away from the "pervasively sectarian" test. According to the *Mitchell* plurality, the Court "took pains to emphasize the narrowness of the 'pervasively sectarian' category" in *Bowen*.[268] The *Bowen* Court found that "it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is 'religiously inspired.'"[269] In fact, the Court has only specifically named religious schools as being "pervasively sectarian" institutions.[270] In *Agostini*, the Court continued to move away from this test as it upheld aid to religious schools when the program contained the above safeguards.[271]

In response, commentators argue that faith-based initiatives could provide aid to churches, which would be even "more pervasively sectarian than parochial schools because indoctrination is the sole

264 Agostini v. Felton, 521 U.S. 203, 234 (1997); *see also Mitchell*, 530 U.S. at 863–64 (O'Connor, J., concurring) (finding that annual monitoring visits are sufficient and presuming that religious school officials will act in good faith when reporting to supervisors).

265 *Agostini*, 521 U.S. at 234.

266 *See* Michelman, *supra* note 6, at 488–89; Peters, *supra* note 9, at 1202–03.

267 *See* Michelman, *supra* note 6, at 488–89; Peters, *supra* note 9, at 1202–03.

268 *Mitchell*, 530 U.S. at 826–27 (plurality opinion) (quoting Bowen v. Kendrick, 487 U.S. 589, 620–21 (1988)).

269 *Bowen*, 487 U.S. at 621.

270 *Mitchell*, 530 U.S. at 828–29 (plurality opinion); *see also* Michelman, *supra* note 6, at 489 (noting that "church-affiliated primary and secondary schools are the only institutions that the Court has explicitly recognized as pervasively sectarian").

271 Agostini v. Felton, 521 U.S. 203, 234–35 (1997).

purpose of most churches while schools have the additional function of education."[272] However, any churches eligible for funds under the faith-based plan would be required to have the "additional function" of providing "valid public purposes," such as overcoming poverty and treating addiction.[273] Under the above guidelines, these churches would also be required to refrain from diverting the federal funds toward religious activities or worship.

Furthermore, the *Mitchell* plurality officially abandoned the "pervasively sectarian" test. The accommodationist block of Justices explained that "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."[274] Since faith-based initiatives further a legitimate secular purpose, the plurality will not "reserve special hostility for those who take their religion seriously, [or] who think that their religion should affect the whole of their lives."[275] The plurality explained that when the term "pervasively sectarian" was coined, it "could be applied almost exclusively to Catholic parochial schools."[276] The four Justices held that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools" and that the "doctrine, born of bigotry, should be buried now."[277]

Although Justice O'Connor did not join the *Mitchell* plurality, her views on this issue are similar. In *Agostini*, Justice O'Connor wrote the opinion that permitted aid to "pervasively sectarian" schools[278] and, in her *Mitchell* concurrence, she rejected the presumption that a religious school would necessarily inculcate religion.[279] She explained in *Mitchell* that a "presumption of indoctrination, because it constitutes an absolute bar to the aid in question regardless of the religious school's ability to separate that aid from its religious mission, constitutes a 'flat rule, smacking of antiquated notions of "taint," [that] would indeed exalt form over substance.'"[280] Therefore, Justice O'Connor demonstrated that she believes even religious, or "pervasively sectarian," schools can separate the government aid "from [their] religious mission." She would similarly presume that religious

272 Peters, *supra* note 9, at 1203.

273 Exec. Order No. 13,199, 66 Fed. Reg. 8499, 8499 (Jan. 29, 2001).

274 *Mitchell*, 530 U.S. at 827 (plurality opinion).

275 *Id.* at 827–28 (plurality opinion).

276 *Id.* at 828–29 (plurality opinion).

277 *Id.* at 829 (plurality opinion).

278 *See* Agostini v. Felton, 521 U.S. 203, 234–35 (1997).

279 *Mitchell*, 530 U.S. at 857–58 (O'Connor, J., concurring).

280 *Id.* at 858 (O'Connor, J., concurring) (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993)).

social service providers would not necessarily inculcate religion. Hence, the "pervasively sectarian" test should not present any problem to the constitutionality of the faith-based plan.

CONCLUSION

The Court's decision to uphold school vouchers in *Zelman* has important implications for the future of President Bush's faith-based plan. The case demonstrates that when a faith-based program is indirectly funded through the use of vouchers, the Court will treat it as falling within the private choice category of its Establishment Clause case law. The Court will uphold such a program as long as government aid meets the neutrality and private choice requirements. Indirect government aid only promotes religious activities because individuals make private decisions to redeem their vouchers at religious institutions.[281] Under such circumstances, the reasonable observer would infer that the individuals, and not the government, have endorsed the religious message.[282] Therefore, when faith-based programs are funded through vouchers, Justice O'Connor and a majority of the Court will be less concerned that a religious organization may be using the government aid to promote a religious message.[283] For example, the voucher program that the Court upheld in *Zelman* provided indirect aid to religious schools *without* any secular content restrictions on how the aid was to be used.[284]

Although the element of private choice removes several constitutional obstacles, it is not required in a government aid program. When private choice is absent from an aid program, the Court will generally be more concerned with how the government aid is used. If a direct aid program is neutral to religion, the four accommodationist Justices would likely uphold it even though the aid is substantially diverted to religious uses.[285] However, to gain the support of a fifth Justice, namely Justice O'Connor, a direct aid program must fulfill additional safeguards to ensure that federal funds are not used to promote a religious message.

Justice O'Connor has demonstrated that it is wrong for the Court to presume that religious organizations are incapable of adhering to

281 Zelman v. Simmons-Harris, 536 U.S. 639, 652–55 (2002).

282 *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring).

283 *See Zelman*, 536 U.S. at 652–55; *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring).

284 *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring).

285 *Mitchell*, 530 U.S. at 820–25 (plurality opinion).

secular content restrictions and other safeguards.[286] Justice O'Connor will not require religious social service providers receiving direct aid to stop performing religious activities. She will require, however, that government funds be used for secular purposes. Unlike the accommodationist Justices, Justice O'Connor requires that the amount of diversion of federal funds toward religious uses be de minimis.[287] The *Mitchell* plurality called into question what constituted permissible diversion of funds under Justice O'Connor's analysis.[288] To avoid the appearance of impropriety or endorsement, directly funded faith-based initiatives, and other direct aid programs, should strictly regulate the diversion of funds and only permit accidental or extremely limited diversion. Thus, a majority of the Court will uphold directly funded faith-based initiatives as long as the proper safeguards are in place and the program does not result in the diversion of aid toward religious uses.

Zelman did not in itself resolve all of the constitutional concerns surrounding the faith-based plan. However, developments in the Supreme Court's Establishment Clause jurisprudence have paved the way for it to uphold either an indirect or direct faith-based program. Although a directly funded program will be subject to more stringent confines, the Court will likely find it constitutional. Recent Supreme Court cases, such as *Zelman* and *Mitchell*, suggest that Congress did not need to remove religious provisions from the CARE bill. Therefore, despite the legislative and political setbacks, proponents of the faith-based plan should be reassured by these Establishment Clause cases and should be confident in the constitutionality of the plan.

286 *See supra* note 241 and accompanying text.

287 *Mitchell*, 530 U.S. at 865 (O'Connor, J., concurring).

288 *Id.* at 832–34 (plurality opinion).