

## THE CONSTITUTIONALITY OF VOUCHERS AFTER *MITCHELL V. HELMS*

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The controversy over educational vouchers for private, religious schools has risen to the forefront of public debate. Although the concept has been around since the 1950s,<sup>1</sup> public attention has only focused on vouchers over the last dozen years. The Milwaukee voucher plan, enacted in 1990 for nonsectarian schools,<sup>2</sup> was expanded in 1995 to include religious schools.<sup>3</sup> The Cleveland voucher program was adopted in 1995,<sup>4</sup> and the trend continued with Florida passing a potentially statewide program in 1999.<sup>5</sup> These three programs, all involving religious schools and currently limiting eligibility to low income children or children attending “failing schools,” have provided laboratories for studies and restudies on the effectiveness of vouchers for school reform.<sup>6</sup> Educational scholars have made claims, counterclaims, and recriminations about the various findings, which range from vouchers producing significant improvement in student performance to

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1. See VIRGIL BLUM, S.J., *FREEDOM OF CHOICE IN EDUCATION* 19 (1958); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 89 (1962); John E. Coons & Stephen D. Sugarman, *Vouchers for Public Schools*, *INEQUALITY IN EDUC.*, Nov. 1973, at 60.

2. Act of April 27, 1990, No. 336, § 228, 1989 Wis. Laws 1535, 1601-02 (codified as amended at Wis. STAT. ANN. § 119.23 (West Supp. 2000)).

3. Act of July 26, 1995, No. 27, sec. 4002, § 119.23(2)(a) (intro.), 1995 Wis. Laws 30, 497 (codified as amended at Wis. STAT. ANN. § 119.23 (West Supp. 2001)). See *Jackson v. Benson*, 578 N.W.2d 602, 607-08 (Wis. 1998) for a history of the Milwaukee Parental Choice Program.

4. Act of June 30, 1995, § 1 secs. 3313.974-979, 1995 Ohio Laws 898, 1182-91 (codified as amended at OHIO REV. CODE ANN. §§ 3313.974-979 (Baldwin Supp. 2001)). See *Simmons-Harris v. Zelman*, 234 F.3d 945, 948-51 (6th Cir. 2000), *reh'g and reh'g en banc denied*, Nos. 00-3055, -3060, -3063, 2001 U.S. App. LEXIS 3344, at \*1 (6th Cir. Feb. 28, 2001), for a history of the Ohio Pilot Scholarship Program.

5. Act of June 21, 1999, ch. 99-398, § 2, 1999 Fla. Laws 4268, 4275-80 (codified at FLA. STAT. ANN. § 229.0537 (West Supp. 2001)).

6. The various programs are described in *CTR. ON EDUC. POL'Y, SCHOOL VOUCHERS: WHAT WE KNOW AND DON'T KNOW . . . AND HOW WE COULD LEARN MORE* (2000), available at [http://www.ctredpol.org/pubs/CEP\\_school\\_vouchers](http://www.ctredpol.org/pubs/CEP_school_vouchers); ALEX MOLNAR, *CTR. FOR EDUC. RESEARCH, ANALYSIS, & INNOVATION, EDUCATIONAL VOUCHERS: A REVIEW OF THE RESEARCH* (1999), available at <http://www.uwm.edu/Dept/CERAI/EDVouchers/educationalvouchers.html>.

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them providing no improvement at all.<sup>7</sup> Often the policy arguments, both pro and con, are like ships passing in the night, with proponents claiming that vouchers expand educational opportunities to individual students and opponents emphasizing that vouchers divert attention and resources away from true systemic reform.<sup>8</sup> Greater parental satisfaction is the only result on which all sides apparently can agree.<sup>9</sup> With each new study, the vitriol between the two sides only increases.<sup>10</sup>

While the policy arguments over vouchers are likely to continue indefinitely, there is a good chance that the legal questions will be resolved shortly. When one speaks of the legal or constitu-

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7. Compare JAY P. GREENE ET AL., CTR. FOR AM. POLITICAL STUDIES, HARVARD UNIV., OCCASIONAL PAPER NO. 97-1, EFFECTIVENESS OF SCHOOL CHOICE: THE MILWAUKEE EXPERIMENT (1997) (finding faster student improvement on both math and reading tests), available at <http://www.ksg.harvard.edu/pepg/mil.htm>; Cecilia Elena Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Q.J. ECON. 553, 583-84, 587-88 (1996) (reporting that students in voucher program improved more rapidly on standardized math tests but not on standardized reading tests), and IND. CTR. FOR EVALUATION, IND. UNIV., EVALUATION OF THE CLEVELAND SCHOLARSHIP AND TUTORING GRANT PROGRAM 1996-1999, at 15-16 (1999) [hereinafter CLEVELAND REPORT], available at <http://www.indiana.edu/~iuce/documents/3rdClevelandRpt.pdf> (finding small but statistically significantly faster improvement in two of six subjects over a period of two years of participation); with MOLNAR, *supra* note 6, at 19 (asserting that “no strong evidence exists that voucher programs improve student achievement”) and *id.* at 20 (“vouchers have, at best, an uncertain upside”), and JOHN F. WITTE ET AL., ROBERT LA FOLLETTE INST. OF PUB. AFFAIRS, UNIV. OF WIS., FOURTH YEAR REPORT: MILWAUKEE PARENTAL CHOICE PROGRAM (1994), available at <http://www.lafollette.wisc.edu/research/publications/fourthYear/fourthYear.html> (finding no statistically significant difference). R

