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NOTE

FINDING DIRECTION IN INDIRECTION: THE DIRECT/INDIRECT AID DISTINCTION IN ESTABLISHMENT CLAUSE JURISPRUDENCE

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More than fifty years ago, Justice Robert Jackson wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[1] Though that star has remained fixed, other stars have from time to time become more prominent in the constitutional heavens. In recent Supreme Court cases, one development in Establishment Clause jurisprudence has emerged as such a prominent star. That development is the distinction between direct and indirect state aid to religion.

The importance of the direct/indirect distinction can easily be seen in one case already pending before the Supreme Court; it is also prominent in the various disputes over private school vouchers. The case now pending before the Court is *Mitchell v. Helms*,[2] concerning the constitutionality of a federal statute commonly known as "Chapter Two."[3] The statute provides federal funds for state and local agencies to loan computer equipment to private religious schools, and it is being challenged as a violation of the Establishment Clause. No recent

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1 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

2 119 S. Ct. 2336 (1999) (mem.).

3 20 U.S.C.A §§ 7301–73 (West 2000); *see also* notes 7–14 *infra* and accompanying text.

case addresses the constitutionality of private school voucher programs; in fact, the Justices have been careful over the past twelve months to avoid hearing such a case.[4] In several of the lower court opinions regarding vouchers, however, the constitutional difference between direct and indirect aid to religion has been explicitly invoked.[5] It is quite possible that, with either *Mitchell* or a voucher case, the Court will eventually rely on the direct/indirect distinction in order to demarcate the complicated boundaries between church and state. Whether aid is direct or indirect could therefore become crucial for determining whether the state aid in question is constitutional under the Establishment Clause.

The difficulty thus far with the direct/indirect aid distinction has been the Supreme Court's conceptual confusion over what constitutes indirect aid to religion. That confusion is partly the result of several different Establishment Clause doctrines related to the distinction between direct and indirect aid. These alternative doctrines, often

4 Some of the cases for which certiorari was denied involved the exclusion of religious schools from voucher programs, rather than their inclusion; all of the cases would have presented the question of whether such state aid to religious schools was constitutional under the Establishment Clause. *See* Strout v. Albanese, 178 F.3d 57 (1st Cir.), *cert. denied*, 120 S. Ct. 329 (1999) (finding constitutional the Maine voucher program's exclusion of religious schools in the face of Equal Protection, Free Exercise, Due Process, and Free Speech Clause challenges); Kotterman v. Killian, 972 P.2d 606 (Ariz.), *cert. denied*, 120 S. Ct. 283 (1999) (holding that the Arizona tax credit for private school tuition donations was constitutional); Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me.), *cert. denied*, 120 S. Ct. 364 (1999) (finding the Maine voucher program constitutional in the face of Free Exercise, Equal Protection, and Establishment Clause challenges); Chittenden Town Sch. Dist. v. Department of Educ., 738 A.2d 539 (Vt.), *cert. denied*, 120 S. Ct. 626 (1999) (holding that the state constitution required exclusion of religious schools from voucher program and that the Free Exercise Clause of the First Amendment was not implicated); Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998) (finding the Milwaukee Parental Choice Program constitutional); *cf.* Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (finding that the revised Cleveland voucher program violated the Establishment Clause); Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) (holding that the Cleveland voucher program was unconstitutional on state law grounds, though asserting in dicta that the program did not violate the Establishment Clause).

5 *See Strout*, 178 F.3d at 62 ("This dichotomy between direct and indirect aid is a recurring theme throughout Establishment Clause litigation."); *Kotterman*, 972 P.2d at 614 ("[S]chools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents."); *Simmons-Harris*, 711 N.E.2d at 211 (finding that "[t]he primary beneficiaries of the School Voucher Program are children, not sectarian schools," which creates the "indirect nature of the aid"); *Jackson*, 578 N.W.2d at 617 (emphasizing that state aid reaches religious schools "only as a result of numerous private choices of the individual parents of school-age children").

troublesome in their own right, seem to assume some constitutional distinction between direct and indirect aid to religion without offering any definition of those terms. They therefore need to be untangled before the concept of indirect aid to religion can be clearly outlined.

In order to make more concrete its analysis of how these various constitutional doctrines could be applied, this Note takes *Mitchell v. Helms* and the voucher program recently enacted in Florida as examples.[6] By way of background, Chapter Two of the Elementary and Secondary Education Act of 1965[7]—the statute at issue in *Mitchell*[8]—is a federal program that supplies block grants to states to provide financial support for, among other things, library services and instructional and media materials for both public and private schools.[9] Chapter Two requires the equitable participation of children in private schools in all of its programs,[10] but because the participation of private, religious schools raises the possibility of an Establishment Clause violation, Chapter Two contains several statutory safeguards limiting how funds can be distributed. For example, aid to private schools is re-

6 The Florida program makes a good model not only because it is quite typical of voucher programs, but also because it has not yet been subjected to a full cycle of litigation. Programs in Wisconsin, Arizona, Maine, and Ohio have already been litigated in the highest courts of those states. Florida, therefore, presents a somewhat "fresher" example of a voucher program.

7 On October 20, 1994, Congress enacted a new set of amendments to the Elementary and Secondary Education Act. *See* Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518. What is commonly referred to as "Chapter Two" is now Subchapter VI in the latest version of the statute. Subchapter VI is codified at 20 U.S.C.A. §§ 7301–73 (West 2000). Following the practice of the Fifth Circuit in *Helms v. Picard*, 151 F.3d 347, 367 n.14 (5th Cir. 1998), *cert. granted sub nom.* Mitchell v. Helms, 119 S. Ct. 2336 (1999), I will refer to this statute as "Chapter Two," but I will cite to the most current version of the legislation. *Walker v. San Francisco Unified School District*, 46 F.3d 1449 (9th Cir. 1995), however, refers to the 1988 version of Chapter Two, which was formerly codified at 20 U.S.C.A. §§ 2941–71 (West 1988). There are no relevant differences between the 1988 and 1994 versions.

8 Prior to *Mitchell*, the constitutionality of Chapter Two has been considered in only two Court of Appeals cases: *Helms*, 151 F.3d at 347 (finding Chapter Two unconstitutional), and *Walker*, 46 F.3d at 1449 (upholding the constitutionality of Chapter Two).

9 *See* 20 U.S.C.A. § 7301(b)(4). "Instructional materials" include, perhaps most importantly, computers. *See Helms*, 151 F.3d at 367. *See generally* Brief Amicus Curiae on Behalf of Arizona Council for Academic Private Education et al., in Support of Petitioners, Mitchell v. Helms, *cert. granted*, 119 S. Ct. 2336 (1999) (No. 98–1648), *available in* 1999 WL 642412.

10 *See* 20 U.S.C.A. § 7372(a). In Jefferson Parish, the school district whose program was challenged in *Helms*, 30% of the funds provided by Chapter Two were allocated to nonpublic schools. *See Helms*, 151 F.3d at 368.

stricted to "secular, neutral, and nonideological services, materials, and equipment."[11] All federal funds must supplement the resources already available, and they can in no case supplant other sources of funding.[12] In addition, "the control of funds . . . and title to materials, equipment, and property [provided] . . . with such funds, shall be in a public agency . . . and a public agency shall administer such funds and property."[13] In short, Chapter Two allows local education agencies to make loans of instructional materials and equipment to religious schools. Although no funds flow to the religious schools, the fact that the equipment is loaned to schools—rather than to students or parents—means that Chapter Two might provide a kind of forbidden direct aid to religion.

This Note also scrutinizes the Florida private school voucher program, known as the "A+ Plan for Education."[14] The foundation of the program is a statewide assessment of public schools, which would assign to each school an annual performance grade from "A" to "F."[15] Unlike some other voucher programs, the Florida A+ Plan limits its voucher eligibility according to these school performance grades.[16] A student in Florida is eligible for an "opportunity scholarship" to use at a participating nonpublic school if that student attended a school that received two "F" grades in any four-year period.[17] Participating private schools may be religious schools that satisfy all of the eligibility requirements.[18]

Taken together, Chapter Two and the Florida A+ Plan have the right characteristics to present test cases for the distinction between direct and indirect aid to religious institutions. This Note draws upon

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11 20 U.S.C.A. § 7372(a)(1).

12 *See* 20 U.S.C.A. § 7371(b); *see also* Part II.C *infra* (discussing the supplement/supplant distinction).

13 20 U.S.C.A. § 7372(c)(1).

14 *See generally* 1999 Fla. Sess. Law Serv. 398, § 7 (West); EXECUTIVE OFFICE OF THE GOVERNOR, THE BUSH/BROGAN A+ PLAN FOR EDUCATION (visited Jan. 17, 2000), <http://www.state.fl.us/eog/press_releases/January/1_25_education.html>.

15 *See* 1999 Fla. Sess. Law Serv. 398, § 7 (West). "A" schools are those making excellent progress towards state goals, "B" schools making above average progress, "C" schools making satisfactory progress, "D" schools making less than satisfactory progress, and "F" schools failing to make adequate progress. *See id.*

16 The primary limitations on the Milwaukee Parental Choice Program, for example, were that students had to come from families whose income did not exceed 1.75 times the federal poverty level and that a maximum of 15% of the school district's population could participate in the program. *See* WIS. STAT. ANN. § 119.23(2) (West 1999).

17 *See* 1999 Fla. Sess. Law Serv. 398, § 2(2)(a) (West). Students may also attend neighboring public schools with grades of "C" or better. *See id.* § 2(3)(a)–(b).

