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An Unconstitutional Stereotype: Catholic Schools as Pervasively Sectarian

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AN UNCONSTITUTIONAL STEREOTYPE: CATHOLIC SCHOOLS AS “PERVASIVELY SECTARIAN”

GERARD V. BRADLEY

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    Brief submitted by the author to the Supreme Court in Zelman v. Simmons-Harris, 122 S. 
    Ct. 2460 (2002).
I. INTRODUCTION

The Supreme Court first held public assistance to religious schools unconstitutional in 1971 in *Lemon v. Kurtzman.* From then until now the concept of "pervasively sectarian" has played a central role in "parochaid" jurisprudence; every holding against "direct" aid has rested upon it as a necessary premise. "Pervasively sectarian" refers to the assertedly religious ("sectarian") character of the entire curriculum at parochial schools. Religion, it is said, so permeates the whole educational program that "direct aid" to any aspect of that program inescapably aids religion itself. And that, it is said, violates the Establishment Clause.

Because aid statutes typically aim to foster only secular education—maps, field trips, secular books, guidance services—branding schools "pervasively sectarian" makes it possible for Justices so inclined to find an Establishment Clause violation. A bare majority of the Supreme Court sidestepped "pervasively sectarian" while upholding the Cleveland voucher program in *Zelman v. Simmons-Harris.* Those five Justices decided that public money went to parochial schools due to parents' genuine "private choice." No "direct aid" to religious schools occurred at all.

1. 403 U.S. 602 (1971).
2. *E.g.,* Aguilar v. Felton, 473 U.S. 402 (1985) (holding unconstitutional a program to fund public employees teaching in parochial schools); Freedom from Religion Found. v. Bugher, 249 F.3d 606 (7th Cir. 2001) (striking down a state program giving religious schools aid in obtaining telecommunications access because the state could not ensure that the funds would be used solely for secular purposes).
4. *Meek,* 421 U.S. at 365-66 ("Even though earmarked for secular purposes, when [direct aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, state aid has the impermissible primary effect of advancing religion.") (quoting *Hunt v. McNair,* 413 U.S. 734, 743 (1973)).
5. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").
7. *Id.* at 2467-68.
"Pervasively sectarian" was still important in *Zelman*. The Supreme Court majority, comprised of the *Mitchell v. Helms* plurality and Justice O'Connor, did not deny that the recipients' schools were "pervasively sectarian." The District Court explicitly reached that conclusion. The Sixth Circuit affirmed the lower court's ruling, implicitly but necessarily adopting the "pervasively sectarian" conclusion, as did the four *Zelman* dissenters on the Supreme Court.

The "pervasively sectarian" concept—the essential link between "parochial" and unconstitutionality—is nevertheless under fire. In *Mitchell*, four Justices abandoned the "pervasively sectarian" category. Justice Thomas, writing for Justices Scalia, Kennedy, and Rehnquist, traced the concept to a "shameful pedigree that we do not hesitate to disavow." That "pedigree" was a history, going back at least to the 1870s, of "pervasive hostility to the Catholic Church and to Catholics in general," and "it was an open secret that 'sectarian' was code for 'Catholic.'" This "doctrine," Justice Thomas concludes, was "born of bigotry," and "should be buried now." Thus, "direct aid" programs remain presumptively unconstitutional, unless one of the *Zelman* dissenters—or Justice O'Connor—abandons the concept of "pervasively sectarian." This article supports such abandonment by showing that the "pervasively sectarian" theory presents an unconstitutional stereotype of Catholic belief and practice.

II. *ZELMAN* AND "PERVASIVELY SECTARIAN"

The *Simmons-Harris v. Zelman* District Court found that at the start of the 1999-2000 school year, forty-six of fifty-six participating schools—about eighty-two percent—were

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8. 530 U.S. 793 (2000). Justice Thomas wrote the opinion of the Court, in which Justices Scalia, Kennedy, and Rehnquist joined. *Id.*
10. *Simmons-Harris v. Zelman*, 234 F.3d 945, 969 (6th Cir. 2000) [hereinafter *Simmons-Harris II*] (Ryan, J., concurring and dissenting) ("[T]he majority devotes considerable attention to the mission statements of several religious schools, which indicate the pervasively religious character of their programs."). The *Zelman* Supreme Court dissenters were Souter, Stevens, Ginsburg, and Breyer. *Zelman*, 122 S. Ct. at 2460.
11. See *Mitchell*, 530 U.S. at 826-29 (Thomas, J., concurring).
12. *Id.* at 828.
13. *Id.*
14. *Id.* at 829.
religiously affiliated. More than sixty percent were Roman Catholic. Given these statistics, the District Court expressly found that "parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because sectarian schools overwhelmingly predominate." The District Court found that Ohio's program was "virtually indistinguishable" from the tuition reimbursement program the Supreme Court struck down in Committee for Public Education and Religious Liberty v. Nyquist, in which the majority of benefited schools were also sectarian. "A program that is so skewed toward religion," the court concluded, "necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools. For both of these reasons, the court finds the Program to be in violation of the Establishment Clause." From start to finish, the District Court's argument rested upon the view that the Cleveland schools involved were "pervasively sectarian." In its opinion, the District Court explicitly paid homage to Bowen v. Kendrick: "One way in which direct government aid might have that [primary] effect [of impermissibly advancing religion] is if the aid flows to institutions that are 'pervasively sectarian.' By essentially affirming the District Court's reasoning, the Sixth Circuit relied equally upon the "pervasively sectarian" view. As Judge Ryan noted in his opinion: "The majority... attempts to support its view... by utilizing the transparent argument that this statute should be struck down because the religious schools in the program are too religious.