8. Compare CLEVELAND REPORT, *supra* note 7, at 23 (claiming that the Cleveland program has been effective in providing a greater range of educational choices for low-income students while maintaining the racial composition of Cleveland public schools) and GREENE ET AL., *supra* note 7, at 10 (suggesting that students given a choice of school performed better than did other students not given such choice) with MOLNAR, *supra* note 6, at 19-20 (suggesting that vouchers may lead to increased ethnic, racial, and class polarization). R

9. See Kim K. Metcalf & Polly A. Tait, *Free Market Policies and Public Education: What Is the Cost of Choice?*, PHI DELTA KAPPAN, Sept. 1999, at 65, 73 (finding that research on school choice consistently showed parents were pleased with the opportunity voucher programs gave their children to attend private schools). R

10. See *id.* at 67 (noting that studies of voucher programs have provided “confusing—even contradictory—results,” which those on both sides of the issue selectively employ to fortify their positions); see, e.g., John F. Witte, *The Milwaukee Voucher Experiment: The Good, the Bad, and the Ugly*, PHI DELTA KAPPAN, Sept. 1999, at 59, 63-64 (providing methodological criticism of study, reported in GREENE ET AL., *supra* note 7, which purported to show significant improvement in academic performance due to participation in Milwaukee voucher program). R

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tional issues, the focus, of course, is on whether vouchers for religious education violate the Establishment Clause of the First Amendment.<sup>11</sup> This is because approximately eighty-five percent of private school students attend parochial or religious schools.<sup>12</sup> To date, the legal record on vouchers has been mixed, with courts upholding vouchers or voucher-like proposals in at least four instances but rejecting such proposals or claims in at least eight instances.<sup>13</sup>

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11. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

12. See STEPHEN P. BROUGHMAN & LENORE A. COLACIELLO, NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., PRIVATE SCHOOL UNIVERSE SURVEY, 1997-98, NCES 1999-319, at 2 (1999), available at <http://nces.ed.gov/pubs99/199319.pdf> (stating that sixteen percent of private school students attend nonsectarian institutions).

13. At least three states’ highest courts have upheld vouchers or similar programs against Establishment Clause challenges. See *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211, 214 (Ohio 1999) (invalidating state program, however, on state constitutional grounds); *Kotterman v. Killian*, 972 P.2d 606, 616 (Ariz. 1999) (upholding state tax credits for donations to organizations providing scholarships for children to attend private schools), *cert. denied*, 528 U.S. 810 (1999), and *cert. denied*, 528 U.S. 921 (1999). To the author’s knowledge, every federal court to address the issue has found an Establishment Clause violation. See *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 730, 741-42 (N.D. Ohio 1999) (enjoining voucher program’s operation until determination on merits because voucher opponents had “very substantial chance” of winning on Establishment Clause challenge), *stay granted*, 528 U.S. 983 (1999); *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 864-65 (N.D. Ohio 1999) (granting summary judgment to voucher opponents and permanently enjoining enforcement of program), *aff’d*, 234 F.3d 945, 961 (6th Cir. 2000), *reh’g and reh’g en banc denied*, Nos. 00-3055, -3060, -3063, 2001 U.S. App. LEXIS 3344, at \*1 (6th Cir. Feb. 28, 2001); see also *Miller v. Benson*, 878 F. Supp. 1209, 1216 (E.D. Wis. 1995) (stating that were it to fund sectarian schools, voucher program would have violated Establishment Clause), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995); cf. *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999) (finding that exclusion of sectarian schools from state program paying grants directly to private schools to fund education for children in communities without public schools, did not violate Establishment Clause or other federal constitutional provisions), *cert. denied*, 528 U.S. 931 (1999). One state’s highest court has ruled the same way as *Strout*. See *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127, 147 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999) (having same objection to same program as in *Strout*). Other United States jurisdictions have found that vouchers violated their own constitutions or statutes. See *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 738 A.2d 539, 562 (Vt. 1999), *cert denied*, 528 U.S. 1066 (1999) (finding that public school district’s reimbursement of students’ tuition expenses at private high schools violated state constitutional religion clause); see also *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (rendering an advisory opinion that proposed program would violate state constitutional religion clause); *Asociacion de Maestros v. Torres*, Nos. AC-94-371, AC-94-326, 1994 WL 780744, at \*12 (P.R. Nov. 30, 1994) (finding violation of commonwealth constitutional non-religion clause); *Goff*, 711 N.E.2d at 214-16 (finding vio-

For years, the lead case was *Jackson v. Benson*, with the Wisconsin Supreme Court upholding the constitutionality of the Milwaukee Parental Choice Program in 1998.<sup>14</sup> The U.S. Supreme Court sent mixed signals by denying certiorari in that case<sup>15</sup> and when the Arizona Supreme Court upheld tax deductions for donations to organizations funding scholarships to attend sectarian schools,<sup>16</sup> but also declining to review decisions by the Vermont Supreme Court striking down a voucher-like program<sup>17</sup> and those of the First Circuit<sup>18</sup> and Maine Supreme Judicial Court<sup>19</sup> permitting the exclusion of sectarian schools from a similar program. Of the two cases currently in litigation, the retrial in the constitutional challenge to the Cleveland plan—recently held unconstitutional by the Sixth Circuit<sup>20</sup>—is the case most likely to be granted certiorari, as the high court has already intervened in the case by staying an injunction that had halted the program.<sup>21</sup> A decision by the Supreme Court on the Cleveland plan is at least a year away.