18 *See id.* § 2(4).

these two programs to explore the boundaries of the direct/indirect distinction as it applies to state aid to religion. Part I explains the importance of the direct/indirect distinction and gives some possible reasons for its prominence in recent Establishment Clause cases. Part II considers three doctrines that are closely related to the direct/indirect distinction, all of which can become entangled in any discussion of whether state aid to religion is direct or indirect. Part III then considers the direct/indirect distinction itself, particularly three different interpretations of the distinction and their relative strengths.

I. A DISTINCTION WITH A DIFFERENCE

When dealing with an issue related to the religion clauses of the First Amendment, the Supreme Court occasionally draws lines in shifting sands and attempts to distinguish apparently indistinguishable cases. This practice results in the sometimes confused rationales the Court offers to justify its decisions. To take just a few examples, the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*[19] confronted the question of whether the University of Virginia could constitutionally deny generally available financial support to a student-managed religious newspaper.[20] In analogizing the situation to a state-sponsored "limited forum" in a freedom of speech paradigm, the Court admitted that the funding scheme was "a forum more in a metaphysical than a spatial or geographic sense."[21] Similarly, the Court in *Employment Division v. Smith*[22] attempted to distinguish the result in that case from the apparently contrary rule of *Sherbert v. Verner*[23] by postulating a new category of "hybrid rights."[24]

The Court's apparent difficulty with matters of church and state raises the possibility that its use of the distinction between direct and indirect aid to religion is as vague and unhelpful as its use of a "metaphysical forum" or a "hybrid right." Much ink can be spilled attempting to explicate these various categories without arriving at any greater understanding of the contours of the Establishment Clause. If the dif-

19 515 U.S. 819 (1995).

20 *See id.* at 822–23.

21 *Id.* at 830. What makes something a "metaphysical forum" was left unexplained by the Court.

22 494 U.S. 872 (1990).

23 374 U.S. 398 (1963).

24 *See Smith*, 494 U.S. at 881–82. As with a "metaphysical forum," the Court did not even sketch the outlines of what a "hybrid right" might be. *See id.*; *see also* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704–07 (9th Cir.), *vacated*, 192 F.3d 1208 (1999); William L. Esser, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998).

ference between direct and indirect aid is a distinction without a constitutional difference, then there is little cause to be interested in it.

But the direct/indirect distinction is interesting precisely because it does appear to help explain what kinds of state aid to religion are constitutionally permissible. The Court's use of the distinction expresses an intuition that if funds go to religion as a result of truly independent and autonomous decisions, then that kind of aid is constitutional under the Establishment Clause. Indeed, there is at least one paradigmatic case of indirect aid to religion that almost anyone would agree is constitutional: "[A] State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary."[25]

More importantly, there could be significant theoretical convergence on the doctrine that any indirect aid to religion would be permissible. For example, a nonpreferential account of the separation of church and state holds that aid to religion is acceptable if it does not prefer one sect to another.[26] Indirect aid, perhaps by definition,[27] cannot amount to the state's preferring one religious group over another, because autonomous individuals make the decisions that ultimately result in any resources reaching religion. Alternatively, an endorsement principle requires that state aid does not endorse or disapprove of any religious message.[28] Indirect aid, because it is filtered through an autonomous decisionmaker, cannot give the appearance of being a governmental stamp of approval. Or again, a coercion principle requires that the state abstain from coercing any religious

25 Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 486–87 (1986). Presumably, another example of truly indirect aid to religion could be found in the Combined Federal Campaign (CFC), which facilitates charitable giving by federal employees to voluntary health and welfare agencies. *See generally* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985). Faith-based charitable organizations that participate in the CFC stand in a similar position to religious institutions that receive a state employee's salary as a result of her private and independent choice.

26 *See* Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting); *id.* at 113 ("The [Establishment] Clause was . . . designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

27 For possible definitions of "indirect aid," see *infra* Part III.

28 *See* Lynch v. Donnelly, 465 U.S. 668, 690–94 (1984) (O'Connor, J., concurring); *id.* at 691 (arguing that the Establishment Clause was designed to prevent "the evil of government endorsement or disapproval of religion").

practice.[29] Indirect aid does not so coerce anyone, because any participation in a religious practice is the result of the fully private choices of individuals. In general, it is possible to say that several different accounts of the "wall of separation between church and state" can agree with the idea that indirect aid to religion—aid that is somehow the result of an independent and private choice—is permissible under the Establishment Clause.

In fact, where there is truly indirect aid to religion there might be no state action, and therefore the First Amendment of the Constitution would not even be implicated. For there to be any constitutional violation, there must have been action by the state or its agents.[30] State action is not necessarily limited to cases in which a state or one of its political subdivisions has exercised power; state action may also be found when there is private performance of a public function[31] or when the state is entangled in some activity.[32] But if the state merely provides a benefit like a tuition voucher to parents, the state action might end at that point. When parents then privately decide to use that voucher to send their children to a religious school, that decision might be attributable to the private actor only, not the state. Assuming that some kind of voucher scheme like this is an example of indirect aid to religion, the state action doctrine gives a compelling reason for thinking that such indirect aid does not violate the Establishment Clause. After all, without any state action, it is not even possible to allege a constitutional violation.[33]

So, there might be substantial agreement that truly indirect aid to religion would be constitutionally permissible under the Establishment Clause. Where substantial disagreement exists is in the meaning

29 *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .")

30 *See* Civil Rights Cases, 109 U.S. 3 (1883). The one exception to the state action doctrine is the proscription of slavery in the 13th Amendment. *See* United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911).

31 *See* Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944). *But see* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

32 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

33 Of course, this discussion does not attempt to delineate just what kinds of aid are "indirect"; it merely gives an additional reason for thinking that such aid is permissible under the Establishment Clause. *See infra* Part III.

of "indirect aid" to religious institutions. That disagreement is exacerbated by the tangle of different constitutional doctrines that relate to the distinction between direct and indirect aid. Understanding those alternative doctrines is a necessary preliminary to any inquiry into the precise definition of the category "indirect aid."

II. Alternative Doctrines and the Direct/Indirect Distinction

There are several different Establishment Clause doctrines that overlap the distinction between direct and indirect aid.[34] A complete look at the direct/indirect distinction requires consideration of three alternative constitutional approaches: (1) the distinction between textbooks and instructional materials, (2) the *Lemon* test, particularly as it was reinterpreted in *Agostini*, and (3) the distinction between aid that supplements and aid that supplants the resources of religious institutions.

A. *Textbooks vs. Instructional Materials*

The constitutional distinction between textbooks and other instructional materials closely corresponds to a possible distinction between direct and indirect aid to religious schools; it is also one of the strangest features of Establishment Clause jurisprudence. In *Board of Education v. Allen*,[35] the Supreme Court found that a New York law permitting school districts to loan textbooks to parochial school students did not offend the First Amendment. The Court acknowledged that textbooks might have a religious significance that cannot be found in the bus transportation it permitted in *Everson v. Board of Education*.[36] Still, the statute did not permit loans of religious books, and because school district officials could presumably distinguish between secular and religious books,[37] textbook loans were deemed to be permissible. It soon became clear, however, that if textbooks were a form of licit aid to religious schools, they might be the only such aid permitted. In 1975, the Court decided *Meek v. Pittenger*,[38] in which a plurality of the Justices permitted loans of textbooks to students but found that loans of instructional material and equipment other than textbooks were an unconstitutional establishment of religion. The constitutional distinction between textbooks and instructional materials was

34 For an explanation of how the direct/indirect distinction is related to these other doctrines, see *infra* text accompanying notes 118–28.

35 392 U.S. 236 (1968).

36 330 U.S. 1 (1947).

37 *See Allen*, 392 U.S. at 245.

38 421 U.S. 349 (1975).

confirmed two years later in *Wolman v. Walter*,[39] which permitted textbook loans on the authority of *Allen* and *Meek* but invalidated loans of instructional material and equipment, even though the loans were made to students and their parents rather than directly to the schools.

On its face, the distinction between textbook and instructional materials—items such as periodicals, photographs, maps, charts, sound recordings, films, projection equipment, recording equipment, and laboratory equipment[40]—seems absurd. As Senator Daniel Patrick Moynihan once asked, if the Court will allow books in religious schools but not maps, what should be done with an atlas?[41] But beyond the obvious difficulty in line drawing or definition, a further problem with the distinction is its lack of a sufficiently persuasive justification. In *Allen*, the Court assumed that school officials could adequately determine the content of the textbooks in order to limit them to secular texts.[42] In *Meek*, however, the Court seemed to give two rationales for distinguishing instructional materials and equipment and finding them unconstitutional. First, the instructional material and equipment was loaned "*directly* to qualifying nonpublic . . . schools";[43] this was different in an important way from textbook loans that were given to students. Second, the loans of instructional materials and equipment constituted "substantial amounts of *direct* support"[44] to pervasively sectarian schools, which offended the Establishment Clause. In *Wolman*, the statute providing loans of instructional materials made those loans to parents instead of directly to the school, but "[d]espite the technical change in legal bailee, the program in substance [was] the same."[45] After *Wolman*, therefore, it appears that the justification for the textbook/instructional materials distinction was the quantity of aid involved in the latter.

Yet, the Court has never explained why loans of maps, photographs, or projection equipment are "more substantial" than loans of textbooks to each nonpublic school student for every secular subject. The earlier analysis of *Allen* suggests that the relevant distinction between a textbook and various other kinds of instructional materials is that a textbook has definitive content, while instructional materials

39 433 U.S. 229 (1977).

40 *See Meek*, 421 U.S. at 355.

41 *See* 124 CONG. REC. 25,661 (1978).

42 *See Allen*, 392 U.S. at 245 ("Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books . . . .")

43 *Meek*, 421 U.S. at 363 (emphasis added).

44 *Id.* at 365 (emphasis added).