III. "PERVERSIVELY SECTARIAN" IN THE SUPREME COURT

The District Court and Sixth Circuit naturally sought guidance from the Supreme Court's decisions on school aid,

19. Nyquist, 413 U.S. at 768 (noting that approximately eighty-five percent were church-affiliated).
21. Id. at 853 (quoting Bowen v. Kendrick, 487 U.S. 589, 609-10 (1988)).
which, as a matter of fact and as a matter of explicit analytical reliance, have concerned Catholic schools. The term has never acquired another referent: the Court has never deemed a college to be “pervasively sectarian,” and no non-Catholic K-12 school has figured independently in any decided case. Justice Thomas noted in Mitchell that the term was “coined” when it “could be applied almost exclusively to Catholic parochial schools.”

Although the Court did not use the phrase, the concept of “pervasively sectarian” first figured in a denial of aid to private schools in 1971, in Lemon. The Lemon Court abandoned the conclusion, stated just three years earlier in Board of Education v. Allen, that the secular education in religious schools was autonomous from religious training. Relying upon Pierce v. Society of Sisters, the Allen court also said that the State had a legitimate interest in the competent teaching of non-religious subjects in parochial schools. The Allen court never denied, although it did not explicitly affirm, that the Catholic schools in Pierce (or in Allen) had an integrated, religious mission. They were, as the opinion for the Court by Justice White repeatedly said, “parochial” schools. But the Court chose to rest its analysis not upon the overall mission or identity of the schools, but upon

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23. In Everson v. Board of Education, Justice Rutledge reminded the Court that all of the affected pupils attended Catholic schools. Everson, 330 U.S. 1, 30 n.7 (1947) (Rutledge, J., dissenting). Ninety-five percent of the students in the Rhode Island program invalidated in Lemon attended Catholic schools. Lemon v. Kurtzman, 403 U.S. 602, 608 (1971). In the Pennsylvania program, ninety-six percent were church-related schools, and “most” of them were Catholic. Id. “Practically all” of the affected students in Nyquist, the Court wrote, were Catholic. Nyquist, 413 U.S. at 768. In Meek, the Court recognized that seventy-five percent of the affected Pennsylvania schools were church-related, and further observed that the beneficiaries of the challenged program there were mostly Catholic. Meek v. Pittenger, 421 U.S. 349, 364 (1975). In Wolman v. Walter, the figure, according to the Court, was ninety-two percent enrollment in Catholic schools. 433 U.S. 229, 234 (1977). Interestingly, Board of Education v. Allen, which upheld aid to nonpublic schools, is an exception: the Court’s opinion did not explicitly refer to the percentage of beneficiaries who were Catholic. The Allen court said only that twenty-percent of all New York school children—some 900,000—attended non-public schools. Bd. of Educ. v. Allen, 392 U.S. 236, 248 n.9 (1968). The District Court in Mitchell found that of forty-six participating schools, forty-one were religiously affiliated (as of 1986-87). Mitchell v. Helms, 530 U.S. 793, 805 (2000). Thirty-four participating schools were Catholic. Id. The court expressly found, after reviewing some thirty-five exhibits, that the Catholic schools were “pervasively sectarian.” Id. at 904.

25. See Allen, 392 U.S. at 248.
27. See Allen, 392 U.S. at 245.
28. See, e.g., id. at 238.
the autonomy of secular training in them. After Allen, the way was open for substantial state aid to assist religious schools, all the way up to the cost of the secular education provided (alongside religious training) in them.

Beginning in Lemon, the Supreme Court shifted the focus of its church-state analysis from the public good—secular instruction—provided by parochial schools, to the overall "mission" of those schools. At the same time, the Court decided to consider them not simply as private or parochial (as it had in Allen), but as Catholic.

A fallacious argument brought about this unexplained shift in focus. Writing separately in Lemon, Justice Brennan expressed the new focal point, which the Court adopted in Meek v. Pittenger: "[T]he secular education those [Catholic] schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." More recently, the Fifth Circuit adopted this view in Helms v. Picard, only to have a plurality of the Supreme Court reject it in Mitchell. But the Sixth Circuit in Zelman explicitly eschewed the Mitchell plurality in favor of Justice O'Connor's concurrence: "[Justice O'Connor] found the plurality's approval of actual diversion of government aid to religious indoctrination in tension with our precedents and . . . unnecessary to decide the instant case." In effect, the Sixth Circuit returned to the Meek view, necessarily considering the Meek statement—let us call it Proposition 1—inconsistent with Allen's statement, which we shall call Proposition 2: "the processes of secular and religious training are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."

29. See id. at 247-48 ("[P]arochial schools are performing, in addition to their sectarian function, the task of secular education.").

30. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) ("[T]he District Court concluded that the parochial schools constituted 'an integral part of the religious mission of the Catholic Church.' The various characteristics of the schools make them 'a powerful vehicle for transmitting the Catholic faith to the next generation.'").