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lation of state constitutional non-religion clause); *Giacomucci v. Southeast Delco Sch. Dist.*, 742 A.2d 1165, 1177 (Pa. Commw Ct. 1999) (finding violation of state statute). *But see Jackson*, 578 N.W.2d at 620-30 (declining to find a violation of state constitutional religion or non-religion clauses or doctrine); *Kotterman*, 972 P.2d at 617, 620-21 (denying any contravention of religion or non-religion clauses); *Goff*, 711 N.E.2d at 211-14 (holding no violation of religion or two of three non-religion clauses); *Bush v. Holmes*, 767 So. 2d 668, 677 (Fla. Dist. Ct. App. 2000) (declining to find a violation of non-religion clause).

14. 578 N.W.2d at 616.

15. 525 U.S. 997 (1998), *denying cert.* to 578 N.W.2d 602 (Wis. 1998).

16. *Rhodes v. Killian*, 528 U.S. 810 (Ariz. 1999), *denying cert.* to 972 P.2d 606 (1999); *Kotterman v. Killian*, 528 U.S. 921 (Ariz. 1999), *denying cert.* to 972 P.2d 606 (1999).

17. *Andrews v. Vt. Dep't of Educ.*, 528 U.S. 1066 (1999), *denying cert.* to 738 A.2d 539 (Vt. 1999).

18. *Strout v. Albanese*, 528 U.S. 931 (1999), *denying cert.* to 178 F.3d 57 (1st Cir. 1999).

19. *Bagley v. Raymond Sch. Dep't*, 528 U.S. 947 (1999), *denying cert.* to 728 A.2d 127 (Me. 1999).

20. *Simmons-Harris v. Zelman*, 234 F.3d 945, 961 (6th Cir. 2000), *reh'g and reh'g en banc denied*, Nos. 00-3055, -3060, -3063, 2001 U.S. App. LEXIS 3344, at \*1 (6th Cir. Feb. 28, 2001).

21. After the district court granted a preliminary injunction against the program's operation, *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 741-42 (N.D. Ohio 1999), the Supreme Court granted a stay of that order, *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999). On a summary judgment motion, the district court permanently enjoined operation of the program, *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999), a decision the Sixth Circuit upheld, *Zelman*, 234 F.3d at 961.

The other case currently in litigation is that of Florida's Opportunity Scholarship Program, which is on remand following the state court of appeals' overturning of the trial judge's decision awarding summary judgment to voucher

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Some observers claim, however, that the Supreme Court has already provided its answer on the constitutionality of vouchers. Beginning with the 1983 tax deduction case of *Mueller v. Allen*,<sup>22</sup> the Court has indicated that the existence of an intervening private choice may neutralize constitutional concerns about funding religious institutions.<sup>23</sup> As the Court there stated, Establishment Clause objections are reduced where “public funds become available [to religious schools] only as a result of numerous, private choices of individual parents of school-age children.”<sup>24</sup> Subsequently, the Court has used similar language in holdings allowing a visually disabled student to use his public scholarship to attend a Bible college,<sup>25</sup> a hearing impaired student to use a publicly paid sign-language interpreter in a parochial school,<sup>26</sup> and public school teachers to provide remedial and enrichment courses in parochial schools.<sup>27</sup> Even the Court’s more liberal members have opined that Establishment Clause concerns are diminished where public aid “reache[s] religious institutions ‘only as a result of the genuinely independent and private choices of aid recipients.’”<sup>28</sup>

If the quartet of earlier holdings of *Mueller*,<sup>29</sup> *Witters v. Washington Department of Services for the Blind*,<sup>30</sup> *Zobrest v. Catalina Foothills*

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opponents on state constitutional grounds. See *Bush v. Holmes*, 767 So. 2d 668, 677 (Fla. Dist. Ct. App. 2000).

22. 463 U.S. 388 (1983).

23. The Court held that a Minnesota statute permitting the deduction from state income tax of expenses incurred in providing “tuition, textbooks and transportation” for the attendance of one’s children at an elementary or secondary school did not violate the Establishment Clause. *Id.* at 400. Justice Marshall’s dissent contended that the deduction had the “direct and immediate effect of advancing religion” in that among the parents eligible for the deduction, the overwhelming majority were sending their children to religious private schools, since almost no public schools within the state charged tuition and the vast majority of students at private schools attended sectarian ones. *Id.* at 405 (Marshall, J., dissenting). The majority brushed aside this disparate impact-like objection, insisting that parents with children at public schools were still eligible for the deduction, *id.* at 397, and those ineligible for the deduction merely “fail[ed] . . . to claim the tax relief to which they [were] entitled—under a facially neutral statute . . .,” *id.* at 401.

24. *Id.* at 399.

25. *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 489 (1986).

26. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993).

27. *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997).

28. *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 880 (1995) (Souter, J., dissenting) (quoting *Witters*, 474 U.S. at 487, and also citing *Mueller*, 463 U.S. at 399-400, and *Zobrest*, 509 U.S. at 10-13).

29. 463 U.S. at 400.

30. 474 U.S. at 489.