45 Wolman v. Walters, 433 U.S. 229, 250 (1977).

like computers and film projectors can be easily diverted to sectarian uses. However, the Court in *Meek* noted that even though some instructional materials are "self-policing"[46]—those that are inherently secular, nonideological, and neutral—loans of those instructional materials are unconstitutional. It is hard to imagine how laboratory equipment could be converted to sectarian instruction, and periodical subscriptions, musical recordings, and films have content that is just as determinate as textbooks. Therefore, it would seem that no adequate justification can be given for the textbook/instructional material distinction. It remains, as the Ninth Circuit has described it, "[a] thin distinction—unmoored from any Establishment Clause principles."[47]

The Justices themselves have noted the inconsistencies in this constitutional distinction. Writing separately in *Meek*, Justice Brennan thought that the large appropriations involved in that case weighed equally against the loans of textbooks and of instructional materials.[48] Along with Justices Douglas and Marshall, Justice Brennan would have found the textbook loans at issue in *Meek* unconstitutional.[49] Justice Rehnquist wrote separately to comment on the "arbitrariness"[50] of the plurality's textbook/instructional material distinction. The results in *Wolman* were even more fractured, with five different Justices offering opinions. As happened in *Meek*, two different groups of five Justices were willing to permit textbook loans but forbid instructional material loans. Justice Marshall wrote that he would overrule *Allen*, thereby eliminating the need to make this awkward distinction.[51]

Because the textbook/instructional material distinction is narrower and less abstract than the difference between direct and indirect aid, the Supreme Court may be more inclined to use it to settle relevant Establishment Clause cases in the most limited manner possible. This is certainly possible in *Mitchell*, in which the petitioners have concentrated on the application of *Meek* and *Wolman* to the issue of Chapter Two aid to religious schools. The petitioners contend that if the textbook/instructional material distinction really depends upon how substantial the aid in question is, then it is significant that the religious schools and families receiving aid under Chapter Two do not

46 *Meek*, 421 U.S. at 365.

47 Walker v. San Francisco Unified Sch. Dist., 46 F.3d 1449, 1466 (9th Cir. 1995).

48 *See Meek*, 421 U.S. at 377–78 (Brennan, J., concurring in part and dissenting in part).

49 *See id.* at 373.

50 *See id.* at 389 (Rehnquist, J., concurring in part and dissenting in part).

51 *See* Wolman v. Walters, 433 U.S. 229, 259 (Marshall, J., concurring in part and dissenting in part).

comprise a majority of the program's beneficiaries.[52] In the alternative, however, the petitioners argue that *Meek* and *Wolman* should be overruled.[53] Given that more recent cases have tended to allow aid to religious schools or to students attending religious schools,[54] it is possible that the Court will reject the strict separationism of *Meek* and *Wolman.* Since the textbook/instructional material distinction derived from those cases lacks a generally accepted justification, and since it has also led to counter-intuitive results,[55] the Court in *Mitchell* might be willing to abandon *Meek* and *Wolman* and cut off the limited reading of the direct/indirect distinction they suggest.

Even if the textbook/instructional materials distinction persists as one doctrine that overlaps the distinction between direct and indirect aid to religion, the limited nature of that doctrine makes it impossible to apply in a variety of Establishment Clause cases. For example, any constitutionally salient difference between textbooks and instructional materials would have no substantial effect on the constitutionality of school voucher programs. The Florida A+ Plan gives opportunity scholarships to parents so they may send their children to private schools;[56] those vouchers are not loans of equipment, title to which must remain in a public agency. A voucher is a species of aid different from the loan of a computer. Unlike textbooks or laboratory equipment that a school must provide to educate its students adequately, private school tuition is something parents must pay to the school, not something the school must give to its students. Of course, some religious schools provide scholarships to some students, just as the Florida voucher program will provide opportunity scholarships. But those scholarships are not resources that the schools *must* give to the student to provide an adequate education. The tuition paid to the school—whether it is paid by the parents themselves, by Florida through an opportunity scholarship, or by the school itself through its own scholarship program—is different in kind from a textbook or computer that the school makes available to students to educate them.

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52 *See* Petitioner's Brief at 32, Mitchell v. Helms, 119 S. Ct. 2336 (1999) (granting certiorari) (No. 98-1648), *available in* 1999 WL 639126.

53 *See id.* at 33–46.

54 *See* Agostini v. Felton, 521 U.S. 203 (1997) (lifting an injunction that barred Title I remedial education programs from operating on religious school property); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (allowing a state-provided sign language interpreter to assist a deaf student attending a Catholic high school); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986) (permitting state funds to be used by a blind student to attend a private Christian college).

55 *See* Petitioner's Brief, *supra* note 52, at 38–43.

56 *See* 1999 Fla. Sess. Law Serv. 398, § 2(2)(b) (West).

The distinction between permissible loans of textbooks to students and impermissible loans of instructional materials and equipment to schools can be thought of as a rough approximation of the distinction between direct and indirect state aid to religious schools. As should be evident, however, the textbook/instructional material distinction is a constitutional doctrine with several problems, none of which can be solved conveniently; not only does it lead to strange and seemingly arbitrary results, it also lacks a sufficient justification. Though the textbook/instructional materials distinction overlaps the distinction between direct and indirect aid, the former is itself too problematic to help explain the latter.

B. The "Lemon" *Test*

The second Establishment Clause doctrine that touches on the direct/indirect distinction is the familiar *Lemon* test,[57] particularly as it was recast in *Agostini v. Felton.*[58] Before considering what the post-*Agostini Lemon* test might look like, it is worth noting that it is one of the most criticized aspects of Establishment Clause jurisprudence. Five current Justices have questioned the validity of its continued use.[59] Some commentators thought that *Lemon* was dead even before *Agostini.*[60] Nevertheless, the Court has refused to overrule *Lemon* and sign its death certificate. Even in *Agostini,* the Court confirmed that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed."[61] The Fifth Circuit, considering the constitutionality of Chapter Two in Louisiana, stated, "As we read *Agostini,* the Supreme Court has not abandoned,

57 *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the *Lemon* test, state action must satisfy three prongs: it must have a secular purpose, it must have a primary effect that neither advances nor inhibits religion, and it may not foster an excessive entanglement with religion. *See id.* at 612–13.

58 521 U.S. 203 (1997). Given the changes that were made to the *Lemon* test in *Agostini,* it might be better to refer to this test as the "*Agostini* test." However, the Court in *Helms* continued to speak of the *Lemon* test, and since that term has become entrenched in the Establishment Clause vocabulary, it should probably be preserved, unless the Court were to explicitly overrule *Lemon.*

59 *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring). The five Justices are Rehnquist, O'Connor, Scalia, Kennedy, and Thomas. *See id.*

60 *See, e.g.,* Michael S. Paulsen, Lemon *Is Dead,* 43 CASE W. RES. L. REV. 795 (1993).

61 *Agostini,* 521 U.S. at 222. The Court cited as examples its continued use of *Lemon*'s purpose and effects prongs. *See id.* at 223.

nor even fundamentally changed, the *Lemon* test."[62] In Justice Scalia's colorful phrasing, "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence . . . , frightening the little children and school attorneys . . . ."[63]

If the general principles of *Lemon* remain good law, what did change in *Agostini* were "the criteria used to assess whether aid to religion has an impermissible effect."[64] At the very least, the Court recognized that two assumptions about state aid to religious schools—assumptions essential to the holdings in prior Establishment Clause cases—had been abandoned. First, *Zobrest* eliminated the presumption that state-sponsored indoctrination inevitably results from the placement of public employees in parochial schools.[65] Second, the Court abandoned the supposition that all direct aid to religious schools was invalid under the Establishment Clause.[66] But it would also seem that *Agostini* brought about a more thorough overhaul of the *Lemon* test than these two changes would indicate. Most importantly, the Court collapsed the third prong of the *Lemon* test—the entanglement analysis—into the second, effects prong. "[I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect."[67] This development effectively eliminates a separate prong of the original *Lemon* test; if entanglement is but one factor to be considered in assessing the effects of aid to religion, then any entanglement might be outweighed by the other criteria of effect.[68]

Although *Agostini* brought about a change in the criteria of effects, the Court's explanation of that change is unfortunately convo-

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62 Helms v. Picard, 151 F.3d 347, 362 (5th Cir. 1998), *cert. granted sub. nom.* Mitchell v. Helms, 119 S. Ct. 2336 (1999).

63 *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring).

64 *Agostini*, 521 U.S. at 223. Of course, the *Agostini* Court claimed to be doing nothing more than *recognizing* the changes in criteria that had been effected by earlier decisions. This understanding was necessary for the Court to provide relief under Federal Rule of Civil Procedure 60(b). *See id.* at 237.

65 *See id.* at 223.

66 *See id.* at 225.

67 *Id.* at 233; *accord Helms*, 151 F.3d at 358–59 (finding that the *Agostini* Court had "expressly treated" the entanglement prong as an aspect of the effects prong).