32. 151 F.3d 347, 355 (5th Cir. 1998).


34. Simmons-Harris II, 234 F.3d 945, 957 (6th Cir. 2000) (citing Mitchell, 550 U.S. at 837-38 (O'Connor, J., concurring)).

The truth is that Proposition 1 and Proposition 2 are not inconsistent; they both may be true. In fact, if "religious mission" is defined according to Catholic, not state, doctrine, both are true. A glance at Propositions 1 and 2 suggests the overlooked possibility: secular education, delivered in its full integrity and as competently as in public schools, may constitute a part of Catholic schools' "religious mission." Let me explain.

Catholics consider their hospitals, social services agencies, and schools to be "institutional ministries." They all have a specific Catholic mission or identity. This is just as true of Catholic colleges (none of which have been found to be "pervasively sectarian") as it is of Catholic grade schools. But this hardly implies that surgeons at Catholic hospitals do sectarian surgery, or that physics professors at Catholic colleges teach Catholic physics. Mother Teresa of Calcutta ran hospices that had a religious mission, but they were still just hospices. Up until a few years ago, religious brothers of Holy Cross supplied fresh food from farms near South Bend for the dining pleasures of Notre Dame students. These dedicated men had a specific mission within the overall religious mission of the University of Notre Dame, but they were still farmers. There was nothing sectarian about their soybeans.

The Meek Court drew attention to the alleged compound of secular and sectarian when it said that "[t]he very purpose of many of those schools is to provide an integrated secular and religious education."36 Granted, but "integrated" need not mean, and in Catholic usage does not mean, the introduction of doctrine into math or geography class. The Lemon Court noted that the District Court in that case had concluded that "the parochial school system was 'an integral part of the religious mission of the Catholic Church.'"37 Granted, but hospitals and colleges are too, yet neither has been deemed "pervasively sectarian."

Nothing said here implies that it cannot be the case that secular subjects in some religious schools are vehicles for indoctrination, or that all secular subjects are autonomous from religious instruction in all types of religious schools. A school which taught as science the biblical account of a seven-day

36. Meek, 421 U.S. at 366.
creation would, to that extent, "sectarianize" (to invent a term) science. But Catholics do not believe in a young earth; they do not teach Creation Science. One simply cannot infer from the fact that a Catholic school (or college or hospital or orphanage) has an integrated purpose and a Catholic identity—call it a "religious mission"—that all or most (or much, in some cases) that happens therein is tantamount to religious instruction.

There are two premises in Proposition 1. First, Catholic schools have a "religious mission." Second, this "religious mission" is the "only reason" for their existence. Assuming that Catholic schools have a "religious mission" (given the generality of the term, it is clear that they do), it is odd to add that it is the "only reason" for their existence. It is odd because once one states the "mission" of a Catholic school—or of any other institution, for that matter—one has stated its reason for existence. That is generally what a "mission" constitutes.

One reading of the statement that the schools have a "religious mission" that is the "only reason" for their existence is that religious instruction predominates in the school. Taken most straightforwardly, this statement would imply the unconstitutionality of Catholic schools' state certification, within the terms of compulsory attendance laws. It would be like certifying a vacation Bible school as a summer session of required elementary education. But no one argues that Catholic schools should be decertified. Catholic schools deliver the curriculum and other services required by public authority. This premise of Allen has never been questioned. Moreover, if indoctrination were the predominant function of the Catholic school, non-Catholics would have little reason to enroll. Few would. But Catholic schools, especially in urban areas, enroll

substantial numbers of non-Catholic students. In many cases, a majority of students do not profess the Catholic faith.

IV. AUTHENTIC CATHOLIC DOCTRINE ON EDUCATION: SCHOOLING BASED UPON THE GOSPEL

It is surely not the “mission” of Catholic schools to “indoctrinate” pupils, or, to use less loaded terms, to transmit the faith to children; less it is the “only reason” for their existence. Indeed, a separate Catholic school system was started in this country to protect Catholic children from the scandal of aggressive Protestantism in the public schools. Today many see in the Catholic school a disciplined, value-centered environment; apart from the special opportunity to learn the Catholic faith, that is sufficient reason to enroll. This is the picture of the voucher beneficiaries in Zelman: mostly non-Catholic, the children’s families were much more interested in academic quality and child safety than they were in the religious affiliation of the schools.

The mission of Catholic schools is first and foremost, to be a school. Here is the mission of a school—any K-12 school—as the Catholic Church authoritatively describes it:

Among all educational instruments the school has a special importance. It is designed not only to develop with special care the intellectual faculties but also to form the ability to judge rightly, to hand on the cultural legacy of previous generations, to foster a sense of values, to prepare for professional life. Between pupils of different talents and backgrounds it promotes friendly relations an fosters a spirit of mutual understanding; and it establishes as it were a center whose work and progress must be shared together by families, teachers, associations of various types that foster cultural, civic,
and religious life, as well as by civil society and the entire human community. The defining characteristic of the Catholic school is “a special atmosphere animated by the Gospel spirit of freedom and charity.” This, according to bishops and cardinals assembled at the Second Vatican Council speaking in union with the Pope, is the “prototype,” to which “all schools that are in any way dependent on the Church must conform as far as possible.”