*School District*,<sup>31</sup> and *Agostini v. Felton*<sup>32</sup> had not already conclusively decided the issue, then, voucher proponents claim, the high court provided the definitive answer in last term's *Mitchell v. Helms*.<sup>33</sup> In *Mitchell*, the Supreme Court upheld, against an as-applied challenge, the provision of educational technology, materials and library books to private religious schools.<sup>34</sup> What made this case controversial was that the primary form of aid—computers—was readily divertible for religious uses, unlike previous educational aid upheld by the Court.<sup>35</sup> In upholding the program, a majority of the Justices in the plurality and concurrence declared or intimated, respectively, that constitutional concerns were significantly lessened, if not eliminated, where a program neutrally distributes aid under a private choice formula.<sup>36</sup> As Justice Thomas stated for the plurality, the Court has “repeatedly considered whether any governmental

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31. 509 U.S. at 13-14.

32. 521 U.S. at 234-35.

33. 530 U.S. 793 (2000).

34. *Id.* at 835 (plurality opinion).

35. *See Agostini*, 521 U.S. at 228-29 (noting that the Title I services remain under the control of public officials and that no “funds ever reach the coffers of religious schools”). *Compare Meek v. Pittenger*, 421 U.S. 349, 360-63 (1975) (upholding textbook loan program because it applied to both private and public school students and the books were limited to those acceptable at any public school, with no indication in the record “that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes”), *overruled by Mitchell*, 530 U.S. at 835 (plurality opinion), *and Wolman v. Walter*, 433 U.S. 229, 241-44 (1977) (finding that the public provision of speech, hearing and psychological services at sectarian schools did not risk encouraging religious views since the services were not “closely associated with the educational mission” and, given the limited contact between diagnostician and student, left little danger of “transmission of sectarian views”), *overruled by Mitchell*, 530 U.S. at 835 (plurality opinion), *with Meek*, 421 U.S. at 363-66 (striking down direct loan of instructional material and equipment to sectarian schools because, given that “the teaching process is, to a large extent, devoted to the inculcation of religious values and belief,” “[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole”), *Wolman*, 433 U.S. at 249-50 (striking down similar program even though the loans were made to students or parents, since the equipment was about the same as in the *Meek* program, the students would put it to the same use, and the secular educational function still could not be separated from the sectarian), *and Meek*, 421 U.S. at 367-72 (finding that the provision of “auxiliary services” such as remedial and accelerated instruction and guidance counseling on private school premises present an unconstitutional danger of the fostering of religious beliefs), *and id.* at 371 n.21 (invalidating speech and hearing services, like those subsequently upheld by themselves in *Wolman*, 433 U.S. at 241-44, because they were not severable from the other services provided).

36. *See Mitchell*, 530 U.S. at 810 (plurality opinion of four Justices); *id.* at 841-44 (O'Connor, J., joined by Breyer, J., concurring).

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aid that goes to a religious institution does so ‘only as a result of the genuinely independent and private choices of individuals.’”<sup>37</sup> Justice O’Connor echoed a similar sentiment, picking up on language from her earlier opinion in *Witters*, writing that “when government aid supports a school’s religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, ‘[n]o reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or belief.’”<sup>38</sup> According to voucher proponents, these statements, joined by six Court members, conclusively establish that the Court would uphold the constitutionality of a voucher program.<sup>39</sup>

Those of us who oppose voucher programs and have been working for their defeat in the courts appreciate the precariousness of our position. In many respects, the *Mitchell* plurality is a “road-map” for vouchers; the only thing missing from that opinion was the “V” word itself. But voucher opponents have long assumed that three or four Justices support private school vouchers under most circumstances; what was surprising about the *Mitchell* plurality was the brazenness of Justice Thomas’s opinion. The neutrality of a program, bolstered by private choice but not dependent upon it, is all the law requires, Justice Thomas claims, irrespective of whether the diversion of public funds for religious purposes is “guaranteed.”<sup>40</sup> That public funds are used for religious indoctrination is beside the point provided the program is available to religious and nonreligious entities alike.

While Justice Thomas’s opinion is breathtaking in its scope, the opinion by Justices O’Connor and Breyer is potentially more troublesome for voucher opponents, with its qualified but undeniable affirmation of “private choice.”<sup>41</sup> That opinion, which must be seen as controlling not only in *Mitchell* but on the issue of vouchers,<sup>42</sup> invites serious consideration as to whether the debate on the constitutionality of vouchers is all but over. Yet, while *Mitchell* may

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37. *Id.* at 810 (plurality opinion) (quoting *Agostini*, 521 U.S. at 226).

38. *Id.* at 843 (O’Connor, J., concurring) (quoting *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 493 (1986)).

39. See, e.g., Press Release, Becket Fund, Justices Adopt Becket View on “Sectarian” Schools: Decision in *Mitchell v. Helms* Opens Door to School Choice Plans (June 28, 2000) (“Six justices agreed that when government money flows to religious schools as the result of individual decisions of private citizens, the aid is constitutional.”), available at <http://www.becketfund.org/press/062800a.html>.

40. *Mitchell*, 530 U.S. at 809-10, 821 (plurality opinion).

41. *Id.* at 841-44 (O’Connor, J., concurring).