68 "Without an independent 'entanglement' prong, . . . the *Agostini* Court's reformulation of the *Lemon* test is a considerably more lenient establishment analysis . . . ." Doug Roberson, Recent Development, *The Supreme Court's Shifting Tolerance for Public Aid to Parochial Schools and the Implications of Educational Choice:* Agostini v. Felton, *117 S. Ct. 1997 (1997)*, 21 HARV. J.L. & PUB. POL'Y 861, 872–73 (1997).

luted and in some places apparently contradictory. In one place, the Court identifies the "three primary criteria" for evaluating whether governmental aid has the effect of advancing religion as whether the aid "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; [and] create[s] an excessive entanglement."[69] But these labels can be misleading. The Court cashes out the second criterion, defining recipients by religion, as an inquiry into whether the aid creates "a financial incentive to undertake religious indoctrination,"[70] which sounds quite similar to the first criterion. Neutrality is important for this inquiry into financial incentive,[71] but neutrality is also a sub-element of the first criterion, governmental indoctrination.[72] A different confusion handicaps the Court's specification of this first criterion. In explaining that it had abandoned the assumption that "all government aid that directly assists the educational function of religious schools is invalid,"[73] the Court specified that one of the criteria for determining whether a program is permissible direct aid is whether it flowed to the religious school as a result of an individual's autonomous decisionmaking.[74] It would seem that if this requirement is satisfied, then permissible direct aid would be aid that was arguably *indirect*.[75]

The new effects analysis promulgated in *Agostini* is further complicated by the additional sub-elements that help determine the three primary criteria above. Presumably, these subordinate criteria will help to bring the abstract analysis of the *Lemon* test down to the more fine-grained level of the facts in any given case. So, in addition to whether aid is neutrally distributed and directed by the private choices of individuals, the Court will ask if the aid subsidizes religion by "reliev[ing] the sectarian schoo[l] of costs [it] would have borne in edu-

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

70 *Id.* at 231.

71 "This incentive is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

72 *See id.* at 230 (noting that the criteria by which an aid program defines its recipients are relevant in two respects).

73 *Id.* at 225.

74 *See id.* at 226.

75 Of course, this depends on how one disambiguates the meaning of "direct aid." It is partly because of this confusion that some commentators think that *Agostini* erased the distinction between direct and indirect aid. *See* Robyn D. Kotzker, Recent Decision, *Constitutional Law—Departing from the Supreme Court's Traditional Establishment Clause Analysis in the Context of Government Funding to Religious Schools*—Agostini v. Felton, *521 U.S. 203 (1997)*, 71 TEMP. L. REV. 1045, 1077–80 (1998).

cating [its] students."[76] These three factors will determine whether the aid results in "improper governmental indoctrination." The excessive entanglement criterion will be determined by the "character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and religious authority."[77] Specifically, the Court will consider the monitoring, administrative cooperation, and potential for political divisiveness that accompanies the aid program;[78] "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause."[79]

To summarize the discussion above, the Court might attempt to integrate these various elements in the following way. The first issue is whether state aid to religion has a secular purpose. The second issue is whether that aid has the primary effect of advancing religion. There are three criteria that courts should use to determine whether aid has the effect of advancing religion: (1) whether it results in improper governmental indoctrination, (2) whether it creates a financial incentive to undertake religious indoctrination, and (3) whether it causes an *excessive* entanglement of church and state. The factors that determine whether some aid results in governmental indoctrination (the first criterion of effect) are (a) whether it is made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited, (b) whether it flows to the religious institution only as a result of the independent and private choices of individuals, and (c) whether it relieves the sectarian school of costs it otherwise would have borne in educating its students. The factors that determine whether a particular aid program results in an excessive entanglement (the third criterion of effect) are (a) whether it requires pervasive monitoring by public employees, (b) whether it requires administrative cooperation between state and religious authorities, and (c) whether it might increase the danger of political divisiveness.

Of course, no one really knows what the *Lemon* test looks like after *Agostini*. To make matters worse, the Court has frequently complained about the difficulty of employing the test as a determinative

76 *Agostini*, 521 U.S. at 226 (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993)) (alterations in original).

77 *Id.* at 232 (quoting Lemon v. Kurtzman, 403 U.S. 602, 615 (1971)).

78 *See id.* at 233.

79 *Id.* (citing Bowen v. Kendrick, 487 U.S. 589, 615–17 (1988), and Roemer v. Board of Pub. Works, 426 U.S. 736, 764–65 (1976)).

guide to decisions in Establishment Clause cases.[80] The *Meek* Court, for instance, wrote, "It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."[81]

If it is difficult to predict what the *Lemon* test might look like after further clarification, it is more difficult still to guess at how the Court might use that analysis to determine the fate of Chapter Two in *Mitchell v. Helms*. But some general ideas might be sketched out, using the outline of the *Agostini* decision given above. No one believes that Chapter Two lacks a secular purpose, so the first prong of the *Lemon* test is likely to be satisfied.[82] Under the effects analysis, it also seems reasonable to believe that Chapter Two creates no financial incentive to undertake religious indoctrination since Chapter Two aid must be made available to both public and private religious schools on an equitable basis.[83] In fact, in the school district whose Chapter Two program was challenged in *Mitchell v. Helms*, the majority of the federal funds—approximately seventy percent[84]—were provided to public schools.[85] Given this distribution of aid, no parents would send their children to a religious school in order to get the benefits of Chapter Two aid; such aid was more readily available in the public schools. Similarly, it is unreasonable to think that Chapter Two creates an ex-

80 *See* Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (noting that the *Lemon* test is "difficult to apply and yields unprincipled results"); Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stephens, J., dissenting) (referring to "the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' described in *Lemon v. Kurtzman*"); Meek v. Pittenger, 421 U.S. 349, 358 (1975) (stating that the *Lemon* test is "not easily applied").

81 *Meek*, 421 U.S. at 358–59.

82 *See* Walker v. San Francisco Unified Sch. Dist., 46 F.3d 1449, 1464 (9th Cir. 1995) (finding that Chapter Two's aim of improving education is a valid secular purpose). Because the Fifth Circuit relied exclusively on the textbook/instructional material distinction in *Helms*, that court did not consider whether Chapter Two had a valid secular purpose. According to the statute, the objectives of Chapter Two include supporting local education reform efforts, providing funds to implement educational reform programs, encouraging educational innovation and improvement, and helping to meet the special educational needs of some students. *See* 20 U.S.C.A. § 7301 (b) (West 2000). All of those objects constitute valid secular purposes.

83 *See* 20 U.S.C.A. § 7372(a) (West 2000).

84 *See* Helms v. Picard, 151 F.3d 347, 368 (5th Cir. 1998), *cert. granted sub. nom.* Mitchell v. Helms, 119 S. Ct. 2336 (1999).

85 In San Francisco, only $195,482 of the $903,028 the school district was awarded under Chapter Two was set aside for private schools. *See Walker*, 46 F.3d at 1464.

cessive entanglement between church and state. Compared to the Title I programs approved in *Agostini*, Chapter Two provides no greater threat of administrative cooperation between parochial and public school officials, nor is it more likely to result in political divisiveness. Furthermore, the *Agostini* Court did not think that monthly visits to religious schools constituted "*pervasive* monitoring,"[86] so it is unlikely that the more lax supervision of Chapter Two in *Helms* would result in an excessive entanglement.[87]

The more difficult question is whether Chapter Two results in governmental indoctrination. Recipients of Chapter Two benefits are not defined on the basis of religion, since both public and private religious schools can receive funds. However, it is not clear whether Chapter Two funds flow to religious schools as the result of private and independent choices by individuals. On one hand, states apportion Chapter Two funds to private schools on the basis of enrollment in those schools,[88] and the enrollment is wholly determined by the individual choices of parents. On the other hand, funds and services provided by Chapter Two must be administered by the states, and to the extent that the states retain discretion of the use of Chapter Two funds, there is no intervening private party whose decisions result in the flow of state aid to religious schools. It is similarly difficult to say whether Chapter Two aid relieves schools of costs they otherwise would have borne.[89] Every computer that is loaned to a religious school under Chapter Two is one less computer that the school might purchase with its own funds; to that extent, Chapter Two aid may seem to result in governmental indoctrination. However, Chapter Two aid may not supplant funds from other sources.[90] If that statutory requirement is satisfied, then it is difficult to imagine how the Chapter Two funds might otherwise relieve the religious schools of costs they would have shouldered themselves.

Analysis of the government indoctrination criterion of effects does not produce any clear determination of the constitutionality of Chapter Two because the Supreme Court could reach different conclusions about two of the sub-criteria. Worse, *Agostini* is unclear about how these three criteria of effects are related to each other; the Court did not specify whether an aid program must survive scrutiny

86 *See* Agostini v. Felton, 521 U.S. 203, 234 (1997).

87 State officials conducted monitoring visits at participating schools once every two years, far less than the monitoring in *Agostini*, which the Court did not think created an excessive entanglement. *See Helms*, 151 F.3d at 368.

88 *See* 20 U.S.C.A § 7312(a) (West 2000).

89 *See infra* text accompanying notes 101–12.

90 *See* 20 U.S.C.A. § 7371(b) (West 2000).

under all of the criteria, or whether those criteria are simply the factors to be employed in a balancing analysis of effects. If a program must pass each of the three criteria independently, then Chapter Two might be in jeopardy, but if only a majority of the elements (or some lesser combination) must be satisfied, then Chapter Two is likely to survive the challenge. In any event, the example of Chapter Two illustrates that *Agostini* did little to eliminate some of the persistent ambiguities of the *Lemon* test.

Using the outline of the *Agostini* analysis given above, it is also possible to contemplate the application of each criterion of the effects prong to school vouchers. First, it is unlikely that governmental indoctrination would result from a voucher program. Voucher programs like the Florida A+ Plan do not define eligibility for opportunity scholarships in terms of religion,[91] nor do they set any religious qualifications on participating schools.[92] Under the plan, parents can choose to send eligible children to secular private schools, religious private schools, or other public schools; this parental choice means that any money from the state ultimately flows to religious schools only as the result of an independent and private choice.[93] Nor does a voucher program relieve any of the religious schools' educational costs, since vouchers are not a resource that the schools must supply to their students. Second, because vouchers are provided on a neutral basis, they cannot create a financial incentive to undergo religious indoctrination; Florida's opportunity scholarships could also be used at participating secular private schools[94] so children can leave the public school system without being required to go to a religious school. Third, since a voucher program merely pays the tuition for a student

91 Eligible students must have attended the failing school during a school year in which the school received the "F" grade, or else they must be new students (entering kindergarten or first grade) who have been assigned to a failing school for the upcoming year. *See* 1999 Fla. Sess. Law Serv. 398, § 2(2)(a) (West).