In its December 1997 document, The Catholic School on the Threshold of the Third Millennium, the Vatican Congregation for Catholic Education (the highest Church authority, other than the Pope, on Catholic schools) said the goal of the Catholic schools is “the promotion of the [whole] human person,” including the intellectual, moral and spiritual spheres. The Catholic school mission statements quoted by the District Court in Mitchell for instance, echo this aim: “only in such a school can [pupils] experience learning and living fully integrated in the light of faith.” The students’ secular education is enhanced through the development of their faith in Christ. The mission statements must be understood according to the mind of the Church, not the mind of the civil authorities.

Here, then, is an authentically Catholic articulation of an alternative to “pervasively sectarian”: “a special atmosphere animated by the Gospel spirit of freedom and charity.” This is the Catholic meaning—and given the cases, the only relevant constitutionally available meaning—of “religious mission.” Can one infer from the pervasive spirit of freedom and charity that secular teaching is, after all, “so intertwined” with religion that aid to Catholic schools impermissibly advances religion? Does this “atmosphere” supply the premise missing from Proposition 1?

44. Id. § 8.
45. Id. § 9.
48. See supra note 44 and accompanying text.
I identify three major components of the atmosphere of freedom and charity. Together with explicit instruction in the Catholic faith and practice—which occurs in separate, distinct religion class—they constitute the distinguishing Catholic element of the Church’s K-12 schools. None of these components, separately or combined, justifies the inference that secular subjects are infused with sectarian content. In fact, they demonstrate precisely the correctness of Proposition 2: “the processes of secular and religious training are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.”

V. THE INTEGRITY OF SECULAR EDUCATION IS NOT UNDERMINED BY THE GOSPEL ATMOSPHERE OF FREEDOM AND CHARITY

A. Instruction and Training in the Catholic Faith

The District court in Zelman examined evidence of how Catholic schools engage in a substantial amount of religious education and training, including religion classes, sacramental preparation, regular worship, and some religiously oriented extracurricular activities. However, no case has held that the presence of a sizable amount of explicit religious training makes a school “pervasively sectarian.” That concept instead concerns (alleged) spillover of religion into secular subjects, such as math and geography. It has nothing to do with the intensity of religious courses or devotions, or with their number, or even with the ratio of such pious undertakings to “secular” instructions.

49. Another thing that distinguishes Catholic schools is the significantly higher standardized test scores when compared to public schools. See Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2482-83 (2002) (Thomas, J., concurring) (noting that Cleveland’s Catholic schools score significantly higher on Ohio proficiency tests than students at Cleveland public schools. Of Cleveland eighth graders taking the 1999 Ohio proficiency test, ninety-five percent in Catholic schools passed the reading test, whereas only fifty-seven percent in public schools passed. Also, seventy-five percent of Catholic school students passed the math proficiency test, compared to only twenty-two percent of public school students.).


52. In Tilton v. Richardson, the Court held that Catholic colleges and universities were not pervasively sectarian because religion was not likely to permeate the area of secular education. 403 U.S. 672, 687 (1971).
It is true that Catholic schools are subject to the authority of the Church's pastors despite the autonomy of secular subjects. This is because the faith is taught. It is Catholic doctrine that wherever the faith is taught, there is episcopal responsibility. This is also true at the college level. Yet no Catholic college has ever been deemed "pervasively sectarian." For example, according to the law of the Catholic Church, the bishop of any diocese is solely responsible for the teaching of the faith in that place.\(^\text{53}\) This extraordinary authority stems from Catholics' solemn belief that Jesus transmitted to the Apostles His own divine authority, and that the Apostles left bishops as their successors.\(^\text{54}\) Bishops therefore teach with the authority of Christ.

According to Church law, the bishop is responsible for the welfare of Catholics in his territory.\(^\text{55}\) But this does not mean that he is involved in all the Church's local activities, or that all the Church does under his authority has to do with religion itself. The physical plant of any large archdiocese is the size of a small city. The many people responsible for servicing the plant perform tasks that are indistinguishable from those their municipal counterparts perform, even if the former work under the Archbishop's supervision.

The *Lemon* court spoke of how "religious authority" pervaded the whole Catholic school system.\(^\text{56}\) The District Court in *Mitchell* noted that the schools operated under the "general supervision" of the local bishop and the parish pastor, and counted such Episcopal oversight as evidence of an illicit religious-secular compound.\(^\text{57}\) But on a proper understanding of Catholic doctrine, that counting is illicit. The bishop does possess a general oversight role. But that arises, and has little meaning apart, from his special competence as authoritative teacher of the faith. It is either question-begging or a form of double counting to add his authority to the explicit teaching of religion as evidence of "pervasive sectarianism." His authority is an

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54. *See id. c. 375 ("Bishops, who by divine institution succeed to the place of Apostles through the Holy Spirit who has been given to them ....").*
implication of what no one denies: Catholic schools teach the Catholic faith.  