42. See *Simmons-Harris v. Zelman*, 234 F.3d 945, 957 (6th Cir. 2000) (identifying O’Connor’s opinion as controlling in *Mitchell*), *reh’g and reh’g en banc denied*,

be the harbinger of things to come, it is premature to claim that it has conclusively answered the voucher question. Voucher opponents may find comfort in Mark Twain's statement that the "[r]eports of my demise are greatly exaggerated."<sup>43</sup> Justice O'Connor remains the key vote on this issue (now, possibly, along with Justice Breyer), and her opinion leaves many questions unanswered.

First, most striking about Justice O'Connor's concurrence is its unequivocal rejection of the legal theory upon which the plurality opinion rests.<sup>44</sup> As discussed, Justice Thomas's opinion embraces "neutrality" as the sole, operative principle in Establishment Clause adjudication.<sup>45</sup> Identifying government indoctrination as *the* evil to be avoided—arguably, an understatement of the Clause's proscriptions<sup>46</sup>—Justice Thomas asserts that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination [that occurs] has been done at the behest of the government."<sup>47</sup> Justice Thomas's view of neutrality thus rests entirely on the breadth of the class. Assuming the aid is ideologically neutral and made generally available to religion and nonreligion alike, then it matters not that public aid is actually used for religious purposes: "[A]ny use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern."<sup>48</sup> Justice Thomas's approach thus eliminates all consideration of whether the government knows or even intends that public funds will pay for religious activity. So far as private choice is concerned, if neutrally available aid "first passes through the hands . . . of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'"<sup>49</sup> For the plurality, however, while private choice is "a way of assuring neutrality . . . there is no reason why the Estab-

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Nos. 00-3055, -3060, -3063, 2001 U.S. App. LEXIS 3344, at \*1 (6th Cir. Feb. 28, 2001).

43. See JOHN BARTLETT, *FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE* 528 (Justin Kaplan ed., Little, Brown & Co. 16th ed. 1992) (1855) ("The report of my death was an exaggeration.").

44. See text accompanying *infra* notes 51, 57, 68-69, and 71.

45. See *Mitchell*, 530 U.S. at 809-10 (plurality opinion)

46. See Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 *CONN. L. REV.* 871, 902 (1999) (identifying additional Establishment Clause value of equality).

47. *Mitchell*, 530 U.S. at 809.

48. *Id.* at 820.

49. *Id.* at 816 (quoting *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986)).

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lishment Clause requires such a form.”<sup>50</sup> The distinction between direct and indirect aid is irrelevant, as is the degree of independent choice, so long as the aid is neutrally given. Thus, it appears that four members of the Court have apparently gone a step beyond the voucher issue even before they have heard the first voucher case, finding third party choice unnecessary under a neutral aid program. Aid that flows *directly* to religious schools is permissible, provided the program is made neutrally available to religious and nonreligious schools alike.

Justice O’Connor rejects this rationale, calling it “a rule of unprecedented breadth,” one which comes close “to assigning [neutrality] singular importance in the future adjudication of Establishment Clause challenges.”<sup>51</sup> Here, Justice O’Connor returned to her analysis five years earlier in *Rosenberger v. Rector of the University of Virginia*,<sup>52</sup> where she asserted the “equal historical and jurisprudential pedigree” of the no-funding principle.<sup>53</sup> The Court’s earlier holdings touting the importance of neutrality, she claimed, “provide no precedent for the use of public funds to finance religious activities.”<sup>54</sup> The decision thus reveals a fundamental split on the Court, with Justice O’Connor<sup>55</sup> and the *Mitchell* dissenters<sup>56</sup> viscerally opposing the funding of religious indoctrination and worship, even under neutral programs. Justice O’Connor, in fact, describes such funding as “fall[ing] precariously close to the original object of the Establishment Clause’s prohibition.”<sup>57</sup>

While invoking this “no-funding” maxim, Justice O’Connor did not elaborate on which values inform the religion clauses so as to make neutrality insufficient as the primary organizing principle. This is unfortunate. Like the notion of neutrality,<sup>58</sup> the prohibition

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50. *Id.* at 810, 816.

51. *Id.* at 837 (O’Connor, J., concurring) (“Reduced to its essentials, the plurality’s rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content.”).

52. 515 U.S. 819 (1995).

53. *Id.* at 849 (O’Connor, J., concurring).

54. *Id.* at 847.

55. See *Mitchell*, 530 U.S. at 840, 856.

56. See *id.* at 878-84 (Souter, J., dissenting).

57. *Id.* at 856 (O’Connor, J., concurring).

58. The doctrine of neutrality is as follows:

Because neutrality requires so much further specification, it cannot be the only principle in the religion clauses. Nor can it be the most fundamental. We must specify the content of neutrality by looking to other principles in the religion clauses. When we have done that, neutrality should be defined in a way that makes it largely congruent with those other principles.

on funding is not a freestanding value but must rely on other religion clause values to give it substance. Such values include ensuring religious and secular equality, alleviating religious dissension and factionalism, and protecting the legitimacy and integrity of both government and religion.<sup>59</sup> A reference to history is instructive. James Madison's aversion to religious majorities extended beyond his concern for the deleterious effect they had on individual religious liberty.<sup>60</sup> While he acknowledged that impeding majoritarian impulses would provide greater protection for religious minorities,<sup>61</sup> he saw a value in religious equality for the benefit it afforded government and civil society. In his *Memorial and Remonstrance*, Madison identified the value of a society based on "equal conditions,"<sup>62</sup> with people retaining "equal title to the free exercise of

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Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 998 (1990).