92 The Florida statute sets out many requirements for participating private schools, but none of them are related to religion. The schools must accept the opportunity scholarship for each student as full payment for all tuition and fees, meet all health and safety codes, comply with all state statutes governing private schools, adhere to its published disciplinary procedures, and comply with federal race discrimination law. *See id.* § 2(4).

93 The scholarships are disbursed in quarterly payments, via checks made payable to the students' parents, but sent directly to the private school. Parents must then restrictively endorse the checks to the private school. *See id.* § 2(6)(a).

94 Parents of children who attend schools that have received two "F" grades may opt to send the students to any other public school in their district that has received a grade of "C" or higher, or to another public school in an adjacent school district. *See id.* § 2(3)(a)–(b).

to attend a private school, the possibility of an excessive entanglement is slight. There would be little need for pervasive monitoring or extensive administrative cooperation between public and religious school officials. However, because school vouchers have created a great deal of political controversy, the political divisiveness element of the excessive entanglement criterion could be important. Overall, it would seem that a voucher program would be likely to survive a constitutional challenge using the revamped *Lemon* test set out above, but substantial uncertainty remains.

Even though it is possible to predict what results might follow from an application of the post-*Agostini Lemon* test to the cases of Chapter Two and school vouchers, that does not mean that *Agostini* created a useful analytical device. The additional criteria for evaluating the effects prong of the *Lemon* test do not eliminate the earlier ambiguities; in some ways, *Agostini* exacerbated the previously-existing problems. And while the *Agostini* Court relied upon the distinction between direct and indirect aid to religion as an element of its Establishment Clause analysis, it did not attempt to specify the boundaries between those two categories. The post-*Agostini Lemon* test, therefore, cannot fully explain the constitutional distinction between direct and indirect aid to religion.

C. Supplement vs. Supplant

One of the more recent doctrinal developments related to the direct/indirect distinction would be to make explicitly constitutional the difference between aid that supplements and aid that supplants the resources of religious schools.[95] In making this distinction, the character of the aid involved—whether textbooks or other materials and equipment—is less important than the function the aid plays in the religious school, in part because a supplement/supplant distinction could be used to distinguish the aid at issue in *Meek* and *Wolman*

95 The supplement/supplant distinction is clearly contained in the Elementary and Secondary Education Act: "A State or local educational agency may use and allocate funds received under [Chapter Two] only so as to supplement . . . the level of funds that would . . . be made available from non-Federal sources, and in no case may such funds be used so as to supplant funds from non-Federal sources." 20 U.S.C.A. § 7371(b). Whether the supplement/supplant distinction is a creature of statute only or has some constitutional warrant is a matter of debate. *Compare* Petitioner's Brief, *supra* note 52, at 26 n.16 (arguing that the "supplement, not supplant" rule has never been recognized as constitutionally required), *with* Respondent's Brief at 29–30, Mitchell v. Helms, 119 S. Ct. 2336 (1999) (granting certiorari) (No. 98-1648), *available in* 1999 WL 792124.

from other aid programs, like that of Chapter Two.[96] More generally, it might be thought that "the rule of *Meek* and *Wolman* should be limited to cases in which there is an unacceptable risk of diversion of resources to religious purposes . . . because the aid to a religious school is not supplementary."[97] In other words, the real danger of an Establishment Clause violation comes from the possibility that state aid to religious schools would somehow be used for indoctrination; if the aid is such that it merely supplements the instruction and the resources already provided by the religious school, then there is less risk of state sponsored indoctrination.

Although there is no case law that definitively adopts the supplement/supplant distinction as a constitutional requirement, it is possible that the Court might do so, perhaps as a further understanding of the difference between direct and indirect aid to religion. It is important to remember, however, that the supplement/supplant language is actually derived from the text of a statute.[98] The *Agostini* Court worried about the effects of aid that supplants religious schools' instruction, but it did not go so far as to announce explicitly any substantive constitutional rule concerning the distinction.[99] At present, the "supplement, not supplant" rule is a statutory construct that lacks broad constitutional authority across all Establishment Clause issues.

If the supplement/supplant distinction is to be extended beyond its statutory basis, it must be grounded in some constitutional requirement already articulated by the Court. The best authority for adopting the distinction is the *Zobrest* requirement that state aid to religious schools not "relieve[] sectarian schools of costs they otherwise would have borne in educating their students."[100] This rule could be glossed as permitting aid that is supplemental while forbidding any aid that supplants other funds or instructional programs. There is little other support for the supplement/supplant distinction in the Court's opinions other than this particular principle, so if the Court were to adopt

96 *See* Solicitor General's Brief on Behalf of the Secretary of Education in Support of Petition for Certiorari at 22 n.12, Mitchell v. Helms, 119 S. Ct. 2336 (1999) (granting certiorari) (Nos. 98-1648, 98-1671).

97 *Id.* at 24.

98 *See* 20 U.S.C.A. § 7371(b).

99 *See* Agostini v. Felton, 521 U.S. 203, 228 (1997) ("Title I services are *by law* supplemental to the regular curricula.") (emphasis added); *id.* at 244–47 (Souter, J., dissenting).

100 Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993) (characterizing the impermissible aid programs in *Meek* and *Ball*); *see also Agostini*, 521 U.S. at 226. The Fifth Circuit in *Helms* noted this as a requirement for aid to religious schools to be constitutionally permissible. *See* Helms v. Picard, 151 F.3d 347, 358 (5th Cir. 1998), *cert. granted sub. nom.* Mitchell v. Helms, 119 S. Ct. 2336 (1999).

the supplement/supplant distinction as a general Establishment Clause requirement, it is reasonable to think that state aid would be considered "supplementary" if it did not "relieve sectarian schools of costs they otherwise would have borne."

The important question, then, is exactly what constitutes a cost that a religious school otherwise would have borne. On this point, the Fifth Circuit in *Helms* provides a useful example in its analysis of Louisiana's special education program.[101] After noting *Agostini*'s use of the cost-relief rule, the circuit court wrote, "Failure to meet this requirement presupposes that the Jefferson Parish sectarian schools, in the absence of the special education program, would have 'otherwise borne' the costs of providing special education services to their exceptional students."[102] Because the religious schools in *Helms* were not legally obligated to provide such services, it is impossible for the state's special education program to relieve those schools of a cost they otherwise would have borne.[103] To take another example, Justice Souter's *Agostini* dissent implied that the remedial programs at issue in that case were unconstitutional because they supplanted the secular teaching responsibilities of the religious schools.[104] Importantly, his rationale for concluding that the remedial programs were not supplemental rested on what he took to be the requirement that the schools provide such remedial instruction on their own:

> The *obligation* of primary and secondary schools to teach reading *necessarily* extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not distinguish their subjects from the schools' basic subjects, however inadequately the schools may have been addressing them.[105]

Granting arguendo that Justice Souter is correct in believing that schools have an obligation to provide special remedial instruction as part of their overall educational responsibilities, the presupposition of his argument is the same as that of the Fifth Circuit: a religious school can be relieved of the cost of providing some program only if that program is itself legally required of the school. On this interpretation, *Zobrest*'s cost-relief rule can be violated only in those cases in which some required program is paid for with state funds. If the supplement/supplant distinction is to be grounded in the existing case

101 The Fifth Circuit ruled that the special education program did not violate the Establishment Clause. *See Helms*, 151 F.3d at 366. That conclusion was not challenged on appeal, so it is not before the Supreme Court in *Mitchell*.

102 *Helms*, 151 F.3d at 365.

103 *See id.*

104 *Agostini*, 521 U.S. at 244–47 (Souter, J., dissenting).

105 *Id.* at 245–46 (emphasis added).

law, then supplemental aid to religious schools will be any aid that does not relieve the sectarian school of a cost it otherwise would have borne in providing some required program, instruction, or resource; call this the narrow interpretation of the supplement/supplant distinction.[106]

Of course, it is possible to conceive of the supplement/supplant distinction as broader than *Zobrest*'s cost-relief rule; an aid program could "supplant" other religious school resources if it paid for *any* instruction or services that were already provided by the school. But this broader interpretation of the supplement/supplant distinction is untenable for three reasons. First, if aid supplants religious school resources whenever it pays for a program already provided, then a school could become eligible for such aid simply by discontinuing its own program prior to receiving the state aid. For example, suppose that a religious school provided—with its own financial resources—a special music program; under the broad interpretation of the supplement/supplant distinction, any state aid that would help pay for this program would supplant the resources the school had already committed to it. However, if the school could temporarily cancel the music program and divert those resources to its sectarian instruction, then it could apply for and receive state funding to institute the music program, since the state aid would no longer be supplanting existing school resources.[107] So a broader interpretation of supplement/supplant is easily circumvented.

106 This narrow interpretation of the supplement/supplant distinction might be contrary to part of the result reached in *Wolman*. In that case, Ohio required that private religious schools meet certain minimum educational standards, as measured by standardized tests; the State also paid for the standardized tests and their scoring. *See* Wolman v. Walter, 433 U.S. 229, 238–41 (1977). Because they were required by the State, the cost of the tests and scoring would have "otherwise be[en] borne" by the religious schools. Therefore, under this narrow interpretation, the funds to pay for the tests and scoring would have supplanted the resources of the schools and would have been unconstitutional. The Supreme Court, however, found that the state aid that paid for testing and scoring was constitutional. *See id.* at 241. Although this element of *Wolman* appears to be a counterexample to the narrow interpretation of the supplement/supplant distinction, it is worth remembering that *Wolman* was decided roughly one decade before the substantial changes in Establishment Clause jurisprudence represented by *Witters*, *Zobrest*, and *Agostini*; the result might be different following that line of cases.