B. Personal Vocation  

The atmosphere of freedom and charity in Catholic schools prominently includes teachers who live out, and thereby witness to, their "personal vocation." What is the meaning of this crucial term? Probably no concept was more central to the renewal of the Church accomplished at the Second Vatican Council in the mid-1960s than that of "personal vocation." Prior to that time, "vocation" was widely understood to refer to the callings of priests, nuns, and brothers to the specifically religious life of chastity, poverty, and obedience. But the Council reinvigorated the traditional teaching, then largely obscured, that everyone has a vocation. All lay persons—bricklayers, policemen, housewives, doctors, retirees—have a vocation, a specific calling from God to participate in building up good on earth, and thereby storing up material for heaven. The critically important thing is that vocation attaches religious meaning and significance—indeed, the highest kind, for it has to do with what God is calling one to do with one's life—to what are usually mundane tasks:

But the laity, by their very vocation, seek the kingdom of God by engaging in temporal affairs and by ordering them according to the plan of God. They live in the world, that is, in each and in all of the secular professions and occupations. They live in the ordinary circumstances of family and social life, from which the very web of their existence is woven. They are called there by God that by exercising their proper function and led by the spirit of the Gospel they may work for the sanctification of the world from within as a leaven.

The Holy Cross Brothers who cultivated soybeans near South Bend had a personal vocation. So did all of the other Catholic
farmers in the area, as did the truckers who carried the produce to campus, and the food service workers who prepared it. This notion of personal vocation is basically identical to what Vice President Gore meant when he said that "the purpose of life is to glorify God." He did not mean that he would, or that anyone should, ceaselessly preach Christian doctrine. He meant that one should, and that he would, glorify God by doing well those secular tasks entrusted to him. Given the deep Christian convictions of so many Americans throughout our history, one may suppose that members of Congress, governors, presidents, and judges have performed their constitutional duty as a calling from God, and as a way to praise God.

The aim of much recent Catholic theology of work and of Catholic engagement with contemporary culture—an engagement whose Latin term, aggiornamento, stands as one description of the Council's whole project—is to sanctify ordinary daily tasks. For Catholics, "sanctification" is to do exactly what the non-Catholic does, but to serve God by doing it well, to do it with a supernatural purpose added to the ordinary purposes of getting the job done. A Catholic may conclude that God wants him or her to be a farmer, a secretary, a toll collector, or a president. In each case, a Catholic fulfills his or her vocation by being the best secretary, or president, he or she can be.

The Declaration on Christian Education attaches the "highest importance" to the "vocation" of teachers, who "aid parents in fulfilling their duties and who, as representatives of the human community, undertake the task of education in schools." The Declaration refers not only to the Roman Catholic "community" but to the civil community. Thus, the fact that teachers of secular subjects in Catholic schools view themselves as serving God does not justify labeling Catholic schools "pervasively sectarian." This is because a Catholic teaching in a public school would be living according to her personal vocation as much as a Catholic teaching in a Catholic school. A teacher's vocation does not change when she leaves public schools and begins teaching at a Catholic school.

63. GE, supra note 43, § 5.
An additional, and more fundamental, reason why this important concept cannot be used to distinguish a "pervasively sectarian" school is that it would violate the Free Exercise Clause, as the Court interpreted it in Employment Division v. Smith and Church of Lukumi Babalu Aye v. Hialeah. Those cases stand for the proposition that where an action is legitimately generally prohibited, the Constitution does not require different treatment for believers who engage in the activity for religious reasons, or for the religious significance they see in or attach to it. The cases also stand for this corollary: Where public authority generally permits an activity—say, slaughtering animals—it may not discriminate against persons who would engage in the activity for religious reasons or for the religious significance they see in or attach to it. It would doubtless be unconstitutional," the Smith Court said, "to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf.

From these cases, one thing is perfectly clear: it would violate the Free Exercise Clause for the government to discharge or otherwise discriminate against a public school math teacher on the ground that the math teacher, like Al Gore, was known to consider teaching math as his calling from God. It follows that the presence of a similarly dedicated math teacher in a Catholic institution, or even a number of such devout teachers, cannot justify discrimination against that school.

C. Teachers as Moral Exemplars: Gospel Charity

The Second Vatican Council said that "teachers by their life as much as by their instruction bear witness to Christ, the unique Teacher." This witness is not preaching or explicit instruction in the faith. It is the silent witness one gives by living out one's personal vocation, by living a life of Christian charity. The more

64. U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . .").
67. See Smith, 494 U.S. at 878-79; Hialeah, 508 U.S. at 531 ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").
68. Smith, 494 U.S. at 877-878.
69. GE, supra note 43, § 8.
recent document on schools in the new millennium states that "teachers and educators fulfill a specific Christian vocation and share an equally specific participation in the mission of the Church to the extent that it depends chiefly on them whether the Catholic school achieves its purposes."

These authentic teachings show that Catholic teachers are required to be examples of the morally upright life. In the 1960s, the Archbishop of New Orleans publicly "excommunicated"—declared outside the Church—three ardent segregationists. The District Court in Mitchell cited an Archdiocesan policy by which teachers and principals might be discharged for a public lifestyle contrary to church teaching. Thus, we should expect that no segregationist or racist would find employment in New Orleans' Catholic schools.