59. See Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 256-67 (1999) ("Equality and freedom of speech interests are simply too essential a part of the constitutional framework relating to religion to be dismissed as irrelevant or secondary."); Ira C. Lupu, *To Control Faction and Protest Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 360 (1996) (discussing the Religion Clauses' "other animating concerns—to protect religious equality and to control religious factionalism"); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-99 (1992) (identifying the alleviation of dissension).

60. *The Federalist Papers* Number 51 states this concern most clearly:

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . . .

THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

61. In a letter to Thomas Jefferson during the fight over ratification of the Constitution, Madison warned that

In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 562, 564 (James Morton Smith ed., 1995). Madison was concerned that enacting a bill of rights would be counterproductive, particularly in protecting religious freedom, in that public pressure would lead legislators to define such a right much more narrowly than it would be were it to remain implicit. See *id.*

62. James Madison, To the Honorable Assembly of the Commonwealth of Virginia a Memorial and Remonstrance para. 4 (1785) [hereinafter Memorial and

Religion according to the dictates of Conscience.”<sup>63</sup> Speaking to those who would promote religious liberty as the sole value, Madison countered that “[w]hilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.”<sup>64</sup> Madison also viewed the religion clauses as ensuring the integrity of both government and religion, writing that religious establishments produce a “spiritual tyranny on the ruins of the Civil authority,”<sup>65</sup> while they undermine the “purity and efficacy of Religion.”<sup>66</sup> Finally, the prohibition on funding guards against coercion of religious liberty by ensuring that no one is forced to contribute “three pence” toward the support of another’s faith.<sup>67</sup> A constitutional paradigm that uses neutrality as the sole or primary principle, however, fails to take account of these other important values. Although Justice O’Connor did not elaborate on these values, her instincts were correct.

Justice O’Connor’s rejection of neutrality as the only axiom for Establishment Clause adjudication<sup>68</sup>—at least the plurality’s version—is therefore highly significant, for it is upon neutrality theory that private choice relies. Justice O’Connor does not deny the importance of neutrality in aid cases<sup>69</sup>—for that matter, neither do

Remonstrance], in JAMES MADISON ON RELIGIOUS LIBERTY 55, 57 (Robert S. Alley ed., 1985) [hereinafter MADISON].

63. *Id.* (quoting VA. DECLARATION OF RIGHTS of 1776 art. XVI).

64. *Id.* The theme of religious equality as distinct from religious liberty runs throughout the Memorial. See *id.* para. 1, in MADISON, *supra* note 62, at 56 (expressing concern that “the majority may trespass on the rights of the minority”); *id.* para. 8, in MADISON, *supra* note 62, at 58 (declaring that a “just Government” must protect “every Citizen in the enjoyment of his Religion with the same equal hand”); *id.* para. 15, in MADISON, *supra* note 62, at 59 (reaffirming the “‘equal right of every citizen to the free exercise of his Religion according to the dictates of conscience’”).

65. *Id.* para. 8, in MADISON, *supra* note 62, at 58.

66. *Id.* para. 7, in MADISON, *supra* note 62, at 58; see also James Madison, *Detached Memoranda*, reprinted in MADISON, *supra* note 62, at 89, 90 (describing the constitutional “separation between Religion & Govt” as “[s]trongly guard[ing] . . . [against] the danger of encroachment by Ecclesiastical Bodies”).

67. Memorial and Remonstrance, *supra* note 62, para. 3, in MADISON, *supra* note 62, at 57.

68. *Mitchell v. Helms*, 530 U.S. 793, 839 (2000) (O’Connor, J., concurring).

69. “I do not quarrel with the plurality’s recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges . . . . Nevertheless, we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.” *Id.* at 838, 839.

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Justices Souter, Stevens and Ginsburg<sup>70</sup>—and she would likely uphold a neutral program containing safeguards that ensure that funds are not used for worship or indoctrination. But the plurality's unwillingness to temper its view of neutrality as the *sine qua non* of constitutionality and bring Justice O'Connor into their fold indicates a fundamental disagreement over the ordering of Establishment Clause values and on how those values apply in the real world. Justice Thomas's failure to acknowledge Justice O'Connor's concerns means that her vote in a close voucher case will likely turn on which faction is more responsive to her concerns. In essence, the plurality missed a golden opportunity in an arguably easier case to secure Justice O'Connor's vote on vouchers.

Second, Justice O'Connor identified several factors beyond the neutrality of a program that have been crucial to determining the constitutionality of aid in the past. Those factors include whether public funds reached the coffers of the religious schools, whether the aid was actually diverted for religious uses, and whether the aid supplanted obligations and expenses the schools would otherwise have assumed.<sup>71</sup> In refuting the plurality's neutrality theory, Justice O'Connor elevated these factors near the level of a constitutional rule. The extent to which Justice O'Connor views these additional factors as significant to the constitutionality of a program involving private choice is uncertain, for they apply most clearly with direct aid. However, one could see these other factors assuming greater importance depending on the circumstances of a particular case. If, for example, voucher recipients constitute a high percentage of students attending religious schools such that the schools' existence is dependent on the voucher funds which pay for the bulk of their operations, then Justice O'Connor might elevate the significance of the supplement-versus-supplant factor.<sup>72</sup> Her opinion in *Mitchell* in-

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70. *See id.* at 878-84 (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting).

71. *Id.* at 839, 840 (O'Connor, J., concurring).

72. The requirement that public aid supplement, not supplant, the functions and obligations of religious schools can be traced to the Court's earliest church-state holdings, *see, e.g.,* *Cochran v. La. St. Bd. of Educ.*, 281 U.S. 370, 375 (1930) (holding that even though parochial schools received textbooks from the state, they "are not the beneficiaries of these appropriations . . . nor are they relieved of a single obligation, because of them"), and is most closely associated with the holdings in *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975), and *Grand Rapids School District v. Ball*, 473 U.S. 373, 397 (1985), both of which prohibited state aid that relieved religious schools of "otherwise necessary cost[s] of performing their educational function[s]." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993). The Court reaffirmed this distinction in *Agostini* by declaring that the services in question did not "supplant the remedial instruction and guidance counsel-

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icates that she sees a connection between aid that supplants religious school functions and government-financed indoctrination. As she emphasized in describing the Title I and sign language services in *Agostini* and *Zobrest*, those aid programs did not “reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.”<sup>73</sup> When public aid pays for all aspects of the religious school’s operations, however, it is likely that government funds have been used to indoctrinate religion.<sup>74</sup> The existence of private choice does not ameliorate these concerns, particularly when the focus is on the supplanting nature of the aid.

Justice O’Connor’s reference to “true private-choice” throughout the opinion<sup>75</sup> also suggests possible concerns with voucher programs in which the element of private choice is merely cosmetic. This careful use of language suggests that she appreciates an important distinction between programs that offer a true universe of options and those that merely use third persons to direct the financial benefit to religious institutions. In determining whether the program offers genuine choice, Justice O’Connor would likely consider not only the breadth of available applications of the aid, but also whether the program creates incentives for religious use, whether the program by policy or practice defines recipients by reference to religion, and the degree of independence the recipient has in exercising his or her choice.<sup>76</sup> For instance, the Cleveland Voucher Program, under which vouchers can be used only in private schools (no public schools participate in the program),<sup>77</sup> where eighty-two percent of the participating schools are religious<sup>78</sup> and where approximately ninety-six percent of the students attend religious schools,<sup>79</sup> may raise concerns for Justice O’Connor. As designed by the Ohio Legislature, the program offers a very limited use of options. Vouchers may only be used in private schools which are pre-

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ing already provided in New York City’s sectarian schools.” *Agostini v. Felton*, 521 U.S. 203, 229 (1997).

73. *Agostini*, 521 U.S. at 228 (quoting *Zobrest*, 509 U.S. at 12).

74. See *Mitchell*, 530 U.S. at 848 (O’Connor, J., concurring) (remarking that *Agostini* found no evidence of “impermissible financing of religious indoctrination” because the aid was “by law supplemental to the regular curricula.” (quoting *Agostini*, 521 U.S. at 228)).

75. E.g., *id.* at 842.

76. See *id.* at 845, 846, 848.

77. See *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000), *reh’g and reh’g en banc denied*, Nos. 00-3055, -3060, -3063, 2001 U.S. App. LEXIS 3344, at \*1 (6th Cir. Feb. 28, 2001).

78. *Id.*

79. *Id.*

dominately sectarian. As such, the program creates incentives for religious use. Justice O'Connor should find this problematic.

The universe of options offered is crucial as it will determine whether the program creates incentives for religious uses or guarantees that choice is being exercised independent of the government. I agree with Professor Brownstein<sup>80</sup> that if vouchers work anywhere, they work best at the college level where: (1) all students pay tuition irrespective of the public-private character of the institution; (2) there are multiple public and private options (for example, "flagship" state universities, land-grant colleges, community colleges, nonreligious private colleges, and church-affiliated colleges), thereby guaranteeing a variety of choices; (3) a majority of the private options are not religious thus preventing incentives toward religious use;<sup>81</sup> and (4) there is a longstanding history of extensive public funding of multiple varieties (scholarships, grants, loans) that are usually portable. As such, the facts in *Witters* presented an easier case, based on the wide variety of secular applications for the scholarship at the college level.<sup>82</sup> The Court also assumed, based on the universe of options, that no one other than Larry Witters would likely use his scholarship to attend a Bible college, thus assuring that no "significant portion of the aid . . . [would] end up flowing to religious education."<sup>83</sup> In contrast, vouchers at the elementary and secondary school level are usually redeemable only at private schools (since public schools are free). The vast majority of private options are religious, and the single funding mechanism—the voucher—is rarely portable; it cannot be used for any other educational service or product other than private religious school tuition.

Justice O'Connor's use of the phrase "true private choice" also suggests that the choices must be independent and meaningful. As reference points, she cites to *Witters* and *Zobrest*, analogizing to an employee donating a portion of his government issued paycheck to a religious institution.<sup>84</sup> This analogy better fits under the facts of those cases, where the recipients were awarded their benefits based on independent criteria—their disabilities—which in turn provided them a greater entitlement to the aid as well as greater control over

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80. Brownstein, *supra* note 46, at 934-37.

81. *See id.* at 934 n.157.

82. *See Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986) ("Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian.")

83. *Id.*

84. *Mitchell v. Helms*, 530 U.S. 793, 841 (2000) (O'Connor, J., concurring).

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its use. In both cases, the aid was effectively the individual recipient's money which they could then apply to a true universe of options. In both cases, the recipients had a greater ownership interest in and control over the aid than would exist with a voucher, such that the choice was more meaningful. As a result, it is difficult to argue that Larry Witters and Larry Zobrest served primarily as conduits for funneling aid to private religious schools. Justice O'Connor's reference to the government employee analogy as an example of a "true private choice" situation does not necessarily suggest that she would view recipients of vouchers under a program limited to private schools as presenting the same situation. The government employee has a distinct possessory interest in her salary, while a voucher recipient's "ownership" interest is contingent on first qualifying under the program and then on the existence of other factors such as the amount of available funding, the number of available seats, being selected under a lottery process, and finally meeting the admissions criteria of the private school. Moreover, a government paycheck, with no conditions attached as to its use, is clearly distinguishable from a voucher that is redeemable only at a set number of private schools.

Finally, unlike the *Mitchell* plurality,<sup>85</sup> Justice O'Connor recognizes the continuing importance of the distinction between direct and indirect aid.<sup>86</sup> Unfortunately, Justice O'Connor's specific position on this issue is unclear. She does not clarify whether the distinction considers only the method by which the funds are transferred to the religious entity (that is, whether "directly" from the government or "indirectly" through a third party) or something more, such as whether the effect of the benefit is "'direct and substantial' . . . or indirect and incidental."<sup>87</sup> The Court has been imprecise with its terminology when discussing what constitutes direct or indirect aid. Earlier decisions suggest that where aid has a substantial impact on the religious functions of a recipient institution, it is indistinguishable from a direct subsidy, even though the aid was "formally given to parents and not directly to the religious schools."<sup>88</sup> These holdings focus not on the method of payment

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85. *Id.* at 815-16 (plurality opinion).

86. *See id.* at 841-44 (O'Connor, J., concurring).

87. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 394 (1985) (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 785 n.39 (1973)). For a detailed discussion of this issue, see Steven K. Green, *Private School Vouchers and the Confusion over "Direct" Aid*, 10 *GEORGE MASON U. CIV. RTS. L. J.* 47 (2000).

88. *Ball*, 473 U.S. at 394 (citing *Nyquist*, 413 U.S. at 780-94, and *Sloan v. Lemon*, 413 U.S. 825, 828-30, 832-33) (1973)).

but on the *substantive effect* of the aid—the appropriate inquiry under the “primary effects” test—to determine whether aid was “direct and substantial”<sup>89</sup> or “indirect and incidental.”<sup>90</sup> Justice Thomas agrees that the purpose of the distinction has been to identify instances of religious subsidization, which is not necessarily dependent on the form of payment,<sup>91</sup> though he is willing to jettison the underlying prohibition on subsidization. Justice Souter also acknowledges that the route aid takes is less important than its substantive impact.<sup>92</sup> This makes sense, because having a case turn on whether the aid flows through a third party rather than focusing on the aid’s impact on the religious school elevates form over substance and circumvents the constitutional inquiry of whether the aid advances the religious mission of the religious organization.<sup>93</sup> A majority of the Justices in *Mitchell* apparently recognize this point, though disagreeing on where the inquiry leads.

In any case this focus on the direct-indirect distinction diminishes the significance of the existence of private choice in aid programs. This is why voucher proponents should put little stock in the statements of Justices O’Connor and Souter distinguishing private choice from direct funding situations.<sup>94</sup> In some instances, choice may be a factor supporting the constitutionality of a program, but other important questions about subsidization, incentives, and the universe of options will need to be addressed.

The most that can be gleaned from Justice O’Connor’s opinion is that she, along with Justice Breyer, is open to a “true private-choice” program that contains the above criteria and safeguards, but will judge each situation by its particular facts. A voucher pro-

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89. *Id.* (quoting *Nyquist*, 413 U.S. at 785 n.39) (internal quotation marks omitted).

90. *Id.*

91. *See Mitchell*, 530 U.S. at 815-16 (plurality opinion) (“Although some of our earlier cases did emphasize the distinction between direct and indirect aid, the purpose of this distinction was merely to prevent ‘subsidization.’”) (citation omitted).

92. *See id.* at 889 (Souter, J., dissenting) (insisting that the Court “ha[s] distinguished between indirect aid that reaches religious schools only incidentally as a result of numerous individual choices and aid that is in reality directed to religious schools by the government or in practical terms selected by religious schools themselves”); *id.* at 889 n.8 (noting that the Court’s more recent cases “have continued to ask whether government aid programs constituted impermissible ‘direct subsidies’ to religious schools even where they are directed by individual choice”).

93. *See Green*, *supra* note 87, at 74-81.

94. *See Mitchell*, 530 U.S. at 842-44 (O’Connor, J., concurring); *id.* at 889, 902 (Souter, J., dissenting); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 880-81 (1995) (Souter, J., dissenting).



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gram that offers a limited universe of options and creates incentives for religious use will likely raise serious constitutional concerns for a majority of the Court. Thus, the *Mitchell* holding, while leaving open the possibility of a constitutionally valid voucher program, does not provide a definitive answer to the legal debate over vouchers. The lesson from *Mitchell* is that the constitutionality of vouchers remains a close question and will depend on the specific features of the voucher program. Observers must appreciate the subtle but critically important nuances of each individual Justice's understanding of the values underlying the Establishment Clause and the factors relevant to its interpretation and application.