107 Of course, if the music program were *required* by the state, then the school would be unable to cancel the program and divert its funding to sectarian education in order to become eligible for the state aid. But if the music program were required, it would be brought within the narrower interpretation of the supplement/supplant distinction. In that case, even the narrower interpretation would mean that state aid for the music program would be unconstitutional.

Suppose that, in an effort to eliminate the strategy given in the example above, courts were to use an even broader interpretation of what aid is "supplanting," one in which state aid supplanted a religious school's resources if it paid for a program that the school had offered at any time. This situation points towards the second weakness of a broad interpretation: it would create a powerful disincentive for private schools to introduce new educational programs into their curricula. For example, if aid supplanted the resources of a religious school any time it paid for a program which the school itself had provided at any time, then it would be in the best interests of schools to never offer some kinds of educational programs in the hope of someday receiving state aid for them. Expending a school's own resources on a new program would foreclose the possibility of receiving state aid for such a program in the future, since any future aid for that program would necessarily supplant the resources the school had devoted to it.

Third, the Supreme Court has explicitly refused to conclude that state aid improperly supplants private school resources whenever that aid is used to fund an existing program. The *Agostini* Court considered that possibility in the Title I context, which contained a statutory supplement/supplant limitation similar to Chapter Two. As Justice O'Connor wrote for the Court, "We . . . are unwilling to presume that the [New York City Board of Education] would violate Title I regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I."[108] The Court was speaking of the statutory limitation in Title I, but the distinction between funds that supplement and funds that supplant is the same. If the Court believes that state aid does not supplant a private school's own funding whenever that funding is curtailed in response to the state aid, then the broader interpretation of the supplement/supplant distinction lacks the authority that can be mustered in favor of the narrower interpretation. Therefore, if the Court were to adopt the supplement/supplant distinction, it would be more reasonable for it to take the narrow interpretation, in which aid is supplementary whenever it would not relieve the religious school of costs it would have incurred in providing programs, instruction, or resources that are required by law.

It might be possible to attempt to carve out a middle ground between these two positions. The respondents in *Mitchell* reason that religious schools would otherwise bear the costs of anything that is

108 *Agostini*, 521 U.S. at 229.

related to their "core educational functions."[109] This is an intermediate position because core educational functions would probably include programs, instruction, or resources that are not necessarily required by law (as the narrow interpretation might have it) but would not include some programs funded by the schools that are peripheral to their central educational missions (as the broad interpretation might have it). The textual support for this middle ground also draws on *Zobrest*'s worry that state aid would relieve religious schools of an "otherwise necessary cost of performing their educational function,"[110] but that fails to explain what constitutes a "necessary cost" of performing the educational function. The narrow interpretation offered above solves the problem simply, by saying that whatever is mandated by the state is necessary to the educational function of the religious school. But anything related to a "core educational function" could include almost any program, whether or not it was required by the state. So, for example, if the state does not require music education, such education could still be considered a "core educational function," and any state aid for that program would impermissibly supplant this core educational function.

The difficulty with defining the costs a religious school would otherwise have borne as "core educational functions" should be evident: almost anything could be redescribed as a core educational function, meaning that the line between permissible and impermissible aid would become even more obscure. In fact, some kinds of aid that the Court has found to be constitutionally permissible appear to assist core educational functions; some examples of such aid might be textbooks, deaf translation services, remedial education for students with special needs, or standardized testing and reporting requirements.[111] But why might a computer be part of the "core educational function" of a religious school, when schools have educated students without them for so many years? The narrow interpretation of the supplement/supplant distinction, which considers "supplementary" all aid that does not provide for some instruction, program, or resource that is mandated by law, makes it relatively easy to determine what aid is permissible. "Core educational functions" are comparatively ambiguous, and while they include everything within the reach

109 *See* Respondent's Brief, *supra* note 95, at 30.

110 Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993).

111 *See* Respondent's Brief, *supra* note 95, at 35. Note that this understanding of the supplement/supplant distinction would explain why the provision of standardized testing in *Wolman* would be constitutional. *See supra* note 106. But this understanding also means that provision of textbooks is not a "core educational function," even though textbooks are absolutely central to the study of most subjects.

of the narrow interpretation, they would also include instruction, programs, and resources that are not required. To make it more concrete, if a state mandates that a school provide computer education to its students, then computers will be necessary to meet that requirement, and therefore state aid to supply computers would supplant a school's own resources by relieving it of a cost it otherwise would have borne. But if a state does not require such computer education, and instead computers are simply used to assist instruction in other state-mandated areas, it is not clear whether the provision of those computers is a core educational function for which state aid cannot be given. Certainly, a school might use computers as a part of a core educational function, but it also might not use computers at all. It seems difficult to answer straightforwardly the question of whether having computers on hand for student use is a "core educational function." As Justice Souter put it in his *Agostini* dissent, "[T]he line between 'supplemental' and general education [i.e., core educational functions] is . . . impossible to draw."[112] Therefore, the narrow interpretation of the supplement/supplant distinction is best because it is the only interpretation that leads to reasonably determinate results.

Assuming that the narrow interpretation of the "supplement, not supplant" rule were made a constitutional requirement, Chapter Two and school vouchers provide two useful examples of how that rule could be applied. Under the federal statute, Chapter Two aid is required by law to supplement, and in no way supplant, other resources;[113] a new, constitutional supplement/supplant rule would presumably mirror this statutory requirement. Any aid properly distributed according to the statute would satisfy the supplement/supplant distinction and would therefore be constitutional. Perhaps there would be some circumstances in which some Chapter Two funds would be provided for religious school programs that supplanted those schools' own resources by paying for programs, instruction, or resources that are required by law, and that aid would therefore be unconstitutional. However, such constitutional violations could be found only on a case-by-case basis, and they would in no way threaten the constitutionality of Chapter Two itself. In *Mitchell v. Helms*, it does not appear that Chapter Two funds paid for computers or other items that the religious schools were required by law to provide for their

112 *Agostini*, 521 U.S. at 246 (Souter, J., dissenting).

113 *See* 20 U.S.C.A. § 7371(b) (West 2000); *see also* Helms v. Picard, 151 F.3d 347, 367 (5th Cir. 1998), *cert. granted sub. nom.* Mitchell v. Helms, 119 S. Ct. 2336 (1999).

students.[114] Absent a factual finding that Chapter Two funds were supplanting costs that the religious schools otherwise would have borne, the program in Jefferson Parish would be constitutionally permissible, especially under the narrow interpretation of the supplement/supplant distinction.

Similarly, a voucher program like the Florida A+ Plan would likely survive constitutional scrutiny under the "supplement, not supplant" rule. In order to supplant unconstitutionally costs that would otherwise be borne, state aid to religious schools would have to pay for programs, instruction, or resources that are required of a religious school by the state. Suppose that Florida's opportunity scholarships are understood to be direct aid given to religious schools in order to pay for the cost of educating eligible students who themselves pay no tuition to attend the schools.[115] Since no private schools in Florida are required to admit any student who cannot pay that school's tuition, the opportunity scholarships do not relieve the school of any cost it otherwise would have borne. The opportunity scholarships would be supplemental only and therefore constitutional. It is possible, of course, that religious schools do spend some of their own funds to provide scholarships for some students to attend the school. Under the Florida A+ Plan, a student attending a religious school on such a private scholarship would never become eligible for an opportunity scholarship that might threaten to "supplant" the private scholarship.[116] But even under a slightly different, counterfactual voucher program in which such private scholarship students could become eligible for state tuition vouchers, state vouchers would only supplant the private scholarships under a broad interpretation of the supplement/supplant distinction. Recall that the broad interpretation of the distinction is less satisfactory than the narrow interpretation, and under the narrow interpretation, there is little risk of school vouchers unconstitutionally supplanting religious schools' own resources.

Of course, there is an additional difficulty with the supplement/supplant distinction. The "supplement, not supplant" language is itself borne of a statute, and it is not immediately clear that the statu-

114 The Chapter Two funds distributed in Jefferson Parish were part of block grants for "innovative assistance programs" to help "educational reform," so they apparently cannot pay for something otherwise required. *See* 20 U.S.C.A. § 7351(b)(2) (West 2000); *see also Helms*, 151 F.3d at 367.

115 The alternative interpretation, of course, is that the opportunity scholarships are aid given to parents, who then independently and privately elect to spend the scholarships at a given religious school. The aid would then reach the schools only indirectly. *See infra* Part III.

116 *See* 1999 Fla. Sess. Law Serv. 398, § 2(2)(a) (West).

tory language should be extended so that it would have independent constitutional authority. If it is so extended, then the narrower interpretation of the doctrine has more support in existing Establishment Clause cases. But the tenuous constitutional authority of the supplement/supplant distinction indicates that it may not be a substitute for a full account of the difference between direct and indirect state aid to religion. That distinction requires its own, independent examination.

III. The Meaning of "Direct" and "Indirect" Aid

Each of the three different doctrines discussed thus far—the textbook/instructional materials distinction, the post-*Agostini Lemon* test, and the supplement/supplant distinction—could serve as a center of gravity for Establishment Clause jurisprudence. For example, any clarification of the *Lemon* test would become the new analytical framework through which courts will at least try to frame church-state issues. Similarly, the creation of a general rule that state aid to religious schools can supplement existing resources so long as it does not supplant them would reshape the existing boundaries of permissible state action.[117] However, the Supreme Court could effect a radical shift in Establishment Clause jurisprudence if it were to focus on the paradigm in the background of these three analytical methods. That paradigm, only tentatively and ambiguously articulated, is the distinction between direct and indirect aid to religion.

It takes little effort to expose how the difference between direct and indirect aid is, at least in part, behind the textbook/instructional materials distinction, *Agostini*'s analysis of the *Lemon* test, and the supplement/supplant distinction. To begin, recall that the distinction between textbooks and other kinds of instructional materials was originally developed in the context of an assistance program that is generally agreed to be an example of indirect aid.[118] At issue in *Board of Education v. Allen*[119] was a New York statute that required local school boards to loan textbooks to all students in a school district, including those who attended private religious school. Although the loans were

117 If the Court were to emphasize in *Mitchell* the textbook/instructional materials distinction—either to affirm it or to overrule it—the effects on Establishment Clause jurisprudence would be less profound. The textbook/instructional materials distinction is by its nature of limited scope, so it does not have the potential to exert as much force as a revised and clarified *Lemon* test or a "supplement, not supplant" rule.

118 For possible definitions of direct and indirect aid, see *infra* text accompanying notes 129–34.

119 392 U.S. 236 (1968).

made to students[120]—not to the schools—the Court did not emphasize the indirect nature of the aid in finding the statute constitutional. However, the later cases that continued to permit textbook loans while forbidding loans of other instructional materials distinguished the two kinds of aid, in part, on the basis of their being direct or indirect. For example, *Meek v. Pittenger*[121] found the textbook loan program at issue there was indistinguishable from that in *Allen*,[122] and the Court explicitly noted that "no funds or books are furnished to parochial schools, and the financial benefit is *to parents and children*, not to schools."[123] The loans of instructional materials, on the other hand, were specifically characterized as direct aid to religion. "[T]he massive aid provided the church-related nonpublic schools . . . [by the statute] is *neither indirect* nor incidental."[124] *Wolman v. Walter*[125] further reinforced the use of the direct/indirect distinction as a rationale for differentiating permissible textbook loans and impermissible instructional material loans. In *Wolman*, instructional materials were loaned to parents and students, but "[d]espite the technical change in legal bailee, the program in substance [was] the same as [that in *Meek*]."[126] In other words, whatever the exact route by which instructional materials are provided, such aid is a kind of direct aid, and it is therefore unconstitutional. So it would seem that one way of justifying the somewhat arbitrary distinction between textbooks and instructional materials would be to redescribe that doctrine as merely a specification of the distinction between permissible indirect aid and impermissible direct aid.

It is fairly obvious how the direct/indirect distinction runs through the *Agostini* Court's analysis of the *Lemon* test: one of the criteria under the effects prong is whether the aid in question results in improper government indoctrination, and one of the factors for finding government indoctrination is whether the aid is directed by independent and private choice—i.e., whether it is indirect.[127] What is less obvious is how the direct/indirect aid distinction figures in the possible supplement/supplant distinction. It might be suggested that any aid that could possibly be described as supplanting the resources

120 *See id.* at 239 n.3.

121 421 U.S. 349 (1975).

122 *See id.* at 359

123 *Id.* at 360 (quoting *Allen*, 392 U.S. at 243–44) (emphasis added). The program in *Meek* was identical in this respect to that in *Allen*. *See id.* at 361.

124 *Id.* at 365 (emphasis added).

125 433 U.S. 229 (1977).

126 *Id.* at 250.

127 *See supra* Part II.B for a treatment of the *Lemon* test.

of a parochial school could not be aid that is provided indirectly. If, as several courts have said,[128] vouchers are a kind of indirect aid, then when that aid reaches the private school it is reasonable to think that it could not possibly be supplanting any of the school's own resources. A school could not plan its own expenditures in a way that relied upon aid from the independent and autonomous choices of parents—aid from an indirect source—and so it may not be reasonable to think that such aid could be anything more than supplemental.

The important point from the foregoing analysis is that a constitutional distinction between direct and indirect aid is likely to cut across these other constitutional doctrines, even if only in the background. In fact, a broad interpretation of the direct/indirect distinction—an interpretation holding, for example, that any form of indirect aid to religious institutions is constitutional—could completely reshape Establishment Clause jurisprudence. The challenge, then, is to define the term "indirect" in a way that makes it possible to determine whether a particular instance of state aid to religion qualifies as indirect and is therefore immune to constitutional challenge. There are three plausible ways to define "indirect," which can be called the conduit understanding, the necessity understanding, and the sufficiency understanding.

The conduit understanding would mean that indirect aid to religion occurs in any case in which no funds or aid flow to religious coffers. This understanding of what makes aid indirect is suggested in the majority opinion in *Rosenberger*; while taking care to explain that the state aid to religion at issue in that case was not an example of direct aid, the Court noted, "Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to [the religious student group's] coffers."[129] The conduit understanding treats aid as being direct whenever the government provides some kind of resource—financial or otherwise—to the religious group itself. On the other hand, if no government resources actually reach the religious group, then the aid in question is indirect. So, while the government might not be able to give money to a religious school to buy computers, it might be able to reimburse the school for the cost of some service. It would not simply be a matter of where the money flows, because a government reimbursement for some material purchase, like computers, would be direct aid. The real question is whether any financial or material resource ends up on the religious institution's balance sheet. Of

128 *See supra* note 5.

129 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842 (1995).

course, one difficulty with this understanding of direct and indirect aid is that it might not account for the paradigmatic case of a government employee who diverts his salary to a religious group; since the money the state pays its employee ultimately flows to the religious group, it would seem to be unconstitutional under the conduit understanding. But even if the conduit understanding of direct is not a complete specification of the direct/indirect distinction, it is one preliminary possibility.

At the other end of the spectrum is what could be called the necessity understanding of indirect aid. On this interpretation, if there is any independent and private choice along some state aid's path to a religious organization, then that private choice renders the aid indirect. All that is required, in other words, is that some private choice be a necessary condition for the state aid to reach a religious institution. A simple example should make this interpretation clear. If a state were to distribute some kind of aid to public and private schools on a per student basis, then the independent and private choices of parents to send their children to religious schools would be a necessary condition for any of the aid to reach a particular school. Because this private decision is necessary to the school's receiving the state funds, the aid to the school would be considered indirect. The necessity understanding of indirect aid is therefore a very broad interpretation of the direct/indirect distinction, one that could possibly render many different kinds of aid indirect and therefore constitutional. Perhaps any program that distributed resources to religious groups on a nondiscretionary basis would be indirect aid.

The third understanding of the direct/indirect distinction presents an intermediate approach. According to the sufficiency understanding of indirect aid, state aid to religion is indirect only if some independent and private choice is itself sufficient for the aid to reach a religious group. To return to the example above, parents might make the private decision to send their children to religious schools, but that decision would not be sufficient for any state funds to go to the religious school. On the other hand, if it were the case that every student were given the approved textbooks for her required subjects, regardless of where she went to school, then the parental choice to send a child to a private religious school would be sufficient for this aid to go to religion. So, the sufficiency understanding is narrower than the necessity understanding, but it would still allow aid to flow to the religious school in a way that the conduit understanding might not. The sufficiency understanding also provides a neat explanation of why the example of the government employee is constitutional: the

employee's decision to turn his paycheck over to the religious organization is the sufficient condition for the funds to reach religion.

There is one other possible understanding of the direct/indirect distinction, but it is one that is quite clearly mistaken. Justice Souter's *Agostini* dissent objected to the Court's decision to "authorize *direct* state aid to religious institutions,"[130] but it did so on the basis of an erroneous understanding of what constitutes direct aid. Justice Souter rejected any comparison between the Title I program at issue in *Agostini* and the individual benefits that were approved in *Witters* and *Zobrest*. "Instead of aiding isolated individuals within a school system, New York City's Title I program before [being invalidated in] *Aguilar* served about 22,000 private school students, all but 52 of whom attended religious schools."[131] According to Justice Souter, any aid that is "direct and *substantial*" is unconstitutional,[132] but it is clear that he thought substantial aid to religion became direct aid by virtue of its size. The individual aid that was provided in *Witters* and *Zobrest* was "on a scale that could not amount to a systemic supplement,"[133] so it could be considered to be permissible indirect aid to individuals. What is crucial for Justice Souter, however, is that "even formally individual aid must be seen as aid to a school system *when so many individuals receive*[] *it that it becomes a significant feature of the system.*"[134] In short, when deciding whether state aid to religion is direct or indirect, size matters; if the amount of aid can be characterized as "massive"—on some unspecified scale—or the number of students who benefit from it is substantial, then the aid program will be direct and therefore unconstitutional.

Clearly, this understanding of the direct/indirect distinction is incorrect. The Court does sometimes speak of impermissible aid to religion as "direct and substantial,"[135] but in other places it makes clear that the categories "direct" and "substantial" are independent of one another.[136] Justice Souter appears to bleed the one category into the other, so that a large enough aid program would always be considered direct aid, no matter what its other characteristics. But putting so

130 Agostini v. Felton, 521 U.S. 203, 240 (1997) (Souter, J., dissenting) (emphasis added).

131 *Id.* at 251.

132 *See id.* at 250 (quoting School Dist. v. Ball, 473 U.S. 373, 394 (1985)).

133 *Id.* at 252.

134 *Id.* (citing Wolman v. Walter, 422 U.S. 229, 264 (1977)) (emphasis added).

135 *See* School Dist. v. Ball, 473 U.S. 373, 394 (1985).

136 *See* Meek v. Pittenger, 421 U.S. 349, 365 (1975) (characterizing the aid in that case as "neither indirect nor incidental" and suggesting that they are different categories).

much emphasis on the size of the state aid is misguided; one of the clearest principles in Establishment Clause jurisprudence is that any unconstitutional aid to religion, even "three pence,"[137] must be forbidden. Perhaps a separate constitutional principle requires that state aid to religion be forbidden if it is substantial enough—whatever "substantial enough" might mean—but it is strange to think that aid that would otherwise be indirect somehow becomes direct simply because of the amount involved.

Rejecting Justice Souter's understanding of the direct/indirect distinction, however, does not settle which of the other three understandings is best. The conduit understanding of direct aid might be objectionable because many kinds of aid programs could be reconstructed so that actual aid does not flow to the coffers of religious institutions. The university funds in *Rosenberger* are a good example; simply because the university was paying a third-party printer that provided a service to the religious student group, that aid would be indirect under the conduit approach. Almost any material or financial benefit that a state might want to provide to a religious school could be transformed so that the state funds flowed to some third party, rather than to the religious group. Even if the state wanted to provide a material benefit, like loaning computers to schools (as is the case under Chapter Two), it might be possible for schools to rent the needed equipment from a third party provider and then have the state pay the bill. And while the conduit understanding of indirect aid would probably allow for far more state aid than what might be desired, it would also forbid some kinds of state aid that are intuitively acceptable. If the state were to pay its employee even though it knew the employee was going to divert all of the money to some religious group, the conduit understanding, taken in isolation at least, seems to require that such a situation would be a case of impermissible direct aid to religion. Since it is generally understood that such a case constitutes indirect state aid to religion, the conduit understanding fails to satisfy the Establishment Clause; it is both overinclusive and underinclusive.

Between the other two alternative understandings, it is not clear which is superior. Under the necessity understanding, state aid to religion is indirect if there is some private and independent choice that was necessary for the religious institution to receive the aid; this understanding would allow substantial aid to religious schools. Suppose a state were to decide to allocate on a per student basis a portion of its

137 *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987).

education funding for the general use of individual school districts and then mandate that each school district distribute the state funds, also on a per student basis, to both public and private schools. In this case, the state funding would in some sense travel to wherever particular students attended school; the private and independent choice of parents to send their children to a religious school would be necessary for a certain amount of state aid to reach the religious institution. Neutral and generally available state funds would be accessible at both public and private religious schools on an equal basis. Some might object that the necessity understanding provides too much aid to religious schools, but some clear rationale would be needed for excluding religious schools from otherwise generally available resources.[138]

But even if the necessity understanding of indirect aid is constitutionally acceptable, that does not mean that the more modest sufficiency understanding is unacceptable. There are many kinds of state aid to religion that would qualify as indirect under the necessity understanding that would also count as indirect under the sufficiency approach. The difference between the understandings would matter in only some cases, but it is not clear whether that difference renders one or the other interpretation of the direct/indirect distinction more acceptable. The exact difference between the two is perhaps seen most clearly in the two examples of Chapter Two aid and school vouchers.

According to the federal statute, state education agencies are required to allocate Chapter Two funds to the states on a per student basis.[139] However, the local authorities have complete discretion to determine how to spend the Chapter Two funds within their school districts.[140] Suppose that the states did not have discretion in the

138 As the Supreme Court has pointed out, simply because some neutral and generally available state resource reaches religion, it does not run afoul of the Establishment Clause. For example, the availability of police and fire protection for churches cannot be constitutionally impermissible. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Widmar v. Vincent, 454 U.S. 263, 274–75 (1981). The Establishment Clause never requires the exclusion of religious institutions from evenhanded participation in general government benefits. *See generally* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Board of Ed. v. Mergens, 496 U.S. 226 (1990); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

139 *See* 20 U.S.C.A. § 7312(a) (West 2000) ("[T]he State educational agency shall distribute [the funds] according to the relative enrollments in public and private, nonprofit schools within the school districts . . . .").

140 *See* 20 U.S.C.A. § 7353 (West 2000).

amount of funding they provided to the public and nonpublic schools, and that the federal funds had to be distributed on a per student basis to each school. According to the necessity understanding, Chapter Two would then be indirect aid to religion, since the choices of parents to send their children to religious schools would be necessary for any funds to reach a school. With a slight modification, Chapter Two could be administered so that it would conform to the requirements of the necessity understanding.

Such a modification would be futile under a sufficiency understanding of indirect aid, however. Because the Chapter Two funds will always move from the state to the religious school, there would be no third party whose independent and autonomous choice would be sufficient for the state aid to reach the religious school. As Justice Souter put it, "[T]here [would be] no third party standing between the government and the ultimate religious beneficiary to break the circuit by its independent discretion to put state money to religious use."[141] Without the intervening private actor, Chapter Two could not satisfy the sufficiency understanding of indirect aid to religion. There is plenty of textual support in the opinions of the Court for the idea that state aid becomes indirect when there is some private actor standing between the state and the religious institution, whose independent decisionmaking is sufficient for the state aid to reach its "ultimate religious beneficiary."[142] And if this sufficiency understanding of indirect aid were endorsed by the Court, then it would follow that Chapter Two would be unconstitutional direct aid.

While Chapter Two might not pass constitutional scrutiny under a sufficiency understanding of the direct/indirect distinction, school vouchers would probably be permissible under either interpretation. School vouchers like the opportunity scholarships provided in Florida are an indirect form of aid to religion because parents decide, independently and privately, at which school to use the scholarship. In the case of a school voucher, there is clearly a private decisionmaker standing between the government and the beneficiary of the aid. Because the parental choice of where to use a school voucher is the sufficient condition for aid to go to a religious institution, voucher programs would have to be considered indirect aid under the sufficiency understanding. Hence, voucher programs would survive constitutional scrutiny.

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141 *Rosenberger*, 515 U.S. at 886 (Souter, J., dissenting).

142 *See generally id.*; *Zobrest*, 509 U.S. at 1; *Witters*, 474 U.S. at 481; *Mueller*, 463 U.S. at 388.

There is one point about voucher programs that is worth laboring over, however. The Florida A+ Plan, like the voucher programs in Milwaukee and elsewhere, delivers the voucher funds to religious schools through a somewhat complicated vehicle. According to the Florida statute, scholarship checks are sent directly to the private schools, but they are made out to the students' parents, who restrictively endorse them.[143] It should be clear, however, that the scholarship funds cannot be considered to be direct aid simply because the checks are sent directly to the schools, rather than the parents. In the past, the Supreme Court has looked beyond similar legal technicalities in determining whether state aid to religion is constitutional.[144] Regardless of where scholarship checks are sent—or even to whom they are made payable—the fact remains that a tuition voucher is indirect aid because parents, and not the state, are controlling who receives the aid. It does not make a constitutional difference what particular payment method is used so long as the ultimate decisionmaking authority is in private hands.

It appears that under either of the more reasonable interpretations of the direct/indirect distinction, substantial state aid to religious institutions should be constitutional. Whether the ultimate contours of the distinction are drawn broadly (as with the necessity interpretation) or more narrowly (as with the sufficiency interpretation), state aid programs that channel funds through truly independent and autonomous decisionmakers should withstand constitutional scrutiny. Such programs, like the Florida voucher program, do not offend the Establishment Clause because they are truly indirect aid to religion, aid that cannot be attributed to any state actor. And even if a narrower construction of the direct/indirect distinction becomes accepted, one that requires "indirect aid" to reach religion only as the result of sufficient private decisionmaking, then it will still be possible to provide some kinds of state aid to religious schools. This result follows even if the Court in *Mitchell* were to decide that Chapter Two is a form of impermissible direct aid.[145]

143 *See* 1999 Fla. Sess. Law Serv. 398, § 2(b)(6) (West).

144 *See* Wolman v. Walter, 433 U.S. 229, 250 (1977) (finding that a change in legal bailee of state equipment loaned to religious schools does not convert an otherwise unconstitutional program into a constitutional one).

145 It is difficult to speculate as to whether there is any kind of *permissible* direct aid, but it may not be correct to assume the category "indirect aid" exhausts the set of state aid programs that could be constitutional.

IV. CONCLUSION

Given the difficulties usually associated with the Supreme Court's Establishment Clause jurisprudence, it is not surprising that the doctrinal development of the distinction between direct and indirect aid to religion has been without clear progress. Part of the difficulty, of course, has been the substantial overlap of several different judicial ideas with the direct/indirect distinction. The difference between textbooks and other instructional materials can be understood as shorthand examples of indirect and direct aid respectively; similarly, the categories "direct" and "indirect" play a prominent part in the Court's restatement of the *Lemon* test in *Agostini v. Felton.* But if the direct/indirect distinction is to become an intelligible Establishment Clause doctrine, it must be understood and delineated separately from other principles and ideas.

When considered alone, the difference between direct and indirect aid to religion can be defined in many different ways. Some of these approaches, like the blending of the ideas of direct and substantial aid that is suggested by Justice Souter's dissent in *Agostini*, are clearly mistaken. State aid to religion can be substantial without being direct, and it can be direct without being substantial; there is no reason to think that the two categories are isomorphic. Alternative interpretations have varying strengths and weaknesses; the conduit understanding of direct and indirect, for example, would yield results that conflict with some of the settled expectations of the Establishment Clause. Between the necessity and sufficiency interpretations of indirect aid, however, there is substantial room for disagreement.

But one of these interpretations must be accepted. Before the distinction between direct and indirect aid to religion can become a true guiding star for Establishment Clause jurisprudence, the Supreme Court must clarify the categories of direct and indirect aid. The differences between the challenges presented by Chapter Two and private school vouchers give the Justices an opportunity for further articulation of the direct/indirect distinction. To be effective, however, the Court must differentiate this constitutional distinction from the other doctrines with which it intersects. Only then will the difficult analytical work of outlining the boundaries between direct and indirect aid be fruitful. Less useful interpretations, like the conduit understanding of indirect aid, should be discarded, but ultimately it will require careful judgment to determine which of the alternatives—necessity or sufficiency—is essential to the Establishment Clause.