That teachers are expected to exhibit good character is not a peculiarly Catholic policy. All teachers, if not most employees of all types, are expected to be of good character. That good character is expected to pervade Catholic schools is therefore no evidence of a suspect sectarianism. It is probably true that a few moral norms to which Catholic teachers must conform are not standards to which their public counterparts must conform. An adulterous relationship, for example, could lead to dismissal in a Catholic school but not in all public schools. But this is not evidence of sectarianism. For the Church teaches, as a matter of doctrine, that moral norms such as the prohibition of adultery are "written on the hearts" of all persons, that neither revelation nor the teaching authority of the Church is necessary to know that adultery is wrong. Catholics believe that the immorality of

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70. THRESHOLD, supra note 46, § 19 (citing GE, supra note 43, § 8).
72. See Mitchell v. Helms, 530 U.S. 793, 905 n.25 (2000) (Souter, J., dissenting) ("The Archdiocese's . . . contracts of principals and teachers in its schools contain a provision allowing for termination for lifestyle contrary to the teachings of the Roman Catholic church.").
such acts is innate in humanity, part of the natural moral law. And all the great religious traditions in America—Christian, Jewish, Muslim, Mormon—agree.

It is and has always been Catholic doctrine that, in matter of what today might be called "lifestyle," everything the Church teaches can be known by reason alone. One who wishes to show that instead the Church teaches what reason cannot know—and that therefore the good character of Catholic teachers is a "sectarian" presence in the schools—would have to prove it. He would have to engage, and refute, rational arguments by Catholics and others that justify Catholic teachings.

D. The Proposition that Secular Subjects are Infected With Religion is Unproved. Evidence Given for it Amounts to a Violation of the "Content Neutrality" the First Amendment Requires.

Justice Douglas said in his concurrence in Lemon that Catholic schools "give the church the opportunity to indoctrinate its creed delicately and indirectly, or massively through doctrinal courses." Justice Rutledge, dissenting in Everson, said that "commingling" religious and secular teachings causes the entire Catholic school system to be "permeat[ed]" with religion. Justice Douglas, dissenting in Allen, warned about a "creeping sectarianism [which] avoids the direct teaching of religious doctrine but keeps the student continually reminded of the sectarian orientation of his educators." He speculated that "[s]ome parochial schools may prefer those texts which are liberally sprinkled with religious vignettes." He cited no evidence of the preference, and the texts challenged in Allen were approved by the state for use in public schools. If and when the record is compiled in a lawsuit—but, mercifully, not before—courts may have to grapple with the question of how many "vignettes" is one too many.

That number is surely much greater than zero. The Supreme Court has said that even public schools are not constitutionally required to ban the study, much less the mention (in "vignettes" or otherwise) of religion. The Court in School District of Abington

78. Id.
79. See id. at 238-39.
Township v. Schempp invalidated devotional reading of the Bible in public schools.\(^8\) The Schempp Court stressed, however, that the Establishment Clause did not evict religion from the curriculum.\(^8\) Integrated into the teaching of history, civilization, ethics, comparative religion and the like, the Ten Commandments may appropriately be taught.\(^2\) The upshot is that public schools may not teach any sectarian doctrine as true, but that teaching about religion, through storytelling or "vignettes," is not to be confused with prohibited indoctrination. For this reason, the many examples Justice Douglas cited of "creeping sectarianism" (e.g., listing which signers of the Declaration of Independence and the Constitution were Catholic, and noting that Sir Edmund Hillary left a crucifix on Mt. Everest\(^8\)) does not count as evidence of "indoctrination." A public school teacher so inclined might just as well mention such curiosities. These "vignettes" may remind younger members of a particular minority group of the secular achievements of their forebears, accomplishments that the public schools may consciously slight. In any event, such cultural and ethnic awareness is not peculiar to the Catholic schools.

Justice Douglas' spirited assertions are wide of the mark. But they nevertheless express an important truth: Many subjects required by state licensing authorities—history, civics and English—do not permit elimination of the teacher's personal interpretations; probably no subject does. No complete objectivity or neutrality is possible; insisting otherwise is naive. Depending upon the subject, student sophistication, and ambition of the course, questions legitimately arise within classes in secular subjects which cannot be answered without reference to some point of view, some interpretive guide, some set of evaluative criteria, outside the subject. What caused the American Civil War? Did the Vietnam War conclude with an honorable peace? Should a literature course include *Huckleberry Finn*? If so, what should the teacher say about its portrayal of African-Americans? What did the Court mean when it said in

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81. See id. at 225.
83. See *Allen*, 392 U.S. at 260 n.9 (Douglas, J., dissenting).
Brown v. Board of Education\textsuperscript{84} that African-Americans educated in segregated schools suffered from psychological harm from the experience? Where the state requires certain subjects to be taught, and where those subjects call for subjective treatment by individual teachers, a teacher's "take" does not smudge the subject's autonomy or integrity. The subject is completed, not compromised, by the added perspective.

Justice Douglas consistently used religiously loaded—which is to say, very Catholic—examples, including the Crusades and the Inquisition.\textsuperscript{85} He had a point: Teachers will interpret and evaluate some mandated subjects. But what follows? Justice Douglas seems to have thought that there were (wrong) "sectarian" answers, and (right) objective answers, to the inevitable interpretative questions. However, objectivity is not possible here; as the Court squarely held in \textit{West Virginia State of Education v. Barnette}, there can be no politically "orthodox" answer.\textsuperscript{86} What, then, could distinguish the parochial school teacher's viewpoint as "sectarian," and as a basis for discriminatory treatment, from the public school teacher's "objective" viewpoint?

It is true that teachers in Catholic schools may deal with the inevitable subjective elements of a course in a way consonant with Catholic teaching. That is one reason why practicing Catholics are preferred as teachers in Catholic schools. Nevertheless, to discriminate against institutions that adopt a particular viewpoint on debatable interpretations of such required subjects as history, civics, and literature is to violate the viewpoint neutrality required by the First Amendment.\textsuperscript{87}

Although the Catholic school is not a government forum of any kind, \textit{Lamb's Chapel} is still closely analogous. Here the government certifies a school and requires it to teach certain courses. Those subjects, then, are much like the designated topics available for treatment in the nonpublic forum in \textit{Lamb's Chapel}. The rule of that case applies: "the government violates the First Amendment when it denies access to a speaker solely to

\textsuperscript{84} 347 U.S. 483, 494 (1954) ("To separate [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority ... in a way unlikely ever to be undone.").

\textsuperscript{85} See \textit{Allen}, 392 U.S. at 260-262 (Douglas, J., dissenting).

\textsuperscript{86} 319 U.S. 624, 642 (1943).

suppress the point of view he espouses on an otherwise includible subject.”\textsuperscript{88} Although the government is not “suppressing” speech in this instance, the reason why it may not suppress speech is the reason why it may not discriminate at all against viewpoints on required subjects: the First Amendment requires neutrality.

VI. CATHOLIC DOCTRINE FORBIDS “INDOCTRINATION” AS THAT TERM IS USED IN THE CASES

“Indoctrination” is a term more often used in the cases than explained in them. In \textit{Zelman}, for example, Justice Stevens repeatedly accused Ohio of paying for “religious indoctrination.”\textsuperscript{89} But Justice Stevens failed to explain the notion, nor did he explain how a student population, two-thirds of which was not Catholic, could be so readily “indoctrinated” by teachers at Catholic schools.

The Supreme Court has often treated “inculcation” as a synonym for “indoctrination.”\textsuperscript{90} “Indoctrination” might therefore mean “teaching,” the transmission of a particular body of thought—Catholicism—through lengthy instruction. If this is the intended meaning, Catholic schools do not come close to “pervasively” indoctrinating students. No one asserts that Catholic schools teach religion most of the time, save commentators who use a less wholesome meaning of “indoctrination.”

The case containing the Supreme Court’s most informative expression of what “pervasively sectarian” means did not involve primary and secondary schools, but Catholic colleges. In deciding that Catholic colleges were not “pervasively sectarian,” Chief Justice Burger, writing for a plurality in \textit{Tilton v. Richardson}, opined that college students were “less impressionable and less susceptible to indoctrination” than younger pupils.\textsuperscript{91} College students’ “skepticism” equips them to

\begin{footnotesize}
88. \textit{Id.} at 394 (quoting Corneliau v. NAACP, 473 U.S. 788, 806 (1985)).
90. \textit{E.g.}, \textit{Mueller} v. \textit{Allen}, 463 U.S. 388, 414 (1983) (Marshall, J., dissenting) (“The instructional materials which are subsidized . . . plainly may be used to inculcate religious values and belief.”); \textit{Mitchell} v. \textit{Helms}, 530 U.S. 793, 843 (2000) (O’Connor, J., concurring) (“[I]f the religious school uses the aid to inculcate religion in its students . . . the government has communicated a message of endorsement.”).
\end{footnotesize}
resist indoctrination. The "internal disciplines" and "academic freedom" of higher education courses limit the opportunity for "sectarian influence." Finally, the Chief Justice observed that church colleges sought "to evoke free and critical response from the students."

Along all these lines, the Chief Justice sought to compare Catholic K-12 schools unfavorably to Catholic colleges. He made explicit in Tilton what was often implicit, or evidently presupposed, in the K-12 cases: religious "indoctrination" was not the simple teaching of Catholicism. Indoctrination in primary schools trades upon the pupils' lack of freedom and critical reflection. It did so in two ways. Either the students were commanded to believe, or they were manipulated into believing. "Indoctrination" was either heavy-handed or insidiously subliminal.

The many unflattering judicial observations of Catholic schools that offered to show "indoctrination" have appealed to popular stereotypes of Catholics (not just children) as regimented followers, commanded by their hierarchical masters. Caricatures so gross and so harmful to another ethnic, racial, or religious minority, are not easily located in the U.S. Reports.

The judicial caricature of Catholic belief and practice requires only the following two-part rejoinder. First, the role of liberty in any grade school child's education is limited and conditional. The state compels them to attend school and compels all schools, including Catholic ones, to teach certain secular courses. America's grade school children are present in a U.S. History class, then, only because the state compels them to be present.

92. Id.
93. Id.
94. Id. at 672.
95. "The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their education at an early age.'" Id. at 685-86 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 664, 671 (1970)).
96. See Tilton, 403 U.S. at 685-86 (suggesting that pre-college students are "impressionable" and "susceptible" and lack "academic freedom").
99. One should not pretend that public schools do not seek to mold students' minds and hearts about a great many things. Students do not learn the virtues of socialism or racism in American primary schools, and that is a good thing. Students have no choice
The liberty that permits some children to attend Catholic, rather than state, schools is not the liberty of any child; rather, it is the liberty of parents. (No case has ever held that a child has a legal right to attend a school the child prefers to that which his parents chose.)

The Court first recognized the parents’ constitutional right to choose nonpublic schools in *Pierce v. Society of Sisters.*\(^1\) The Catholic schools respect this liberty even more than the state schools, at least for parents who wish their children to receive an integrated education. This parental liberty has always been the foundational moral imperative of Catholic educators. The Church has always taught that parents have the primary duty and therefore the right to direct the education of their children.\(^1\) All educators, including those running Catholic schools, are bound to view themselves as assisting parents’ discharge of this “primordial and inalienable” right and duty.\(^2\)

The K-12 cases are suffused with the specter of “indoctrination.” Yet—and it does not go too far to term this omission shocking—in no case has the Supreme Court noticed the authoritative teaching of the Church on the most relevant subject: religious freedom. The Fathers at the Vatican Council said, in solemn form, that every human person has the right to religious freedom.\(^3\) Everyone is entitled to freedom from coercion in religious matters, by divine ordination. For God so created people and the rest of the world that “the truth cannot impose itself except by virtue of its own truth, or it makes its entrance into the mind at once quietly and with power.”\(^4\) "In all

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but to be present as they are taught that George Washington was the father of the country and that Martin Luther King was a great civil rights leader.

100. The court stated:

The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.


101. See, e.g., CATECHISM OF THE CATHOLIC CHURCH § 2223; CE, supra note 43, § 3.

102. CATECHISM OF THE CATHOLIC CHURCH, supra note 101, § 2221.


104. Id. § 1.
his activity,” the Fathers add, “a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience.”

These moral constraints upon the presentation of the faith do not pertain only, or even particularly, to the state, as though Catholic educators were free to move in on space Caesar vacated. The morality of free religious belief protects everyone, and it constrains everyone. The pertinent moral norm is that in “spreading religious faith and in introducing religious practices everyone [including religious communities] ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or a kind of persuasion that would be dishonorable or unworthy . . . .” Were Catholic educators to command belief or manipulate children into accepting the faith, they would be acting immorally. A Catholic school that “indoctrinated” its pupils would not be Catholic.

VII. CONCLUSION

The Supreme Court has stated on many occasions that the central aim of the Religion Clauses is to forestall state-sponsored indoctrination. Whenever the government—directly or indirectly, subtly or overtly—prescribes the meaning and content of religious belief, this core command is violated. The government may not set up a church, compose a prayer that all are bound to recite, discriminate against a religion it deems false or inconvenient, or favor another it deems true or helpful. Nor may the government base adverse treatment of believers upon its definition of what they believe. The Supreme Court has consistently stated that civil authorities are bound to accept a religious institution’s definition of its doctrine and beliefs. The Court has consistently interpreted the Free Exercise Clause to require the government to accept a sincere believer’s statement

105. Id. § 3.
106. Id. § 4 (emphasis added).
107. For a discussion of the history of Supreme Court jurisprudence on this topic, see DeStefano v. Emergency Hous. Group, 247 F.3d 397, 406 (2d Cir. 2001).
108. See, e.g., Jones v. Wolf, 443 U.S. 595, 609 (1979) (rejecting a state action that “would appear to require a civil court to pass on questions of religious doctrine, and to usurp the function of the commission appointed by the Presbytery . . . .”); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724 (1976) (“[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government . . . .”).
of what he believes, no matter how strange or singular those beliefs may seem.\textsuperscript{109} Furthermore, the government is bound to accept the implications and inferences believers draw, even where they appear to be illogical or unwarranted.\textsuperscript{110}

Of course, none of these holdings implies that believers are entirely free to act upon their beliefs. The common good often requires that religious conduct be regulated. Sometimes a particular religious practice may justify discriminatory treatment by the government. But the Religion Clauses lose much of their meaning unless the government is under a constitutional duty to accurately identify and understand the pertinent religious beliefs or practices. It may be constitutionally legitimate for government to discriminate among churches or religious schools due to their engagement in political campaigning or in racially discriminatory practices.\textsuperscript{111} But the Religion Clauses impose a high burden of proof: the government must show by clear and convincing evidence that the beliefs and practices of the religious group, as the believers state and interpret them, are racially discriminatory, or do amount to electioneering. Civil authorities are competent to decide, within limits, what questions to ask about a religion and its practice in order to protect the common good, but the answers must be those of the faithful, not of the magistrate. This article has tried to show that judicial designation of Roman Catholic schools as "pervasively sectarian" violates this important constitutional requirement.

\textsuperscript{109} See, e.g., Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that a Jehovah's Witness whose religious beliefs prevented him from manufacturing weapons was denied his First Amendment right to free exercise of religion when Indiana refused to allow him unemployment benefits); Frazee v. Employment Security Dept., 489 U.S. 829 (1989) (holding that a person who refused to work on Sunday on account of his religious beliefs was unconstitutionally denied unemployment benefits).

\textsuperscript{110} See, e.g., Thomas, 450 U.S. at 715 ("Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."); Frazee, 489 U.S. at 834 ("It is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause . . . .").