

The Art of Line Drawing: The Establishment Clause and Public Aid to Religiously Affiliated Child Care

ELIZABETH J. SAMUELS*

Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.¹

We are as Tocqueville described us 150 years ago: "There is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America."²

INTRODUCTION

As the subject of child care has attained prominence on national, state, and local political agendas, the often tortured and uncertain legal discourse on the Establishment Clause has entered a new and difficult area, one that could lead to a profound alteration in the law governing public aid to religious institutions. A new federal program, the Child Care and Development Block Grant ("CCDBG"),³ for the first time provides lower-income families with federal child care aid that is not linked to welfare or other social services. The program includes a provision for vouchers⁴ that may be redeemed by parents

* Assistant Professor of Law, University of Baltimore School of Law. J.D., University of Chicago School of Law, 1980; A.B., Harvard College, 1975. I would like to thank the University of Baltimore Educational Foundation, which provided a summer research grant; the University of Baltimore Law Library, for its superb services; Leonard G. Kotz, for research assistance; Steven P. Grossman, Charles B. Shafer, Wendy G. Shaller, and Sharon E. Rush for their comments and encouragement; and my husband Ira A. Burnim, who as Legal Director of the Children's Defense Fund, lobbied briefly for an earlier version of the statute analyzed in this Article. Although he kindly discussed those activities with me, the views expressed in the Article are mine alone and not those of any other person or organization.

1. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

2. Richard Harwood, *Religious Evasion*, WASH. POST, Dec. 16, 1990, at K6 (quoting from 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 303 (Phillips Bradley ed. & Henry Reeve trans., Alfred A. Knopf 1945) (1848), in an editorial piece discussing, *inter alia*, Gallup poll data on Americans' beliefs such as the estimates that "94 percent believe in God or a universal spirit" and "84 percent believe God answers prayers").

3. 42 U.S.C. § 9858-9858p (Supp. III 1991).

4. States are required to offer parents a choice between enrolling children "with a child care provider that has a grant or contract for the provision" of services, *id.* § 9858c(c)(2)(A)(i)(I), or of receiving a child care certificate, *id.* § 9858c(c)(2)(A)(i).

for sectarian child care⁵ and provisions for financial aid that may be paid directly to religiously affiliated but nonsectarian child care programs.⁶

In the process of enacting this legislation, Congress considered the circumstances under which public aid to religiously affiliated child care services is constitutionally permissible. Although hundreds of millions of federal dollars had already been, and continue to be, available to the states for funding private child care services through welfare-related programs⁷ and social services block grants,⁸ this constitutional issue had not been addressed

5. The statute's definition of "child care certificates" states, "Nothing in this subchapter shall preclude the use of such certificates for sectarian child care services if freely chosen by the parent." *Id.* § 9858n(2).

6. The statute's definition of child care programs that may receive aid includes religiously affiliated providers. "Eligible child care provider" under the statute includes *all* center-based providers that are "licensed, regulated, or registered under State law as described in section 9858c(c)(2)(E)." *Id.* § 9858n(5)(A)(i). The U.S. Department of Health and Human Services Child Care and Development Block Grant regulations define a center-based child care provider as "a provider licensed or otherwise authorized to provide child care services for fewer than 24 hours per day per child in a non-residential setting, unless care in excess of 24 hours is due to the nature of the parent(s)' work." 45 C.F.R. § 98.2(i) (1992).

The restriction on direct funding of sectarian child care services is found in 42 U.S.C. § 9858k(a), which provides that no financial assistance through any grant or contract under the state plan may be used for a sectarian purpose or activity. *Infra* notes 65, 92, 97-111 and accompanying text.

The reader should be aware of the ways in which the terms "religiously affiliated" and "sectarian" are used in this Article to characterize child care programs. "Religiously affiliated" programs include all programs that have any type of relationship with a religious organization. The wide range of existing relations is discussed in part III. "Sectarian" programs include the subset of religiously affiliated programs that actually have religious purposes and engage in religious activities. *See infra* notes 26-27 and 103 and accompanying text.

7. Federal funds support child care through the Aid to Families with Dependent Children ("AFDC") program, which is administered by the states and funded jointly by the states and the federal government. 42 U.S.C. §§ 601-697 (1988). In the 1950's one of the purposes of the program was to allow women to stay at home with young children. Now, with the Family Support Act passed in 1988, the program requires women with young children to work or to be in an education or training program. WHO CARES FOR AMERICA'S CHILDREN?: CHILD CARE POLICY FOR THE 1990S (Cheryl D. Hayes et al. eds., 1990) [hereinafter AMERICA'S CHILDREN] (study by the Panel on Child Care of the National Research Council). The program subsidizes related child care for a limited period of time, in addition to providing child care aid for a limited period to families who are leaving the AFDC program. 42 U.S.C. § 602(G). *See* AMERICA'S CHILDREN, *supra* at 212-13; 42 U.S.C. §§ 602, 603, 1302. For fiscal year 1992, Congress appropriated \$340 million for child care aid under the Family Support Act. CHILDREN'S DEFENSE FUND, THE NATION'S INVESTMENT IN CHILDREN: AN ANALYSIS OF THE PRESIDENT'S FY 1993 BUDGET PROPOSALS i (1992) [hereinafter THE NATION'S INVESTMENT].

Another important source of welfare-related federal spending on child care is the new non-AFDC "At Risk" Child Care program that subsidizes child care costs for families at risk of becoming eligible for AFDC. 42 U.S.C. § 602(i) (Supp. III 1991). For fiscal year 1992, Congress appropriated \$383.8 million for this program. THE NATION'S INVESTMENT, *supra*, at i, which was passed in 1990 as Title IV-A Child Care Amendments. Omnibus Reconciliation Act of 1990, Pub. L. 101-508, 104 Stat. 1388-233 (1990).

Other, much smaller welfare-related federal child care subsidies include AFDC provisions that allow parents to deduct some child care expenses when calculating benefits and programs that provide nutritious meals to children from low-income families who attend child care centers and family day care homes, AMERICA'S CHILDREN, *supra* at 205, 215-16 (referring to 42 U.S.C. § 602(a)(8)(iii) and *id.* §§ 1751-1769, 1771-1789 (1988)).

8. The Social Services Block Grant ("SSBG") program (Title XX of the Social Security Act) provides funds to the states for social services programs for low-income and troubled families, including child protective services, foster care, and child care. 42 U.S.C. § 1397a (1988). A recent child care study, averaging figures developed in several earlier studies, estimated that in one year in the late 1980's, \$591 million out of some \$2.7 billion was expended for child care services. AMERICA'S CHILDREN, *supra* note 7, at 214-15. For additional data and estimates, see THE NATION'S INVESTMENT,

at the federal level by either the legislative or the executive branch. Previously enacted programs had included neither statutory nor federal regulatory restrictions on aid to religiously affiliated child care.

The CCDBG establishes a number of state-administered forms of aid for all types of public, private not-for-profit, and private for-profit child care providers, including religiously affiliated ones.⁹ Unlike the earlier programs that included child care aid, this program expressly prohibits using any financial assistance that is paid to a provider under a grant or contract with a state "for any sectarian purpose or activity, including sectarian worship or instruction[.]"¹⁰ The CCDBG, in addition, imposes certain nondiscrimination requirements with respect to grant and contract recipients' use of religious preferences in admitting children and employing staff.¹¹ Finally, the program *requires* states to allow eligible families to choose between (1) sending children to providers that receive payments from the state under a grant or contract and (2) receiving vouchers, called "child care certificates,"¹² which

supra note 7, at i; CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 1991, at 44 (1991) [hereinafter THE STATE OF AMERICA'S CHILDREN 1991]; H.R. REP. NO. 985, 100th Cong., 2d Sess. 5 (1988); and CHILDREN'S DEFENSE FUND, A CHILDREN'S DEFENSE BUDGET 210 (1987).

Some additional child care is provided incidentally through the federally funded Head Start program, 42 U.S.C. §§ 9831-9855g (Supp. III 1991), which provides health and social services as well as preschool educational services for poor children and their families. Head Start was not established to provide child care, and most sites operate only during the school year and only for part of the day. However, about 20% of local sites operate full day. THE STATE OF AMERICA'S CHILDREN 1991, *supra*, at 45; AMERICA'S CHILDREN, *supra* note 7, at 167. The Head Start Appropriation for fiscal year 1992 was \$2.2 billion. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 1992, at 18 (1992) [hereinafter THE STATE OF AMERICA'S CHILDREN 1992].

9. See *supra* note 6.

In addition to center-based providers, the statutory scheme also includes group home child care, family child care, and other child care provided for compensation—if services of these three types are licensed, regulated, or registered under state law and satisfy state and local requirements. 42 U.S.C. § 9858n(5)(A). Federal regulations define a "group home child care provider" as "two or more individuals who provide child care services for fewer than 24 hours per day per child, in a private residence other than the child's residence, unless care in excess of 24 hours is due to the nature of the parent(s)' work." 45 C.F.R. § 98.2(t) (1992). The statute defines a "family child care provider" as "one individual who provides child care services for fewer than 24 hours per day, as the sole caregiver, and in a private residence," 42 U.S.C. § 9858n(6); the federal regulations add the qualification that this care must be "in a private residence other than the child's residence," 45 C.F.R. § 98.2(r) (1992). (These definitions exclude care given in a child's home by a person employed by the child's family.)

Finally, the statute also makes aid available to certain adult relatives who provide child care. An eligible child care provider includes, "a child care provider that is 18 years of age or older who provides child care services only to eligible children who are, by affinity or consanguinity, or by court decree, the grandchild, niece, or nephew of such provider, if such provider is registered and complies with any State requirements that govern child care provided by the relative involved." 42 U.S.C. § 9858n(5)(B).

Group home care, family child care, and care provided by relatives are never religiously affiliated care because such child care programs never have any type of formal relationship with a religious organization. Aid to these types of providers, therefore, does not raise the Establishment Clause issues addressed in this Article. Free Exercise concerns, however, may be implicated by the statute's limitations on these child care providers' use of funds for religious purposes and activities and on their religious discrimination in the selection of children. See *infra* text accompanying notes 10-11, 64-66, 73-74, 92, 101 for descriptions of those limitations. (The statute does, however, exempt family child care providers from the restriction on religious discrimination in admissions. 42 U.S.C. § 9858l(a)(2)(A).)

10. 42 U.S.C. § 9858k(a).

11. *Id.* § 9858l(2)-(4); see *infra* notes 73-88 and accompanying text.

12. See *supra* note 4.

can be redeemed for sectarian child care services.¹³ This Article examines the constitutionality of these provisions.

The CCDBG's church-and-state-related provisions represent a legislative effort to perform the type of Establishment Clause line drawing that the Supreme Court has traditionally undertaken and continues to undertake in cases involving aid to religious institutions. The congressional debate and the public controversy it engendered over line drawing between permissible and impermissible aid to religiously affiliated child care, and the resolution reached in the CCDBG, all achieve an important constitutional aim. They reflect and reinforce a public ideal expressed in the Court's existing jurisprudence, the ideal that religious liberty is safeguarded by the separation of the public sphere of government and the private sphere of religion.¹⁴ Critics who would reformulate this jurisprudence argue with some force that the lines drawn in past Supreme Court decisions between permissible and impermissible aid are vague and unpredictable.¹⁵ The Court itself is periodically apologetic for a lack of coherence and clarity in its aid-to-religious-institutions cases.¹⁶ Its doctrinal difficulties are illustrated in the well-known pair of rulings that permit aid for bus transportation to and from parochial schools, yet forbid aid for transportation for field trips.¹⁷ But, however imprecise the exercise, and wherever the line is drawn, the very act of drawing a line, of determining when aid is permissible, upholds the Establishment Clause ideal.¹⁸

The enactment of the CCDBG demonstrates that the line-drawing exercise is a feasible and useful task. With the statute's grant and contract aid provisions, Congress has constructed a scheme that allows substantial aid to religiously affiliated child care while drawing a workable line between

13. See *supra* note 5.

14. For a recent example of this from a somewhat unexpected source, see *Lee v. Weisman*, 112 S. Ct. 2649 (1992). Although he has appeared to define the Establishment Clause's prohibitions more narrowly, Justice Kennedy wrote:

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting non-believer, these same Clauses exist to protect religion from government interference.

Id. at 2656-57.

As religion clauses scholar Professor Douglas Laycock wrote, "It is too often forgotten that the Establishment Clause and the Free Exercise Clause both protect religious liberty. They both protect religious believers as well as nonbelievers." Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37, 68 (1991).

15. See *infra* notes 192-93, 314 and accompanying text.

16. See *infra* note 191 and accompanying text.

17. *Wolman v. Walter*, 433 U.S. 229 (1977); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); see *infra* notes 168-69 and accompanying text.

18. Cf. William P. Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S. CAL. L. REV. 495 (1986). Professor Marshall describes the essence of Establishment Clause issues as "a conflict over symbols and not actual effects." *Id.* at 550. He argues that "a symbolic understanding of establishment may appropriately provide a cohesive framework under which establishment jurisprudence may be remodeled." *Id.* at 498.

prohibited aid that advances religion and permissible aid that does not. This Article argues that under existing Establishment Clause doctrines, the CCDBG measures allowing financial assistance to be paid by states to religiously affiliated nonsectarian child care programs are constitutional, whereas the requirement that the program's vouchers be redeemable for sectarian services is probably not constitutional. The Court, however, may modify and develop current Establishment Clause jurisprudence in ways that will allow the use of vouchers for religious programs.¹⁹ This Article maintains that such action by the Court would undermine the traditional Establishment Clause ideal of separation between church and state.

The questions addressed in this Article regarding the CCDBG's church-and-state provisions are urgent ones. Federal and state agencies now implementing the CCDBG must analyze the statute in light of current Establishment Clause mandates, just as Congress struggled to do in the process of its enactment.²⁰ State and federal courts will have to do the same in any challenges to the statute. Furthermore, even if federal constitutional doctrines are reworked and relaxed, state courts will have to decide whether to follow or to depart from federal Establishment Clause doctrines when interpreting the religion clauses of their own constitutions. For example, state courts may find their states' voluntary participation in the CCDBG, or their states' own child care assistance schemes, violative of state constitutional provisions regarding religion, even if they are permissible under the Establishment Clause.²¹

Part I of this Article describes briefly the child care system that Congress undertook to support and expand by enacting the CCDBG. Part II describes the central features of the CCDBG and its church-and-state-related provisions. Finally, Part III analyzes both the meaning and the constitutionality of the church-state provisions in light of the Supreme Court's existing Establishment Clause jurisprudence.

I. THE CHILD CARE SYSTEM

The current national child care landscape is a varied one that has a small public sector and is dominated by a large private one.²² A major portion of

19. See, e.g., *infra* notes 274-312 and accompanying text.

20. See *infra* notes 63, 69-72, 107 and accompanying text.

21. The State of Washington in 1989 illustrated how a state court may rely on state constitutional provisions to depart from the Supreme Court's Establishment Clause jurisprudence. In *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), the Supreme Court approved under the Establishment Clause an isolated instance of vocational rehabilitation payments requested for a blind man to study for the ministry at a private Christian College. On remand, the Washington Supreme Court rejected the payments on state constitutional grounds. *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989). The Supreme Court of Washington determined that the payments would violate the state constitutional prohibition on using public money for religious instruction. *Id.* at 1120. "[O]ur state constitution prohibits the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Id.*

22. A very small percentage of child care services are publicly sponsored. Publicly run child care services, of course, are center-based services. As the following data shows, fewer than half of children in care attend any sort of center-based program. Of the children who spend substantial time in child care

child care services are provided either (1) through family child care, which is child care offered for a small number of children in the provider's private home; (2) by relatives, in the child's home or the relative's home; or (3) in the child's home by an individual employed by the child's family.²³ These types of private care account for more than half of all child care services used by families.²⁴ Among center-based programs, which account for less than half of all child care services used by families,²⁵ a distinct minority are sponsored by religious organizations.²⁶ And among those centers sponsored

(at least 20 hours per week for children younger than age five and at least five hours per week for children of ages five through twelve), recent national studies estimate that the following percentages of children use center-based care for more hours per week than they use other types of programs: 33% of children younger than three, 54% of children aged three or four, and 29% of children aged five to twelve. BARBARA WILLER ET AL., *THE DEMAND AND SUPPLY OF CHILD CARE IN 1990: JOINT FINDINGS FROM THE NATIONAL CHILD CARE SURVEY 1990 AND A PROFILE OF CHILD CARE SETTINGS* 3, 14-15 (1991) (Sponsors of *The National Child Care Survey 1990* include the National Association for the Education of Young Children and the Head Start Bureau of the Administration on Children, Youth and Families in the U.S. Department of Health and Human Services; the sponsor of *A Profile of Child Care Settings* is the Office of Policy and Planning in the U.S. Department of Education). The percentages of children using center-based care are derived from figures for children whose mothers are employed. *Id.* at 15. "Substantial usage of supplemental care is almost exclusively limited to families in which the mother is employed." *Id.* at 14. For figures that include less substantial use of child care, but are quite similar, see *id.* at 9-14. Another recent analysis estimated that in 1987 only 30% of primary child care arrangements for children younger than five, with mothers working full-time, were "child care centers or preschools." THE STATE OF AMERICA'S CHILDREN 1991, *supra* note 8, at 40.

Probably fewer than 15% of the centers are publicly run. Among all child care centers in the United States, which include "[e]stablishments where children are cared for in a group in a nonresidential setting for all or part of the day," WILLER ET AL., *supra*, at 3, 8% are sponsored by public schools; 9% are sponsored by the federal Head Start program; and another 8% are nonprofit programs sponsored by other non-religious sponsors—a group that includes public community agencies, private agencies, and employers. *Id.* at 18. In assessing the significance of the Head Start-related percentage, the reader should note that only approximately 20% of the federally funded Head Start programs nationwide operate for the full day. AMERICA'S CHILDREN, *supra* note 7, at 167. And, most Head Start programs only operate during the school year. THE STATE OF AMERICA'S CHILDREN 1991, *supra* note 8, at 45.

23. See *supra* note 9 (discussing the CCDBG's definitions of "group home child care" and "family child care" and the statute's definition of relative care that qualifies for aid). WILLER ET AL., *supra* note 22, defines "relative care" as "care provided by a relative in the child's home or the relative's home"; "family day care" as "care provided for a small group of children in the caregiver's home"; and, "in-home care" as "care provided by a non-relative who comes into the family home." *Id.* at 3. The report's definition of "family day care" thus includes both the CCDBG's group home care and family child care. (Twenty-one percent of families relying on relatives, according to the report, pay the relative who is providing care. *Id.* at 22.)

24. According to one source, the following percentages of children who spend substantial time in child care use one of these three types of care for more hours per week than other types: 67% of children younger than three, 44% of children aged three or four, and 71% of children aged five to twelve. WILLER ET AL., *supra* note 22. (These percentages are derived from the figures for children whose mothers are employed. For breakdowns by type of care, and for similar figures that include less substantial use of child care, see *id.* at 9-14.)

Another study used census data to estimate the types of care used by families with mothers working full-time and children younger than five: relatives, 39%; non-relatives in child's home, 6%; and family day care homes, 25%. THE STATE OF AMERICA'S CHILDREN 1991, *supra* note 8, at 50.

25. See *supra* notes 22-24.

26. According to WILLER ET AL., *supra* note 22, at 21, only 15% of early education and child care centers for children younger than six describe themselves as sponsored by religious organizations. "Among the religious organizations that sponsor center-based early education and care programs, religious private schools constitute only a small percentage of religious sponsors (3 percent)." ELLEN E. KISKER ET AL., *1 A PROFILE OF CHILD CARE SETTINGS: EARLY EDUCATION AND CARE IN 1990*, at 33 (1991) (one of the two studies summarized in WILLER ET AL., *supra* note 22). The proportion of

by religious organizations, only a minority may actually offer sectarian programs that include religious worship or instruction.²⁷

Prior to enacting the CCDBG, the Federal Government already provided substantial financial assistance to this child care system. This assistance included aid distributed through welfare- and social service-related programs,²⁸ as well as significant subsidies of child care services through the federal income tax system.²⁹ The welfare- and social service-related

centers sponsored by religious organizations is "twice as high in suburban areas as in rural areas (10 percent versus 5 percent). . . . In addition, *nonprofit* centers in lower-income areas are less likely to be sponsored by a religious group than are *nonprofit* centers in higher-income areas (32 percent versus 43 percent)." *Id.* at 38 (emphasis added). (Comparable data is not available for before- and after-school programs.) However, 28% of center-based programs report that they are located in a church or synagogue. *Id.* at 43-44.

At the time of the congressional debates on the child care funding schemes that ultimately led to the CCDBG, this type of national survey data was not yet available. The debates reflected a shared rough—and roughly phrased—estimate that approximately one-third of child care is religiously affiliated to some degree. For example: "[C]hurches are the single largest provider of formalized child care in the United States, supplying about one-third of all center-based care." S. REP. NO. 17, 101st Cong., 1st Sess. 67 (1989) (Additional and Minority Views, Additional Views of Sen. Durenberger). "Religious organizations provide over one-third of child care services in this country and are often the only providers in low-income neighborhoods and rural communities." 136 CONG. REC. H1315 (daily ed. Mar. 29, 1990) (statement of Rep. Hawkins); *see also* 136 CONG. REC. H1309 (daily ed. Mar. 29, 1990) (statement of Rep. Bartlett); S. REP. NO. 484, 100th Cong., 2d Sess. 92 (1988) (Additional Views of Sen. Quayle); S. REP. NO. 17, *supra*, at 70 (Minority Views of Sens. Coats, Cochran, and Thurmond).

27. One of the two studies summarized in WILLER ET AL., *supra* note 22, reports that fewer than 5% percent of *all* center-based early education and child care programs for children younger than six identified providing religious instruction as their most important goal. KISKER ET AL., *supra* note 26, at 84. However, 27% of center-based program directors included religious instruction as "one of their program goals." WILLER ET AL., *supra* note 22, at 36. (Comparable data is not available for before- and after-school care.)

In the early 1980's the National Council of Churches sponsored a national study of child care services affiliated with parishes of 15 of the Protestant, Anglican, and Orthodox denominations that belonged to the organization. ELLEN W. LINDNER ET AL., WHEN CHURCHES MIND THE CHILDREN: A STUDY OF DAY CARE IN LOCAL PARISHES 4, 11-13 (1983). The study reported that the child care services affiliated with the almost 9000 parishes surveyed were "not distinctly religious." *Id.* at 75. (These services included before- and after-school care although programs for preschoolers were "far and away the most prevalent." *Id.* at 23.)

[S]ymbols, practices, and teachings commonly viewed as "religious" are conspicuously absent from most church-operated programs. Church-operated centers are no more likely than independently operated centers [housed in churches] to restrict enrollment to members of the congregation, and both are very unlikely to do so. Church-operated centers are somewhat more likely to be concerned with the "spiritual development of the child" than are independently operated centers, but only a small minority of centers consider this a high priority goal. The single area in which religion figures prominently is staff selection: church-operated centers are much more likely to give some consideration to religious beliefs when hiring staff. Thus, while the staff of church-operated centers are perhaps more likely to be professed Christians and probably more likely to be members of the congregation of the church in which the center is housed, the programs they offer are generally open to the community and not distinctly religious.

Id. at 75.

28. *See supra* notes 7-8.

29. *See infra* notes 31-36 and accompanying text.

Using the federal tax system to assist working parents with child care costs has been criticized on the ground that the measures provided by Congress have not been helpful to the lowest income workers who owe little or no taxes. For example, The Children's Defense Fund ("CDF"), a national advocacy group, has argued that these measures are of little or no benefit to poor families. With respect to the most significant tax preference, the dependent care tax credit (*see infra* note 31), the CDF has

programs, with expenditures of hundreds of millions of dollars annually, serve families with very low incomes.³⁰ The tax-related aid is available to all families that pay taxes, and accounts for the bulk of all federal child care assistance.³¹ No statutory or regulatory provisions restrict the use of these types of aid for religiously affiliated child care.³²

Parents who incur child care expenses enjoy significant federal income tax benefits under two different tax measures. The child care tax credit allows working parents to subtract from their tax liability up to \$1440 of their child care expenses, with the amount determined by their income level and their child care costs.³³ The magnitude of this subsidy is illustrated by the credits claimed by taxpayers in 1990: \$2.5 billion.³⁴ A smaller but still sizeable

maintained:

For almost all families living in or near poverty, however, this credit system is of no practical use. First, they cannot afford to make substantial out-of-pocket payments for child care Second, their federal income tax liabilities . . . almost always will be so low . . . that having a credit to subtract provides no relief.

CHILDREN'S DEFENSE FUND, A CHILDREN'S DEFENSE BUDGET FY 1988, at 210 (1987). The group recommended increasing the percentage of expenses subject to the credit and making it refundable. *Id.* at 19. Congress considered making the credit a refundable one, payable through a worker's wages, but this plan ultimately did not emerge as part of the legislative package that included the CCDBG. The Senate earlier in 1990 had passed a child care bill that included a provision making the dependent care credit refundable. S. 5, 101st Cong., 1st Sess. § 212 (1989), reprinted in 135 CONG. REC. S7492 (daily ed. Apr. 24, 1989).

30. See *supra* notes 7-8.

31. "[B]y the early 1980s direct consumer subsidies, which primarily benefit middle- and upper-income families, had become the predominant form of federal support for child care, and they have greatly increased since then In particular, the child care tax credit, which accounted for about one-third of total federal expenditures at the beginning of this decade, now accounts for nearly two-thirds." WILLER ET AL., *supra* note 22, at 196-97; see *infra* notes 33-36 and accompanying text.

32. The only exception is the Head Start Program, which incidentally provides child care, see *supra* note 8, and which prohibits discrimination "because of race, creed, color, national origin, sex, political affiliation, or belief." 42 U.S.C. § 9849(a) (1988) (emphasis added).

The Supreme Court's Establishment Clause case law does not require any such restrictions for a statute to survive a facial challenge, although such restrictions can be an important ingredient in a constitutional aid-to-religious-institutions scheme. See *infra* notes 121-22 and 252 and accompanying text.

33. The expenses for dependent care must be employment-related, and they must be for the care of a child younger than 13, or for care provided in the household for a spouse or dependent adult, or for care provided outside of the house for a spouse or dependent adult if the person receiving care spends at least eight hours a day in the household. 26 U.S.C. §§ 21(a)-(c) (1988).

34. The \$2.5 billion in credits was claimed by 6,910,356 taxpayers. Telephone Interview with John Szilagyi, Chairman of Deferred Tax Consequences Programs, Research Division, U.S. Internal Revenue Service (July 16, 1992) [hereinafter Telephone Interview with John Szilagyi]. In 1989 the credit accounted for \$2.45 billion in credits claimed by 6,091,356 taxpayers. *WHATSOEVER HAPPENED TO CHILD CARE IN 1989?: A TREND REVERSAL AND AN APPARENT CONTRADICTION I* (1991) (report of the Internal Revenue Service Research Division) [hereinafter IRS REPORT]. The amount claimed in 1989 represented a dramatic reduction from the amount claimed the year before, \$3.7 billion. *Id.* The Internal Revenue Service has speculated that this reduction may be due to three factors: (1) the new requirement that taxpayers provide the "taxpayer identification number" ("TIN") of their child care provider, which apparently led taxpayers to forego the credit either if they had been improperly claiming it or if their providers refused to give them a TIN because the providers did not want to report the income they were receiving; (2) the change in the qualifying child age limitations from under age 15 in 1988 to under age 13 in 1989; and (3) the new provision that taxpayers must reduce the amount of their expenses eligible for the credit by the amount of money they receive tax-free under an employer-provided dependent care assistance program. *Id.* at 1-2.

subsidy is provided through employer-sponsored dependent care assistance programs. Federal tax law allows participating employers to deduct, at an employee's option, up to five thousand dollars from the employee's gross income to be used for child care. The employee avoids federal, state, and local taxation of the deducted amount.³⁵ Internal Revenue Service data indicates that in the 1990 tax year, employer-sponsored assistance of this kind was provided to 588,147 employees.³⁶

II. THE STATUTE

The CCDBG reflects a legislative preference for preserving and improving this predominantly private and decentralized system of child care, one which offers a diverse range of choices for families.³⁷ The legislation seeks to ensure that the system provides services that are adequate, sufficiently available, and affordable for working families.³⁸ In light of the congressional preference for a largely private system and the significant participation of religiously affiliated providers in the private system, Congress was faced with

Most of the expenses for which taxpayers claim credit are child care expenses rather than expenses for the care of disabled older children or adults. AMERICA'S CHILDREN, *supra* note 7, at 196-97. A study being conducted by the Internal Revenue Service, using a sample of 225,700 tax returns for 1990, has found that 95.6% of taxpayers claiming the credit did so in connection with child care expenses. Telephone Interview with John Szilagyi, *supra*.

35. 26 U.S.C. §§ 125, 129 (1988). The \$5000 limit is available to a single parent, or to a married parent filing jointly with his or her spouse, when the spouse is not receiving this employer-sponsored benefit. The maximum is \$2500 in the case of a separate return by a married individual. *Id.* § 129(a)(2). The same expenses qualify for these benefits as qualify for the dependent care credit. *Id.* § 129(e)(1). A taxpayer who receives this kind of assistance must reduce the amount of the taxpayer's expenses eligible for the dependent care credit. 26 U.S.C. § 21(c) (1988). Therefore, the employee may not also enjoy a tax credit if his or her employer-provided assistance is \$2400 or more for one child, or \$4800 or more for two or more children.

36. Telephone Interview with John Szilagyi, *supra* note 34. The same expenses that qualify for the dependent care tax credit qualify for this tax preference. *See supra* note 35. Because almost all of the dependent care credits taken by taxpayers are attributable to child care expenses, *supra* note 34, it is likely that most of the income set aside under this tax preference is also for child care expenses. Telephone Interview with John Szilagyi, *supra* note 34 (referencing IRS study of dependent care credit use).

37. The House conference report explains:

The managers believe that parents should have the greatest choice possible in selecting child care for their children. Thus, parents . . . would have complete discretion to choose from a wide range of child care arrangements, including care by relatives, churches, synagogues, family providers, centers, schools, and employers.

H.R. CONF. REP. NO. 964, 101st Cong., 2d Sess. 923 (1990).

As described in *supra* notes 9, 22-24 and accompanying text, the CCDBG operates to support, improve, and expand the existing child care system, which is a largely private system.

38. In the words of the House conference report on the legislation:

The purpose of this block grant program is to increase the availability, affordability, and quality of child care. The provision provides financial assistance to low-income, working families to help them find and afford quality child care services for their children. It also contains provisions to enhance the quality and increase the supply of child care available to all parents, including those who receive no financial assistance under the block grant program.

H.R. CONF. REP. NO. 964, *supra* note 37, at 922.

the necessity of considering what role religiously affiliated services could play in the CCDBG scheme without violating Establishment Clause principles.³⁹

39. Including religiously affiliated services raises the issue of possible political divisiveness along religious lines, a possibility that has concerned the Court in a number of cases involving direct financial assistance to parochial schools. The Court has foreseen that competition among religious groups for government aid could lead to political strife along religious lines, especially when aid programs require annual appropriations and provide assistance to relatively few religious groups. The Court addressed this concern regarding political divisiveness most recently in the 1992 graduation prayer case. *Lee v. Weisman*, 112 S. Ct. 2649 (1992). The Court stated:

The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases.

Id. at 2655-56.

During the legislative battles that ultimately led to the passage of the CCDBG, interest groups did align along religious lines. For example, the United States Catholic Conference sought greater participation for religiously affiliated programs, and some national Jewish and Christian coalitions supported more restrictive church-and-state provisions. *See, e.g.*, Richard T. Foltin & Judith Golub, *Congress Should Pass Child Care This Session; Civil Rights Issues*, N.Y. TIMES, Sept. 26, 1988, at A22; Linda Greenhouse, *Church-State Debate Blocks Day Care Bill*, N.Y. TIMES, Sept. 8, 1988, at B9; Letter from Mary Anderson Cooper, Acting Director, National Council of Churches, and Patrick Conover, Associate for Policy Advocacy, United Church of Christ, Office for Church in Society, to "Representative," (Oct. 19, 1989) [hereinafter Letter] (on file with the author) (expressing support by the coalition for House-passed legislation, 136 CONG. REC. H1290 (daily ed. Mar. 29, 1990), and for Senate-passed legislation, 135 CONG. REC. S7479 (daily ed. June 23, 1989), both of which provided a blanket prohibition on sectarian activities as well as restrictions on religious discrimination in admissions and employment.

Nevertheless, the political divisiveness concern is not as acute here as in the school cases. Unlike the nation's elementary and secondary school system, the child care system described in the preceding part of this Article is a predominantly private rather than public one, and a minority rather than a majority of its private providers are religiously affiliated. Among those child care providers that are religiously affiliated, a wider variety of religious groups are represented than are represented in the Court's parochial school aid cases. *See supra* notes 26-27 and accompanying text; Letter, *supra*, at 1 (asserting that a large, diverse coalition of Protestant denominations and faith groups "provide[s] the great majority of religiously based child care"); *Aguilar v. Felton*, 473 U.S. 402, 406 (1985) (of the 13.2% of eligible students enrolled in private schools, 84% were enrolled in Roman Catholic schools and 8% in Hebrew day schools); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 379 & n.4 (1985) (40 of 41 private schools were sectarian, of which 28 were Roman Catholic, seven Christian Reformed, three Lutheran, one Seventh-Day Adventist, and one Baptist); *Mueller v. Allen*, 463 U.S. 388, 405 (1983) (dissent) (more than 95% of students in private schools attended sectarian schools); *Wolman v. Walter*, 433 U.S. 229, 234 (1977) (more than 96% of privately enrolled students attended sectarian schools, and more than 92% attended Catholic schools); *Meek v. Pittenger*, 421 U.S. 349, 364 (1975) (75% of qualifying private schools were church-related or religiously affiliated); *Sloan v. Lemon*, 413 U.S. 825, 830 (1973) (more than 90% of children in private schools were enrolled in schools controlled by religious organizations or having religious purposes); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 768 & n.23 (1973) (approximately 85% of private schools were church affiliated, consisting of 1415 Roman Catholic schools, 164 Jewish, 59 Lutheran, 49 Episcopal, 37 Seventh-Day Adventist, and 18 others); *Lemon v. Kurtzman*, 403 U.S. 602, 608, 610 (1971) (95% of Rhode Island's non-public school pupils attended Roman Catholic schools; more than 96% of the Pennsylvania non-public school pupils attended church-related schools, most of which were Roman Catholic); *Everson v. Board of Educ.*, 330 U.S. 1, 30 n.7 (1947) (dissent) (all private schools involved were Catholic schools); *see also* *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 765 (1976) (plurality opinion) (stating that "political divisiveness is diminished by the fact that the aid is extended to private colleges generally, more than two-thirds of which have no religious affiliation").

Therefore, in considering whether to fund religiously affiliated child care, the polity is not required to decide whether to extend resources beyond a public secular system to a largely sectarian private system which is dominated by a small number of denominations. *See* George Tobin, *Day Care and the*

A. General Provisions

The child care statute represents a hasty and uneasy compromise among widely differing views about the best ways both of assisting lower-income families and of maintaining a constitutionally permissible and desirable relationship between church and state. There were deep divisions between the White House and Congress and within Congress itself.⁴⁰ The Senate and the House of Representatives had each passed child care bills,⁴¹ both of which were somewhat different from and more financially generous than the CCDBG, before the CCDBG emerged as part of the Omnibus Budget Reconciliation Act of 1990.⁴² These bills culminated a three-year legislative effort that began with the introduction of the original Act for Better Child Care Services ("ABC").⁴³ The U.S. Department of Health and Human Services CCDBG Interim Final Rule attempted to disclaim the statute's

Establishment Clause: The Constitutionality of the Certificate Program in S. 5, the "ABC" Bill, 12 GEO. MASON U. L. REV. 317, 337-38 (1990).

40. See, e.g., Linda Greenhouse, *Despite Support, a Child Care Bill Fails to Emerge*, N.Y. TIMES, June 6, 1988, at A14; Steven A. Holmes, *Tentative Accord Reached on Child Care for Low-Income Families*, N.Y. TIMES, Oct. 27, 1990, § 1, at 10; Julie Johnson, *Child Care: No Shortage of Proposals*, N.Y. TIMES, Mar. 26, 1989, at E5; Martin Tolchin, *Deep Divisions Emerge in Congress on Ways to Expand Aid for Child Care*, N.Y. TIMES, Nov. 11, 1989, § 1, at 12.

41. The Senate bill was introduced in the previous Congress as S. 5, 101st Cong., 1st Sess. (1989), reprinted in 136 CONG. REC. S4865 (daily ed. Apr. 24, 1990). It passed during that session, with an authorization for fiscal year 1991 of \$1.75 billion. *Id.* § 104(a) (passed June 23, 1989), reprinted in 135 CONG. REC. S7479 (daily ed. June 23, 1989).

The House, in the next session of Congress, passed H.R. 3, 101st Cong., 1st Sess. (1989), reprinted in 136 CONG. REC. H1290 (daily ed. Mar. 29, 1990), which included an authorization of \$450 million to pay for child care expenses in fiscal year 1991 (as a new part of Title XX of the Social Security Act), *id.* § 301 (passed on Mar. 23, 1990), as well as an authorization of \$429,000 to assist with the expansion or establishment of child care services, and an authorization of \$260 million to help improve the quality of child care. *Id.*

After the House passed H.R. 3 in the next session of Congress, the Senate again passed S. 5, under the number of, and as a substitute for, the House bill, in order to request a conference with the House on child care legislation. 136 CONG. REC. S4863 (1990) (passed on April 24, 1990). (The only changes made by the Senate to S. 5 involved the federal earned income credit and not the child care provisions that are the subject of this Article. *Id.* References in this Article to the child care provisions of S. 5 as passed are to S. 5 as it was originally passed by the Senate during the first session of the 101st Congress on June 23, 1989.)

42. Child Care and Development Block Grant, Pub. L. 101-508, 104 Stat. 1388-236 (1990). The CCDBG was part of a legislative package that also included an expansion of Head Start, Augustus F. Hawkins Human Service Reauthorization Act of 1990, Pub. L. 101-501, 104 Stat. 1222 (1990); a new welfare-related program that enables states to provide child care funds to families that are not receiving Aid to Families with Dependent Children ("AFDC") but are at risk of becoming eligible for AFDC without such aid, Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, 104 Stat. 1388-233 (1990); and, an expansion of the Federal Earned Income Tax Credit ("EITC"), Revenue Reconciliation Act of 1990, Pub. L. 101-508, 104 Stat. 1388-400 (1990). The expansion of the EITC generally increased this refundable credit for low-income families in addition to (1) providing a larger benefit for families with more than one child, or with a child under the age of one, and (2) allowing a new credit for payments for children's health insurance. *Id.* at 1388-1408 to -1412.

43. S. 1885, 100th Cong., 1st Sess. (1987) (reported out by the Committee on Labor and Human Resources, S. REP. NO. 484, 100th Cong., 2d Sess., pt. 1 (1988), but not passed); H.R. 3660, 100th Cong., 1st Sess. (1987) (reported out by the Committee on Education and Labor, H.R. REP. NO. 985, 100th Cong., 2d Sess., pt. 1 (1988), but not passed); see *supra* note 41 (regarding the bills passed in 1989 and 1990). An intermediate version of these bills was H.R. 30, 101st Cong., 1st Sess. (1989) (not reported out).

history, asserting that "the Congressional leadership and the Administration agreed to start anew in crafting this legislation. As a result, there is relatively little legislative history that is instructive in drafting regulations that reflect the clear intent of the law."⁴⁴ Although the CCDBG departs in significant ways from the House and Senate bills,⁴⁵ the structure and language of its church-and-state provisions did evolve directly from these earlier bills.⁴⁶

The CCDBG authorizes upwards of one billion dollars annually to be distributed in block grants to participating states.⁴⁷ No matching state funds

44. 56 Fed. Reg. 26,194 (1991) (to be codified at 45 C.F.R. §§ 98-99) (proposed June 6, 1991). The Department characterized the history of the CCDBG as follows:

The Child Care and Development Block Grant was worked out in the final days of the 101st Congress after two years of protracted debate within Congress and between Congress and the Administration. The bill was the result of a new compromise between the House, the Senate, and the Administration. The bills which individually passed the House (H.R. 3) and the Senate (S. 5) were not the basis for crafting the compromise, as the Congressional leadership and the Administration agreed to start anew in crafting this legislation.

Id. Unpersuaded by arguments to the contrary, the Department continued to maintain this position in its Supplementary Information published with the final regulations. 57 Fed. Reg. 34,352 (1992) (to be codified at 45 C.F.R. §§ 98-99) (proposed Aug. 4, 1992).

45. The Administration's attempt to completely disown the legislative history of the House and Senate bills is not persuasive. Although it abandons many features of the two bills, the compromise is essentially a stripped-down version of them. It contains the same basic underlying financial aid program, minus many of the two bills' specific federal- and state-level administrative structures, requirements, and procedures. The final version leaves much more discretion to the states with respect to the use of funds and the regulation of child care services. See 42 U.S.C. §§ 9858-9858; *supra* note 41.

46. For example, the CCDBG's general limitation on funding sectarian purposes and activities is essentially identical to the restriction in both the House and Senate bills, as well as in their precursors introduced during the two previous years. The CCDBG states: "No financial assistance provided under this subchapter, . . . or through any other grant or contract[,] . . . shall be expended for any sectarian purpose or activity, including sectarian worship or instruction." 42 U.S.C. § 9858k(a). Compare this to the Senate bill, which said, "No financial assistance provided under this title shall be expended for any sectarian purpose or activity, including sectarian worship and instruction." S. 5, *supra* note 41, § 121(a). The House bill passed that year said: "No financial assistance provided under this subtitle shall be expended for any sectarian purpose or activity, including sectarian worship and instruction." H.R. 3, *supra* note 41, § 301(a) (amending § 2012(a)(2) of Title XX of the Social Security Act, 42 U.S.C. § 1397-1397f (1988)). For nearly identical language in previous bills, see S. 1885, *supra* note 43, § 19(a); H.R. 30, 101st Cong., 1st Sess. § 670P(a) (1989); and H.R. 3660, *supra* note 43, § 118.

More specific church-and-state-related provisions of the CCDBG also evolved from the earlier bills. The CCDBG contains a church-and-state-related prohibition on the use of CCDBG funds in before- and after-school child care programs for "(1) any services provided to such students during the regular school day; (2) any services for which students receive academic credit toward graduation; or (3) any instructional services which supplant or duplicate the academic program of any public or private school." 42 U.S.C. § 9858k(b). An identical provision was part of both the Senate and House bills, as well as of their precursors introduced in Congress in 1988 and 1989. S. 5, *supra* note 41, § 121(c); H.R. 3, *supra* note 41, § 301(a) (amending § 2012(a)(2) of Title XX of the Social Security Act, 42 U.S.C. § 1397-1397f (1988)); S. 1885, *supra* note 43, § 19(c); H.R. 30, *supra* § 670P(b); and H.R. 3660, *supra* note 43 § 19(c).

The CCDBG's limitations on religious discrimination in the admission of children and the employment of staff to work directly with them, also appeared in the bills passed by both the Senate and the House. See 42 U.S.C. § 9858i; S. 5, *supra* note 41, §§ 122(a)(2)-(3) (1990); H.R. 3, *supra* note 41, § 301(a) (amending § 2012(a)(2) of Title XX of the Social Security Act, 42 U.S.C. §§ 1397-1397f (1988)). These limitations on religious discrimination had evolved from generally more stringent limitations in the bills' precursors introduced in 1988 and 1989. See *infra* notes 79, 114.

47. 42 U.S.C. § 9858. The statute authorized \$750 million for fiscal year 1991, \$825 million for fiscal year 1992, \$925 million for 1993, "and such sums as may be necessary for each of the fiscal years 1994 and 1995." *Id.* For fiscal year 1991, the sum actually appropriated was \$731,900,000. THE STATE OF AMERICA'S CHILDREN 1991, *supra* note 8, at 46. For fiscal year 1992, the sum actually appropriated

are required. The states are directed to use 75% of their allocations for two purposes. The principal purpose is to fund child care services for children whose family income is at or below 75% of the state's median income for a family of the same size.⁴⁸ Although the statute does not specify how much of the 75% should be used for this purpose, the House conference report indicated that this purpose should account for a preponderance of this portion of the states' allocations.⁴⁹ Assistance for eligible children is to be provided on a sliding fee scale,⁵⁰ and priority in giving assistance must be afforded to families with very low incomes and to children with special needs.⁵¹ States must give parents a choice of (1) enrolling their child in a program that has a grant from, or contract with, the state or (2) receiving a child care certificate⁵² that may be used as payment for child care services.⁵³ A secondary purpose that states may fulfill with this 75% of their allocations is to fund "activities designed to improve the availability and quality of child care."⁵⁴

States are *required* to use between 18.75% and 20% of the funds allocated to them to improve the quality and increase the availability of child care⁵⁵

was \$825 million, THE STATE OF AMERICA'S CHILDREN 1992, *supra* note 8, at 18.

48. 42 U.S.C. §§ 9858c(c)(3)(B)-(C), 9858n(4)(B). To be eligible, a child also must be under the age of 13, *id.* § 9858n(4)(A), and either living with "a parent or parents who are working or attending a job training or educational program" or receiving or in need of "protective services and resid[ing] with a parent or parents" who are not working or attending a job training or educational program. *Id.* § 9858n(4)(C).

49. "It is the conferees' intent that a preponderance of the block grant funds be spent specifically on child care services and a minimum amount on other authorized activities." H.R. CONF. NO. 964, 101st Cong., 2d Sess. 923 (1990). The Department of Health and Human Services regulations quantify this "preponderance" as at least 90%. 45 C.F.R. § 98.50(d)(2)(i) (1992).

50. The term "sliding fee scale" is defined as "a system of cost sharing by a family based on income and size of the family." 42 U.S.C. § 9858n(12). The House conference report on the CCDBG adds that nothing in the statute "is intended to prohibit the provision of services at no cost to families whose income is at or below the poverty level." H.R. CONF. REP. NO. 964, *supra* note 37, at 923. Earlier Senate and House bills had explicitly stated that in the case of the poorest recipients, states could cover 100% of the cost of child care. S. 5, *supra* note 41, § 3(23); H.R. 3, *supra* note 41, § 659C(21) (amending § 637 of the Head Start Act, 42 U.S.C. § 9832 (1988)); H.R. 30, *supra* note 43, § 670R(29); S. 1885, *supra* note 43, § 3(18); H.R. 3660, *supra* note 43, § 3(18).

51. 42 U.S.C. § 9858c(c)(3)(B)(i). "Special needs" are not defined in the statute or by the U.S. Department of Health and Human Services regulations, 45 C.F.R. § 98.2 (1992), but they presumably include physical and mental disabilities that necessitate special services.

52. The CCDBG defines a "child care certificate" as "a certificate (which may be a check or other disbursement) that is issued by a state or local government under this subchapter directly to a parent who may use such certificate only as payment for child care services." 42 U.S.C. § 9858n(2).

53. *Id.* § 9858c(c)(2)(A)(i)(I)-(II). The section specifies that the certificates "shall be of a value commensurate with the subsidy value of child care services" provided by a program under a grant or contract. *Id.* § 9858c(c)(2)(A)(iii).

When parents choose to enroll their child with a provider that has a grant or contract with the state, the state is required to honor the parents' choice of provider "to the maximum extent practicable." *Id.* § 9858c(c)(2)(A)(ii).

54. *Id.* § 9858c(c)(3)(B)(ii).

55. *Id.* § 9858c(c)(3)(C). This section requires states to use 25% of their allocations for two distinct sets of activities, which are defined in other sections. One of these two sets of activities is "to establish or expand and conduct, through the provision of grants or contracts, early childhood development or before-and after-school child care programs or both." *Id.* § 9858f(a). States are required to use at least 75% of the 25%, which amounts to 18.75% of their total allocations, for this set of activities. *Id.* For the other set of activities, *see infra* note 56 and accompanying text, the states must use at least 20% of

through grants and contracts that may be used to establish, expand, or conduct either early childhood development programs, or before- or after-school child care programs, or both.⁵⁶ Child care certificates may *not* be issued with this portion of the states' funding.⁵⁷ With the remaining 5% to 6.25% of their allocations, states must fund one or more of the following in order to improve the quality of child care: resource and referral programs; grants or loans to help providers meet state and local standards; improvements in monitoring compliance with licensing and regulatory requirements; training and technical assistance; and increased compensation of staff who provide child care for which the CCDBG gives assistance.⁵⁸

Under the CCDBG, states must provide assurances that for all subsidized child care services, state or local requirements are in effect that are "designed to protect the health and safety of children" and that include requirements regarding "prevention and control of infectious diseases," "building and physical premises safety," and "minimum health and safety training appropriate to the provider setting."⁵⁹ Providers of subsidized care must comply with all state and local licensing and regulatory requirements.⁶⁰ Beyond this, states are not required to regulate child care. However, if a provider is not required by state or local law to be licensed or regulated, then it must be registered with the state to receive the funding.⁶¹ On the other hand, states

the 25%, which consists of 5% of their total allocations. 42 U.S.C. § 9858(e). Thus, states must use a minimum of 18.75% of their total allocations for the set of activities described in this note and may use up to 20%, if they limit their expenditures for the other set of activities to the required minimum for that set of activities, which is 5% of their total expenditures.

56. 42 U.S.C. § 9858f(c). The statute mandates:

In awarding grants and contracts under this section, the State shall give the highest priority to geographic areas within the State that are eligible to receive grants under section 2712 of Title 20, and shall then give priority to—

- (1) any other areas with concentrations of poverty; and
- (2) any areas with very high or very low population densities.

Id. § 9858f(c).

57. The permissible uses of this portion of the states' funding are set out in *id.* §§ 9858c(3)(C), 9858e, 9858f.

58. *Id.* § 9858e. For these activities, states are required to use at least 20% of 25% of their total allocations, which amounts to 5% of their total allocations. But states may use up to 6.25% of their total allocations for these purposes if they limit their expenditures for the other activities funded with this 25% of their allocations to the required minimum for those activities. *See supra* note 55.

Other requirements imposed by the CCDBG on the states include: using CCDBG funds to supplement rather than to supplant other public funding of child care, 42 U.S.C. § 9858c(2)(J), assuring that parents will have unlimited access to their children while their children are in care, maintaining a system for parental complaints, ensuring the availability of consumer information, and enforcing state and local licensing and regulatory requirements. *Id.* §§ 9858c(2)(B)-(E).

59. 42 U.S.C. §§ 9858c(2)(F)-(G). The CCDBG also requires that if a state reduces the level of standards applicable to child care services, it must inform the Secretary of the U.S. Department of Health and Human Services "of the rationale for such reduction." *Id.* § 9858c(2)(H). In addition, states must complete a review of "the law applicable to, and the licensing and regulatory requirements and policies of, each licensing agency that regulates child care services and programs in the State unless the State reviewed such law, requirements, and policies in the 3-year period ending on [the date of the enactment of the CCDBG.]" *Id.* § 9858c(2)(I).

60. *Id.* § 9858c(2)(E).

61. *Id.* § 9858c(2)(E)(ii). Such providers must be permitted to register with the state after they have been selected by parents. *Id.*

are specifically permitted to impose more stringent standards on child care providers that offer services funded under the CCDBG.⁶²

B. Church-and-State Provisions

Congress struggled to create provisions for the grant and contract funding mechanism that would satisfy the dictates of the Establishment Clause, yet allow substantial participation by religiously affiliated child care programs. Numerous interest groups participated in a multi-year process of debate and negotiation over these provisions. Some of these groups advocated an interpretation of the Establishment Clause that would permit extensive participation by religiously affiliated providers, including providers of sectarian services; others advocated interpreting the clause to limit the participation of such providers; and still others wanted primarily to secure the enactment of legislation making federal child care assistance generally available to low-income families.⁶³

The measures finally agreed upon provide that no financial assistance given under a grant or contract with a child care program is to be "expended for any sectarian *purpose or activity*, including sectarian worship or instruction."⁶⁴

62. *Id.* § 9858c(c)(2)(E).

63. The original versions of the CCDBG's precursor, the ABC, contained the strictest church-and-state restrictions, prohibiting any use of funds for sectarian activities, any religious discrimination in employment, and so forth. S. 1885, 100th Cong., 2d Sess. § 19 (1988); H.R. 3660, 100th Cong., 1st Sess. §§ 19-20 (1987). These versions of the bill were supported by a coalition that included many Christian and Jewish groups, but they were unacceptable to the United States Catholic Conference. Greenhouse, *supra* note 39, at B9. When the bills were modified to permit some religious discrimination in admissions policies and to remove some restrictions on discrimination in employment, while retaining the prohibitions on funding sectarian services, S. REP. NO. 484, *supra* note 43, pt. 1, at 53 (S. 1885, § 19(b) as reported); H.R. REP. NO. 985, *supra* note 43, pt.1 (H.R. 3660 as reported), opposition was expressed by a number of groups, including the National Education Association, the American Jewish Committee, the Baptist Joint Committee on Public Affairs, and the National Parents and Teacher's Association. Greenhouse, *supra* note 39, at B9. *See also* Florence Flast, (Committee for Public Education and Religious Liberty), *Child-Care Bill Aids Churches, Not Parents*, N.Y. TIMES, July 14, 1989, at A28; Robert L. Maddox, Americans United for Separation of Church and State, *Child-Care Plan Raises Church-State Issue*, N.Y. TIMES, Sept. 23, 1989, § 1, at 22. The president of the Children's Defense Fund, which led the coalition supporting the bill, "urged coalition members to compromise on the church-state issue, leaving it to the courts rather than imperil the bill's momentum. 'There are later forums for all concerned to pursue church-state concerns after the bill is enacted,' she wrote in February in a memorandum to the coalition groups." Greenhouse, *supra* note 39, at B9. Senator Christopher J. Dodd, the sponsor of the legislation, also "said that as a practical matter, it was important to accommodate the churches, pass a bill and let the courts make the ultimate judgment." *Id.* When Congress debated whether to permit parents to use government-issued vouchers to purchase sectarian services, there was again sharp disagreement. *See infra* note 70. And there were numerous expressions of the desire to leave the matter to the courts. *See infra* note 72. Groups that opposed such use of vouchers included the National Council of Churches, the American Baptist Churches, the American Jewish Committee, the United Church of Christ, and the United Methodist Church. 136 CONG. REC. H1319-20 (daily ed. Mar. 29, 1990) (statements of Reps. Morella, Edwards, and Williams). Groups that supported such use included Council for American Private Education, Lutheran Church-Missouri Synod, National Association of Episcopal Schools, National Catholic Educational Association, National Society for Hebrew Day Schools, and Seventh-Day Adventist Board of Education. 135 CONG. REC. S7169 (daily ed. June 22, 1989) (statement of Sen. Durenberger, inserting a letter into the record from a number of groups).

64. 42 U.S.C. § 9858k(a) (emphasis added).

The statute itself does not define the phrase "sectarian purpose or activity." As explained in Part III, the meaning of the statute, read as a whole, is that the states may not fund through grants and contracts any *programs* that engage in sectarian activities.⁶⁵ Religiously affiliated programs that do not engage in religious activities may participate in the statute's grant and contract aid scheme, subject to certain restrictions on religious discrimination in admitting children and hiring employees.⁶⁶

The CCDBG specifies that child care certificates may be used to purchase "sectarian child care services."⁶⁷ The statute does not further describe or define such services, but federal regulations state that the terms "sectarian organization" and "sectarian child care provider" include "any organization or provider that engages in religious conduct or activity, or that seeks to maintain a religious identity in some or all of its functions."⁶⁸ The provision allowing certificates to be used for sectarian services was engrafted onto the statute late in its legislative history, such use having been rejected in earlier versions of the legislation.⁶⁹ Unlike the complex church-and-state-related regulations governing grant and contract aid, this provision was not a product of protracted debate, negotiation, and compromise. There was sharp disagreement during the legislative process about whether it would be constitutional to allow parents to redeem these vouchers for sectarian child care.⁷⁰ When it appeared that the act could not pass without a provision permitting their use for sectarian services, Congress adopted such a provision in later versions of the statute.⁷¹ The view was expressed in debate, and

65. See *infra* notes 92, 97, 99-111 and accompanying text.

66. See *infra* notes 93, 98, 112-16 and accompanying text.

67. "Nothing in this subchapter shall preclude the use of such certificates for sectarian child care services if freely chosen by the parent." 42 U.S.C. § 9858n(2).

68. 45 C.F.R. § 98.2(ii) (1992). The regulation also states that the terms mean "religious organizations or religious providers generally. . . . There is no requirement that a sectarian organization or provider be managed by clergy or have any particular degree of religious management, control, or content." *Id.* "Sectarian purposes and activities" are defined as "any religious purpose or activity, including but not limited to religions worship or instruction." *Id.* § 98.2(jj).

69. See *supra* notes 41, 43 and accompanying text; *infra* notes 70-72 and accompanying text.

70. See, e.g., 136 CONG. REC. H1320 (daily ed. Mar. 29, 1990) (nse for sectarian services does "honor the [C]ourt's standards"); *id.* at H1265 (daily ed. Mar. 29, 1990) (statement of Rep. Ford) ("no doubt in my mind that [it] is unconstitutional"); 135 CONG. REC. S7441 (daily ed. June 23, 1989) (statement of Sen. Hatch) ("many authorities agree . . . [it] is constitutional"); 135 CONG. REC. S7184 (daily ed. June 22, 1989) (statement of Sen. Metzenbaum) ("all the words in the dictionary cannot possibly make that which is unconstitutional constitutional"); *id.* at S7168 (daily ed. June 22, 1989) (statement of Sen. Durenberger) ("no [E]stablishment [C]ause reason why the certificate program should be restricted" to nonsectarian services); *id.* at S7153 (daily ed. June 22, 1989) (statement of Sen. Packwood) ("[n]se of vouchers for sectarian services] is probably actually unconstitutional"); Steven A. Holmes, *House, 265-145, Votes to Widen Day Care Programs in the Nation*, N.Y. TIMES, Mar. 30, 1990, at A1; Tolchin, *supra* note 40, at 12.

71. In June 1989, the Senate first passed a version of the legislation that permitted the use of vouchers for sectarian child care services. S. 5, *supra* note 41, § 12(a). In discussion on the floor of the Senate, Senator Glenn expressed his opposition to the provision, quoting with approval an editorial in *The Washington Post* that stated:

In another important area the bill has been disfigured, however; to pick up votes, the sponsors have abandoned principles they would otherwise uphold and agreed to give public funds to sectarian programs. Congress would stop defending the Constitution and put that entire burden on the courts. Badly as the sponsors want child care, they cannot want it this badly; the

embodied in a version of the provision that passed in both Houses, that instead of attempting to finally resolve the close constitutional question, Congress should simply approve the measure and leave the issue to the courts.⁷²

In addition to identifying which CCDBG funds can be used for sectarian services, the statute imposes restrictions on religious discrimination in admissions and employment. Programs that receive grant and contract aid are prohibited from discriminating on the basis of religion in the admission of children. According to the federal regulations promulgated under the statute, the prohibition does not apply to providers that receive CCDBG funds solely through child care certificates.⁷³ However, the regulatory interpretation is questionable because, on balance, the statute by its terms applies the ban to these providers as well.⁷⁴ The prohibition on discrimination in admissions is

provision needs to be fixed.

135 CONG. REC. S7181-82 (daily ed. June 22, 1989) (statement of Sen. Glenn). Senator Dodd conceded in response:

[I] have talked [to] virtually, I would say, almost every colleague here on both sides of the aisle about this. It was quite clear that this was a feeling that was held very strongly by many, and that they would not be willing to support a major effort in child care in the absence of some language in here. . . . [T]his could have been left, I suppose, to a battle out here on the floor, an amendment fight, which I would say, candidly, those who support the use of certificates and religious-based child-care providers would have prevailed. . . . In any piece of legislation, there is a give and take along the way.

Id. at H7182 (daily ed. June 22, 1989) (statement of Sen. Dodd).

In March 1990, the House first passed a version of the bill that permitted the use of vouchers for sectarian child care services. H.R. 3, *supra* note 41, § 2012(a)(2)(A). The House had rejected (by a vote of 297 to 125) an amendment that would have, like earlier versions of the legislation, simply prohibited the use of any funds for sectarian activities. 136 CONG. REC. H1322 (daily ed., Mar. 29, 1990).

72. The bills passed in the Senate and the House allowing the use of certificates for sectarian services included the qualifying statement that “[f]inancial assistance provided under this subtitle shall not be expended in a manner inconsistent with the Constitution.” S. 5, *supra* note 41, § 121(a); H.R. 3, *supra* note 41, § 301. Senator Kennedy explained:

I know that some Senators are concerned about the constitutionality of permitting child-care certificates to be used for sectarian care. It is a close and difficult question. Our bill draws a line coextensive with the Constitution’s limits. If intervening Supreme Court decisions or other developments were to make it clear that there is a constitutional problem, then the language of the substitute itself would forbid the use of Federal funds for this purpose.

135 CONG. REC. S7144 (daily ed. June 22, 1989) (statement of Sen. Kennedy). A supporter of the bill, who stated his view that the use of vouchers for sectarian services is unconstitutional, continued: “The provision . . . which requires consistency with the Constitution would not therefore authorize Federal funds to be used in such a manner. . . . I recognize that there are conflicting legal opinions regarding this issue and that ultimately the issue may be resolved in the courts. That is not, however, an uncommon result . . .” *Id.* at S7159 (daily ed. June 22, 1989) (statement of Sen. Cranston).

73. “Child care providers (other than family child care providers . . .) that receive assistance through grants and contracts under the Block Grant shall not discriminate in admission against any child on the basis of religion.” 45 C.F.R. § 98.46(a) (1992).

74. The statute states that “[a] child care provider (other than a family child care provider) that receives assistance under this subchapter shall not discriminate against any child on the basis of religion in providing child care services.” 42 U.S.C. § 9858(a)(2)(A). The regulations interpret the phrase “[c]hild care provider that receives assistance under this subchapter” as meaning a provider that receives CCDBG aid through grants or contracts rather than only through certificate programs, 45 C.F.R. § 98.2(k) (1992), distinguishing that phrase from the phrase “services for which assistance is made available under the Act.” 57 Fed. Reg. 34,359, 34,383-84 (1992) (to be codified at 45 C.F.R. §§ 98-99) (proposed Aug. 4, 1992).

subject to one significant exception: a child who will *not* occupy a slot funded under the CCDBG may be given preference if the child or the child's family members "participate on a regular basis in other activities of the organization that owns or operates such provider,"⁷⁵ which may be a church or a parochial school.⁷⁶ This exception is not available, however, if the total of

While it is true that some other sections of the statute do use alternate phrasing—for example, 42 U.S.C. 9858c(c)(2)(E)(i) ("services within the State for which assistance is provided under this subchapter")—this would be an excessively subtle way for Congress to make such an important distinction. In fact, when Congress wishes to make clear in another section of the statute that only grant and contract aid is involved, it does so very specifically. *See id.* § 9858k(a) ("financial assistance provided under this subchapter, pursuant to the choice of a parent under section 9858c(c)(2)(A)(i)(I) of this title or through any other grant or contract under the State plan").

On the other hand, it seems somewhat anomalous to allow parents to redeem the statute's child care certificates for sectarian services while prohibiting the providers of sectarian services from discriminating not only in the admission of children but also in the hiring of the caregivers who will work directly with the children. *See infra* note 81 and accompanying text (discussing the restriction on employment discrimination, which states that a provider "that receives assistance under this subchapter shall not discriminate in employment on the basis of the religion of the prospective employee" if the employee will be working directly with children. 42 U.S.C. § 9858l(a)(3)(A)). If, contrary to the regulatory interpretation, these restrictions on discrimination in admissions and employment apply to providers of sectarian services that receive certificates, then those providers must hire workers on a nondiscriminatory basis to teach religion and to conduct religious activities, even though an applicant's religious beliefs and training would probably be a bona fide qualification for the position.

The legislative history of the prohibitions on discrimination in admissions and in employment does not support the regulations' subtle distinction between "providers that receive assistance" and "services for which assistance is made available." Most of the earlier versions of the prohibition on discrimination in admissions appeared in versions of the statute that included child care certificates but did not permit their use for sectarian services. As first reported out in both the House of Representatives and the Senate, the prohibition on discrimination in admissions explicitly applied to all forms of aid: "A child care provider may not discriminate against any child on the basis of religion in providing child care services in return for a fee paid, reimbursement received, or certificate redeemed, in whole or in part with financial assistance provided under" the Act. H.R. 3660, 100th Cong., 2d Sess. § 119(b) (1988), *reprinted in* H.R. REP. NO. 985, 100th Cong., 2d Sess., pt. 1 (1988); S. 1885, 100th Cong., 2d Sess. § 19(b) (1988), *reprinted in* S. REP. NO. 484, 100th Cong., 2d Sess., pt. 1, at 53 (1988).

In bills introduced in each House in the next Congress, the prohibition on discrimination in admissions again was explicitly applied to all forms of aid. H.R. 30, *supra* note 46, § 670P(d); S. 5, *supra* note 41, § 20(b). But, as reported out by the Senate in that Congress, the prohibition stated only: "A child care provider that receives assistance under this Act shall not discriminate against any child on the basis of religion in providing child care services." *Id.* § 20(b)(2)(A), *reprinted in* S. REP. NO. 17, 101st Cong., 1st Sess., pt. 1, at 23 (1989). It was also in this reported bill that the similarly worded ban on employment discrimination first appeared. S. 5, § 20(b)(3)(A), *reprinted in* S. REP. NO. 17, *supra*, at 23. Although the language in the admissions provision had changed and no longer explicitly referred to all types of aid, the accompanying report does not suggest that the Senate committee attached any significance to the change. S. REP. NO. 17, *supra*, at 49-50. In fact, the committee report states that "[t]he Committee also wishes to clarify that it intends to subject federal financial assistance in the form of child care certificates to the same restrictions required for grants and loans provided under this Act." *Id.* at 50.

Finally, in the next Congress, before the passage of the CCDBG, the Senate passed a version of the legislation that included the same prohibitions on discrimination in admissions and employment, the ones that did not explicitly refer to all types of aid, *and*, for the first time, a provision exempting providers that receive certificates from the general ban on using funds supplied under the statute for sectarian purposes or activities. S. 5, *supra* note 41, §§ 122(b)(2)(A), 122(b)(3)(A), 121(a). In the absence of any indication to the contrary, the Senate either did not intend to also change the applicability of the bans on discrimination in admissions and employment or did not consider the question of changing the nondiscrimination provisions. In the CCDBG, the language of the bans on discrimination survived unchanged. 42 U.S.C. §§ 9858l(a)(2), 9858l(a)(3).

75. 42 U.S.C. § 9858l(a)(2)(B).

76. *See infra* notes 224-29 and accompanying text.

a child care program's public funding from all sources—federal, state, and local—"amounts to 80 percent or more of the operating budget."⁷⁷ Under those circumstances, programs are prohibited from discriminating against any child in admission on the basis of religion,⁷⁸ and thus may not give preference to participants in the other activities of a sectarian organization that owns or operates the program.⁷⁹ This applies to certificate recipients as well as grant and contract recipients, even under the interpretation of the statute adopted by the federal regulations.⁸⁰

Programs that receive CCDBG funds under grants and contracts are also prohibited from discriminating on the basis of religion in hiring an employee whose "primary responsibility is or will be working directly with children in the provision of child care services."⁸¹ According to the federal regulations promulgated under the statute, this ban does not apply to providers that receive CCDBG funds only through child care certificates. But again, the regulatory interpretation is questionable, and the statute explicitly applies the employment discrimination ban to these providers as well.⁸² This limited ban on employment discrimination, like the admissions regulation, has one significant exception. Programs may give preference to an employment candidate for such a position who is "already participating on a regular basis in other activities of the organization that owns or operates such provider."⁸³

77. 42 U.S.C. § 9858I(a)(4).

78. *Id.*

79. Some of the earlier bills considered by Congress contained total bans on religious discrimination in admissions if a child care provider received any federal aid, while other versions included less restrictive schemes in which providers could freely discriminate on the basis of religion in admitting children to non-funded slots. *E.g.*, S. 1885, *supra* note 43 §§ 20(b) (as introduced) (prohibiting religious discrimination in admissions), 19(b) (as reported, S. REP. 484, *supra* note 27, at 53) (prohibiting religious discrimination in admissions only for funded slots); H.R. 3660, *supra* note 43 § 20(b) (1987) (as introduced) (prohibiting discrimination in admissions); H.R. 3600, 100th Cong., 1st Sess. § 119(b) (1987) (as reported, H. REP. 985, *supra* note 43 pt.1) (prohibiting religious discrimination in admissions only for funded slots).

80. 45 C.F.R. § 98.46(c) (1992). The regulations apply this provision to certificate recipients as well as to grant and contract recipients because the reference reads, "assistance provided under this subchapter[.]" instead of, "provider . . . that receives assistance under" the Act. 42 U.S.C. § 9858I(a)(4); *see supra* note 74. However, the statutory provision goes on in the same sentence to refer to the "budget of a child care provider that receives such assistance." 42 U.S.C. § 9858I(a)(4) (emphasis added).

81. 42 U.S.C. § 9858I(a)(3)(A). This restriction applies to all grant and contract recipients. However, the U.S. Department of Health and Human Services has interpreted the statute otherwise, concluding that child care programs owned or operated by sectarian organizations are not subject to this restriction. *See infra* notes 82, 112-16 and accompanying text.

82. 45 C.F.R. § 98.47(a)(1) (1992). The statute states that "[a] child care provider that receives assistance under this subchapter shall not discriminate in employment on the basis of the religion of the prospective employee if such employee's primary responsibility is or will be working directly with children in the provision of child care services." 42 U.S.C. 9858I(a)(3)(A). The regulations interpret the phrase "a child care provider . . . that receives assistance under this subchapter" as meaning a provider that receives CCDBG aid through grants and contracts only, rather than through certificate programs. 45 C.F.R. § 98.2(k) (1992); 57 Fed. Reg. 34,359, 34,384 (1992) (regulation codified at 42 C.F.R. § 98) (distinguishing that phrase from the phrase "services for which assistance is made available" under the Act); *see supra* note 74 (explaining why this subtle distinction made by the regulations is not persuasive).

83. 42 U.S.C. § 9858I(a)(3)(B). The statute states:

If two or more prospective employees are qualified for any position with a child care provider receiving assistance under this subchapter, nothing in this section shall prohibit such child care

Again, this organization may be a church or parochial school.⁸⁴ If a child care program receives 80% or more of its operating budget from public sources, however, it may *not* discriminate in this fashion in hiring staff whose "primary responsibility is or will be working directly with children in the provision of child care."⁸⁵ But in the employment of all *other* staff members, the statute explicitly protects and guarantees the right of a sponsoring sectarian organization to "require that employees adhere to the religious tenets and teachings of such organization, and such organization may require that employees adhere to rules forbidding the use of drugs or alcohol."⁸⁶

In enacting these provisions concerning religious discrimination, Congress sought not only to satisfy Establishment Clause concerns but also to avoid discriminatory conduct.⁸⁷ Congress distanced itself from private actors' religious discrimination by prohibiting such discrimination in admitting children to subsidized slots, and by dictating a facially neutral criterion—membership in a sponsoring organization—for exercising preferences in

provider from employing a prospective employee who is already participating on a regular basis in other activities of the organization that owns or operates such provider.

Id.; see also 45 C.F.R. 98.47(a)(3) (1992) (regulation based on the statutory provision).

84. See *infra* notes 224-29 and accompanying text.

85. 42 U.S.C. § 9858(a)(4); 45 C.F.R. § 98.47(c) (1992) (regulation applies this provision to recipients of certificates as well as to recipients of grant and contract aid).

86. 42 U.S.C. §§ 9858(a)(1)(A)-(B). Federal regulations extend this to all employees of child care services operated by sectarian organizations, 45 C.F.R. § 98.47(b) (1992), although this interpretation is not supported by the language of the statute. See *infra* notes 111-15 and accompanying text.

87. There is a question whether the receipt of CCDBG funds would subject a provider's religious discrimination to constitutional review, but the answer is almost surely that it would not have this effect. The Supreme Court has found that the receipt of substantial public funds, even to perform a highly regulated function, does not make the recipient a governmental actor. For example, in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), the Court held that the personnel decisions of a private school for troubled youth were not governmental actions even though the tuition of most of the students was paid by the Commonwealth of Massachusetts and the school was performing a public function (that is, public education) in a regulated environment. In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court held that the patient transfer decisions of a private nursing home were not governmental actions even though the home depended on public funding, was highly regulated, and applicable regulations encouraged patient transfers. Given this case law, it seems clear that the receipt of CCDBG funds would not render a provider's admission and employment decisions subject to scrutiny under the Fourteenth Amendment. See generally *id.* at 1004 (a "private decision" is not governmental action unless the government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State").

Furthermore, in *Norwood v. Harrison*, 413 U.S. 455 (1973), in an action against a state, the Supreme Court indicated that aid that comports with the Establishment Clause does not implicate the government in a recipient's discriminatory practices. *Id.* at 468. In that case, the Supreme Court held that a state may not, under a law that provides free books to students in all schools, give books to students who attend a private school that engages in racially discriminatory practices. The Court distinguished permissible aid to parochial schools from aid to private schools that have racially discriminatory policies. *Id.* at 468-70. "The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of support of segregated schools through any arrangement . . ." *Id.* at 464 n.7. The Court explained that the Constitution "places no value on discrimination" whereas "the transcendent value of free religious exercise in our constitutional scheme leaves room for 'play in the joints' to the extent of cautiously delineated secular governmental assistance to religious schools." *Id.* at 469-70. Such assistance "does not substantially promote the readily identifiable religious mission of those schools," *id.* at 468, and thus does not implicate the government in the recipient's religiously motivated conduct.

filling non-funded slots and hiring staff who work directly with children.⁸⁸

Finally, in anticipation of possible legal attacks under state constitutions' religion clauses, the statute declares that no provision of a state constitution or state statute may be construed to prohibit "the expenditure in or by sectarian institutions of any Federal funds provided under this subchapter."⁸⁹ Although the provision is perhaps phrased in an unconstitutional fashion, Congress is presumably free under the Supremacy Clause to override any state law restriction on federal expenditures as long as the congressional measure is permissible under the Federal Constitution.⁹⁰ Because no state matching funds are required under the CCDBG, no issue will arise concerning the permissibility under state law of expending such funds for religiously affiliated child care. However, states may wish to voluntarily add state funds. The U.S. Department of Health and Human Services in fact encourages states to administer CCDBG funds together with other welfare-related child care aid programs that include state funds, thereby providing "seamless service" to low-income families.⁹¹ Therefore, issues may arise concerning the

88. An additional church-and-state-related provision of the CCDBG governs the use of federal funds by providers to bring physical facilities into compliance with health and safety requirements. 42 U.S.C. § 9858d(b). The statute allows states to make funds available to all child care providers for "minor remodeling" of buildings and facilities, while excluding the use of funds for the purchase or improvement of land. *Id.* These funds may not be used by sectarian agencies or organizations, however, "except to the extent that renovation or repair is necessary to bring [a] facility . . . into compliance with [the] health and safety requirements" that states are required by the CCDBG to have in effect. *Id.* § 9858d(b)(2). The constitutionality of granting such funds to sectarian organizations is doubtful under the Supreme Court's decision in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In *Nyquist*, the Court rejected a plan that awarded pupil maintenance grants, which were capped at 50% of the average per-pupil cost for such services in the public schools. The Court found that the grants could not be paid to sectarian schools because there was no way to limit their use to the schools' secular activities. *Id.* at 774-77.

89. 42 U.S.C. § 9858l(b). That subsection states:

Nothing . . . shall be construed to supersede or modify any provision of a State constitution or State law that prohibits the expenditure of public funds in or by sectarian institutions, except that no provision of a State constitution or State law shall be construed to prohibit the expenditure in or by sectarian institution of any Federal funds provided under this subchapter.

Id.; see also 45 C.F.R. § 98.3(a) (1992).

90. Under the Supremacy Clause, federal law may of course preempt a state law provision respecting the use of federal funds. *See, e.g.*, *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992). Such a preemption of state law would have the same effect as this statutory provision. Nevertheless, there is no constitutional authority for the Federal Government to dictate to state courts how to interpret state law.

91. 45 C.F.R. § 98.12 (1992) states: "The lead agency must: (a) Coordinate the provision of services for which assistance is provided under this part with other Federal, State, and local child care and early childhood development programs, and before- and after-school programs . . ." According to the supplementary information accompanying the interim rule: "[O]ne goal of a coordinated service delivery system is to create a fabric of seamless service. Seamless service means providing eligible parents access to and payment for child care services and programs which bridge and supplement the parents' child care needs, even as eligibility changes over time . . ." 56 Fed. Reg. 26,200 (1991) (to be codified at 42 C.F.R. § 98).

Recognizing the possibility of state constitutional law questions, however, the final regulations include a provision that does not appear in the statute: "If a State law or constitution would prevent Federal Block Grant funds from being expended for the purposes provided in the Act, without limitation, then States must segregate State and Federal funds." 45 C.F.R. § 98.3(b) (1992).

expenditure of state funds for child care in violation of state constitutional provisions regarding the establishment of religion. Other issues may arise under state law concerning states' voluntary participation in the CCDBG if such participation requires expenditures in violation of state constitutional principles.

III. CONSTITUTIONALITY OF CCDBG AID

Although the CCDBG is the compromise product of conflicting social and constitutional views, the statute taken as a whole and properly interpreted embodies a coherent view of the Establishment Clause. Reflecting existing constitutional doctrines, it divides the universe of child care providers into two groups—nonsectarian and sectarian—one of which may be aided through state grants and contracts *or* through parent-held certificates, and one of which may be financially aided only through the device of certificates.⁹² The statute further expresses its view of the Establishment Clause by imposing restrictions on religious discrimination in admissions and employment.⁹³ The statutory scheme is designed to ensure that there will be no constitutionally impermissible assistance given to sectarian institutions, while channeling substantial federal aid to religiously affiliated providers in ways that are consonant with Establishment Clause values.⁹⁴ This Part argues that the CCDBG's grant and contract provisions are consistent with existing Establishment Clause law.⁹⁵ However, the statute's voucher mechanism, although it may meet with the Supreme Court's approval,⁹⁶ does undermine traditional Establishment Clause doctrines and the current church-and-state balance.

A. The Meaning of the Statute's Provisions

Before analyzing the constitutionality of the CCDBG, it is necessary to address two questions concerning its meaning: (1) whether the statute permits states to award grant and contract aid to sectarian child care programs to support their secular functions, and (2) whether all of the statute's employment discrimination rules apply to religiously affiliated programs. Proponents of a reinterpretation of the Establishment Clause that would allow unrestricted government aid to sectarian organizations have argued that Congress meant

92. See *supra* notes 64-72 and accompanying text; *infra* notes 99-110, 124-40, 224-73 and accompanying text.

93. See *supra* notes 73-88 and accompanying text; *infra* notes 112-16, 264, 272-73 and accompanying text.

94. See *supra* part II.B.

95. But see Lee Boothby, *The Establishment and Free Exercise Clauses of the First Amendment and Their Impact on National Child Care Legislation*, 26 HARV. J. ON LEGIS. 549 (1989) (arguing that the Act for Better Child Care of 1987, which strictly prohibited the use of vouchers as well as grant and contract aid for sectarian activities, would nevertheless offend the Establishment Clause unless a number of very specific restrictions were added to the legislation).

96. But see *id.*

to allow sectarian child care programs to receive direct government aid.⁹⁷ Some have also argued that Congress intended to exempt programs sponsored by sectarian organizations from certain of the statute's employment discrimination rules.⁹⁸ Accepting such constructions of the statute would lead to an assessment of its constitutionality very different from the one presented here.

The CCDBG provides that no financial assistance through grant or contract tuition subsidies may be "expended for any sectarian purpose or activity, including sectarian worship or instruction."⁹⁹ The earliest introduced version of the legislation defined prohibited funding of "sectarian purposes or activities" to include the funding of any sectarian "*program* or activity that has the purpose or effect of advancing or promoting a particular religion or religion generally."¹⁰⁰ This interpretative language was later deleted from the bill, leaving only the general prohibition on funding sectarian purposes or activities, plus the words "including sectarian worship or instruction." The CCDBG contains the remaining language. The significance of the deletion of the interpretive language was the subject of some disagreement in Congress, but the legislative history strongly demonstrates that Congress never abandoned its intention to prohibit the payment of grant and contract aid to sectarian *programs*.¹⁰¹ In addition, the CCDBG's statutory scheme as a

97. E.g., Michael W. McConnell, *Exchange; Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) [hereinafter McConnell, *Religious Participation in Public Programs*]; Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1025-28 (1991); see also John A. Liekweg, *Participation of Religious Providers in Federal Child Care Legislation: Unrestricted Vouchers Are a Constitutional Alternative*, 26 HARV. J. ON LEGIS. 565, 568 (1989).

98. See *supra* notes 74, 81-83 and *infra* notes 112-16 and accompanying text.

99. 42 U.S.C. § 9858k(a). The subsection states:

No financial assistance provided under this subchapter [CCDBG], pursuant to the choice of a parent under section 9858c(c)(2)(A)(i)(I) of this title [grants and contracts under which the state pays tuition subsidies] or through any other grant or contract under the State plan, shall be expended for any sectarian purpose or activity, including sectarian worship or instruction.

Id.; see also 45 C.F.R. § 98.54(d) (1992) ("Funds provided under grants or contracts to providers may not be expended for any sectarian purpose or activity, including sectarian worship or instruction."). According to the federal regulations, "*sectarian purposes and activities* means any religious purpose or activity, including but not limited to religious worship or instruction." 45 C.F.R. § 98.2(jj) (1992) (emphasis in original).

100. H.R. 3660, 100th Cong., 1st Sess. § 19(a)(1)-(2) (1987) (emphasis added). The bill stated:

(1) GENERAL RULE.—No funds authorized by this Act shall be expended for sectarian purposes or activities.

(2) DEFINITION.—For purposes of this subsection, the term "sectarian purposes or activities" means —

(A) any program or activity that has the purpose or effect of advancing or promoting a particular religion or religion generally[.]

Id. Section 19 also prohibited provision of services on the premises of a pervasively sectarian institution unless "all religious symbols and artifacts are covered or have been removed from such classroom or space," and prohibited provision of services by "persons who are otherwise employed as teachers or teachers' aides in a sectarian school." *Id.* at § 19(a)(2)(B). S. 1885, 100th Cong., 1st Sess. §§ 19(a)(1)-(2), 19(a)(2)(B) (1987), contained identical language.

101. Senator Orrin G. Hatch, in the section entitled "Additional and Minority Views[.]" which was appended to a later committee report, argued that the altered, more general prohibition did not prevent an entity receiving funds from including sectarian activities in its child care services. S. REP. NO. 17, 101st Cong., 1st Sess. 63 (1989). "I believe that section 19(a) means what it says . . . The language of this section should be applied in a manner consistent with, but not beyond, the constitutional restrictions of the Establishment Clause as interpreted by the Supreme Court[.]" *Id.* Even the dissenting

whole and other aspects of its legislative history plainly establish that

views in the House Report concerning the altered language noted, however, that "conflicting interpretations of the legislative language have been made," but nevertheless agreed with the interpretation that "church-sponsored child care providers would not be eligible providers under the conditions of the bill unless they completely secularize their programs." H.R. REP. NO. 985, 100th Cong., 2d Sess., pt. 1, at 31 (1988).

According to the Senate Committee Report, the altered, more general language prohibits the receipt of grant and contract aid by a sectarian child care program:

Under a narrow, technical interpretation of this prohibition, one could argue that sectarian activities are permitted in a child care program funded under this Act, so long as no financial assistance under this Act is used for the sectarian activities. The Committee expressly rejects such a narrow, technical interpretation of section 18(a). On the contrary, the Committee adopts a broad interpretation of the prohibition in section 18(a). Under the Committee's broad interpretation, an entity receiving any form of financial assistance under this Act shall not include any sectarian activities, worship or instruction in providing child care services under this Act. Section 18(a) embodies the Committee's intent that *all aspects* of child care services provided by an entity receiving financial assistance under this Act be *completely non-sectarian* in nature and in content.

S. REP. NO. 484, *supra* note 43, at 78 (emphasis in original); *see also id.* at 71 (including in a list of eligible providers, "churches and synagogues that offer nonsectarian services"); *id.* at 79 (prohibiting religious preferences from being "implemented in a manner which will undermine the intent of Congress that all funded programs be completely nonsectarian"). The House Committee Report also referred to the intent of Congress "that all funded programs be nonsectarian in nature and in content." H.R. REP. NO. 985, *supra* note 43, at 19. The report further explained:

The Committee made certain language changes in Sections 19 and 20 of the original bill in order to simplify the provisions on the separation of church and state and nondiscrimination. It is the Committee's belief and intent that the language of the bill as reported by the subcommittee, although more general in form, embodies the important long-standing public policy and constitutional principles relating to the separation of church and state.

Id. Dissenting views appended to the House Report unhappily agreed: "[I]t appears that church-sponsored child care providers would not be eligible providers under the conditions of the bill unless they completely secularize their programs." *Id.* at 31.

When similar legislation was introduced in the next Congress, with the same general prohibition, Congress again intended to allow funding only of nonsectarian programs. According to the Senate Committee's summary of the bill, "Non-sectarian church-based child care is fully eligible for assistance." S. REP. NO. 17, *supra* note 74, at 26. Discussing the bill's general church-and-state limitation, the Committee stated that the section:

[I]s intended to ensure that all child care programs receiving funds under this Act are nonsectarian, whether or not a sectarian institution operates the program. . . . [T]he Committee adopts a broad interpretation of the prohibition in section 19(a). Under the Committee's broad interpretation, an entity receiving any form of financial assistance under this Act shall not include any sectarian activities, worship or instruction in providing child care services under this Act. Section 19(a) embodies the Committee's intent that all aspects of child care services provided by an entity receiving financial assistance under this Act be completely non-sectarian in nature and in content.

Id. at 48-49.

Congressional debates also reflected the view that the general prohibition prevented the payment of grant and contract aid to sectarian programs. The view was expressed in comments about a proposed amendment that included the general prohibition as well as the phrase that "[f]inancial assistance provided under such subtitle shall not be expended in a manner inconsistent with the Constitution of the United States." H. REP. 436, 101st Cong., 2d Sess. at 15. Representative Eliot L. Engel noted: "This amendment would state explicitly that religious organizations can receive Federal funds for child care programs conducted on church property only if the program itself is nonsectarian." 136 CONG. REC. H1316 (daily ed. Mar. 29, 1990) (statement of Rep. Engel). Representative Nita M. Lowey added: "But this amendment does not prevent a single synagogue or a single church from offering child care services. It simply states that those programs must be nonsectarian in nature if they use Federal funds." *Id.* at H1317 (daily ed. Mar. 29, 1990) (statement of Rep. Lowey). Representative Mel Levine stated: "The Edwards amendment would allow funds to go to sectarian institutions that provide nonsectarian care . . ." *Id.* at H1319 (daily ed. Mar. 29, 1990) (statement of Rep. Levine).

sectarian programs may not receive grant and contract funds.

The Federal Government has been rather ambiguous on this dispute when issuing regulations to implement the CCDBG. The Department of Health and Human Services' regulations reiterate the statutory prohibition on funding sectarian purposes and activities,¹⁰² and they define as sectarian those providers that "engage[] in religious conduct or activity or that seek[] to maintain a religious identity in some or all of [their] functions."¹⁰³ The supplementary information to the Department's final regulations states that "care provided under grant or contract may not include sectarian worship or instruction," but it also states that "nothing in the Act or regulation prevents a sectarian organization from using other funds, including funds from certificates, for sectarian activities."¹⁰⁴ On the one hand, the second statement could be interpreted to mean that a sectarian organization could simultaneously offer separate sectarian and nonsectarian programs. On the other hand, the statement could be a subtly expressed endorsement of the view that sectarian programs may receive grant and contract funds so long as they use those particular funds only for nonsectarian activities.

The view that sectarian programs may receive grant and contract aid ignores a central feature of the statute's legislative history. As originally drafted, the statute's church-and-state provisions did not distinguish between recipients of grant and contract aid and recipients of child care certificates. Both forms of aid were made subject to the general prohibition that federal financial assistance could not be "expended for any sectarian purpose or activity."¹⁰⁵

102. 45 C.F.R. § 98.54(d) (1992).

103. 45 C.F.R. § 98(ii)2 (1992). The regulation provides:

Sectarian organization or sectarian child care provider means religious organizations or religious providers generally. The terms embrace any organization or provider that engages in religious conduct or activity or that seeks to maintain a religious identity in some or all of its functions. There is no requirement that a sectarian organization or provider be managed by clergy or have any particular degree of religious management, control, or content[.]

Id. (emphasis removed and emphasis added).

104. 57 Fed. Reg. 34,393 (1992) (to be codified at 42 C.F.R. § 98).

105. The earlier Senate bill, S. 1885, mandated that "[n]o financial assistance provided under this Act shall be expended for any sectarian purpose or activity, including sectarian worship and instruction," S. 1885, *supra* note 43, § 19, and it permitted states to use grants and contracts or child care certificates or both. *Id.* § 8(a). (It did not include any provision permitting the use of vouchers for sectarian care.) The Senate committee report accompanying the bill stated that the legislation:

prohibits an entity receiving any of the forms of financial assistance provided under this Act (e.g., grants, contracts, loans, or child care certificates) from using such assistance for any sectarian purpose or activity, including sectarian worship and instruction. This section is intended to ensure that all child care programs receiving funds under this Act are nonsectarian, whether or not a sectarian institution operates the program.

S. REP. NO. 484, *supra* note 43, at 78 (emphasis added).

The Senate committee also noted that it wished "to clarify that it intends to subject federal financial assistance in the form of child care certificates to the same restrictions required for grants and loans provided under the Act." *Id.* at 80.

The earlier House bill, H.R. 3660, mandated that "no funds authorized by this Act shall be expended for sectarian purposes or activities," H.R. 3660, *supra* note 43, § 19, and it permitted states to have grants and contracts or child care certificates or both. *Id.* § 8(a). (It did not include any provision permitting the use of vouchers for sectarian care.) The House committee report accompanying the legislation said, "The Committee . . . wants to emphasize that federal financial assistance in the form of child care certificates should receive the same legal treatment as grants and loans under this Act." H.R. REP. NO. 985, *supra* note 43, at 12.

During the legislative process, after protracted debate, Congress added to the statute a specific provision allowing child care certificates to be expended for sectarian services: "Nothing in this [statute] shall preclude the use of . . . certificates for sectarian child care services if freely chosen by the parent."¹⁰⁶ This legislative action is inexplicable if the statute's general prohibition on expending CCDBG funds for sectarian "purposes or activities" *already* allowed all forms of aid—grant and contract aid and child care certificates—to be used for sectarian child care services.

If the preexisting church-and-state provisions did not bar sectarian programs from receiving direct aid, then they also would not have barred sectarian programs from redeeming certificates. It would therefore not have been necessary to add a section granting permission for sectarian providers to participate in the child care certificate scheme. The addition of the section permitting participation in the voucher plan was motivated, in fact, by a desire to allow sectarian child care programs to benefit from the CCDBG. The use of the certificate mechanism for this purpose, rather than the use of direct grants and contracts, was seen as a constitutionally more palatable way to include them.¹⁰⁷

106. 42 U.S.C. § 9858n(2).

107. For example, Senator Orrin G. Hatch said:

Constitutional restrictions on direct public aid do not, I believe, apply to indirect aid such as the certificates in this Act even if pervasively religious organizations benefit. The reason is that such organizations receive such aid not as a result of governmental action, but rather as a result of an intervening choice by the primary recipient, in this case the parent.

S. REP. NO. 17, *supra* note 74, at 62 (accompanying S. 5) (Additional and Minority Views, Additional Views of Sen. Hatch) (arguing that the general prohibition on use of aid for religious purposes and activities should not be interpreted to prevent sectarian programs from receiving child care certificates).

And Representative Nancy L. Johnson stated:

[C]onstitutionally, I believe that the only way to get around the church-state issue is to mandate that parents have the right to a voucher and spend it with the provider they think best—just like they have a right to get food stamps and spend them in supermarkets or the corner store.

Mr. Chairman, I attended a long seminar on the subject at Harvard, and the one thing the lawyers on each side of this debate agreed on was that certificates were the only legitimate way to allow public monies to be expended in religious day care.

136 CONG. REC. H1310 (daily ed. Mar. 29, 1990) (statement of Rep. Johnson).

In addition, Representative Marilyn Lloyd stated:

The voucher provisions contained in the Stenholm proposal, for low-income families to send their children to day care facilities in religious institutions, acknowledge that at least one-third of all child care in this county is provided by religious facilities. This language will firmly guarantee family choice and ensure the rights of many Americans who choose religious care as their best option for child care services.

Id. at H1319 (daily ed. Mar. 29, 1990) (statement of Rep. Lloyd).

In support of the amendment deleting language that would have exempted child care certificate recipients from church-and-state limitations, Representative William L. Clay said:

Make no mistake, I want religious organizations to play a significant part in meeting the child care needs of working parents, even with Federal assistance. But as long as these centers are receiving Federal money, they must provide care which is appropriate for all families in their service areas. The Edwards amendment would create a child care proposal that would serve the public good—not specific religions purposes. Specifically, sectarian programs should gather their support from those who share the specific beliefs of the program. If religious centers want to discriminate, they should do so with their own money, not money that has been collected from all taxpayers.

Id. (statement of Rep. Clay).

Furthermore, the view that sectarian programs may receive grant and contract aid—if such aid supports only secular activities—is inconsistent with the basic structure of the statute's funding scheme. The CCDBG's grant and contract aid is designed to subsidize a family's child care costs on a sliding fee scale. A state may pay up to one hundred percent of the child care costs for an eligible child.¹⁰⁸ The amount of aid a family receives depends on the family's income and the cost of the services the family uses. It does not depend in any way on the percentage of these charges that support secular activities or the cost of the secular activities themselves. In other words, grant and contract aid under the CCDBG is designed to subsidize a family's child care services generally rather than to fund only the secular activities of the program.¹⁰⁹

In crafting church-and-state restrictions on these subsidies, Congress labored to satisfy the dictates of the Court's aid-to-religious-institutions cases. It recognized that general subsidies to sectarian programs violated existing doctrine, and therefore it limited grant and contract aid to programs without "any sectarian purpose or activity." This limitation is consistent with the fundamental principle, adhered to in all of the Supreme Court's aid-to-religious-institutions cases, that government may not subsidize the overall operations of sectarian institutions because such subsidies amount to the public funding of religion.¹¹⁰ The idea that government may constitutionally provide general subsidies to sectarian organizations as a means of supporting their secular activities is contrary to the Court's traditional Establishment Clause jurisprudence. If Congress had intended to adopt a theory so completely at odds with the Court's Establishment Clause jurisprudence, surely Congress would have expressed itself more explicitly, rather than implying such a novel result only indirectly and ambiguously.

Moreover, the CCDBG must be read as prohibiting the receipt of grant and contract aid by sectarian programs because the statute does not mandate safeguards for ensuring that sectarian programs use CCDBG funds only for secular functions. Indeed, neither the CCDBG nor the federal regulations require religiously affiliated programs to provide assurances that public funds are being used only for secular activities. Historically, such controls have been inherent or specifically included in aid schemes in which public funds flow to sectarian institutions. Every plan for providing direct aid to parochial schools that the Court has considered has featured such safeguards.¹¹¹ It is

108. See *supra* note 50 and accompanying text.

109. The CCDBG's statutory scheme is significantly different in this respect from the adolescent pregnancy services statute scrutinized in *Bowen v. Kendrick*, 487 U.S. 589 (1988). While the Adolescent Family Life Act ("AFLA") lacks the CCDBG's explicit prohibition on using funds for religious activities, the AFLA funds a specific set of secular social services, which is defined in the statute and which is subject to government monitoring. For a discussion of *Bowen* and the AFLA, see *infra* notes 116-24 and accompanying text.

110. See *infra* notes 127-35 and accompanying text.

111. The Supreme Court noted in one case, "[o]f course, under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursement would cover only secular services. . . . But here . . . the New York law provides ample safeguards against excessive

extremely unlikely that Congress would have authorized direct aid to sectarian child care programs without imposing any such controls.

The second question concerning the meaning of the CCDBG—whether all of the statute’s employment rules apply to religiously affiliated programs—can be resolved wholly by reference to the statute’s plain language. The federal regulations erroneously state that programs, if they are operated by sectarian organizations and derive less than 80% of their funds from public sources, may require employees to adhere to the organization’s religious tenets, and thus are exempt from the statute’s prohibition on religious discrimination in hiring employees who work directly with children.¹¹² The statutory provision at issue states that “a child care provider that receives assistance under this subchapter shall not discriminate in employment on the basis of the religion of the prospective employee if such employee’s primary responsibility is or will be working directly with children in the provision of child care services.”¹¹³ Nothing in this provision permits a reading that exempts certain types of providers—such as religiously affiliated providers—from its restrictions. Nor does any related provision of the statute accomplish this effect.¹¹⁴

or misdirected reimbursement.” *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (citations omitted). Challenged programs have always been targeted, successfully or unsuccessfully in the Court’s estimation, at specifically secular activities, and many programs have also included specific additional safeguards. *See, e.g.,* *Aguilar v. Felton*, 473 U.S. 402 (1985) (public school teachers providing secular educational services for educationally deprived children from low-income families); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (part-time public employees teaching supplemental classes in secular subjects after school, and full-time public employees offering supplemental classes in secular subjects during the regular school day); *Wolman v. Walter*, 433 U.S. 229 (1977) (purchasing secular textbooks, supplying tests and scoring services used in public schools, providing speech and diagnostic hearing services and other services by public employees, supplying secular instructional materials of the kind used in public schools, and providing bus transportation for field trips); *Meek v. Pittenger*, 421 U.S. 349 (1975) (providing secular auxiliary services by public employees, secular instructional materials, and secular textbooks approved for use in public schools); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (providing grants for maintenance and repair, tuition reimbursement, and tax relief calculated to cover only secular portions of educational services); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973) (reimbursing private schools for testing expenses); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (providing a 15% salary supplement for teachers who teach only courses offered in public schools and who agree not to teach courses in religion, at schools in which per pupil expenditures on secular education are lower than at public schools); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (loaning secular textbooks to public and private school students); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (subsidizing transportation to and from school).

112. The regulations provide: “Notwithstanding paragraph (a) of this section [limiting religious discrimination in employment], a sectarian organization may require that employees adhere to the religious tenets and teachings of such organization and to rules forbidding the use of drugs or alcohol.” 45 C.F.R. § 98.47(b) (1992).

113. 42 U.S.C. § 9858l(a)(3)(A).

114. The section of the CCDBG that creates the admissions and employment discrimination rules begins with a declaration that “nothing in this section shall be construed to modify or affect the provision of any *other* Federal law or regulation that relates to discrimination in employment on the basis of religion.” *Id.* § 9858l(a)(1)(A) (emphasis added). The section then proceeds to qualify this principle of construction, regarding *other* federal laws and regulations, by adding that “sectarian organization[s] may require that employees adhere to the religious tenets and teachings of such organization[s], and such organization[s] may require that employees adhere to rules forbidding the use of drugs or alcohol.” *Id.* § 9858l(a)(1)(B). This qualification therefore protects sectarian organizations

Moreover, the provision at issue is followed by a qualifying provision that states: "If two or more prospective employees are qualified for [a] position . . . nothing . . . shall prohibit [a] child care provider from employing a prospective employee who is already participating on a regular basis in other activities of the organization that owns or operates such provider."¹¹⁵ The provision obviously addresses situations in which prospective employees are given preference because of their association with a sponsoring church or other sectarian organization. Like the section this provision qualifies, it would be superfluous if it did not apply to programs operated by sectarian organizations.¹¹⁶

B. The Constitutionality of the Statute's Grant and Contract Aid

The CCDBG's provisions regarding financial and in-kind aid do not on their face violate Establishment Clause proscriptions. The relevant test of the facial validity of these provisions is set out in *Bowen v. Kendrick*.¹¹⁷ In *Bowen*, the Court reviewed the facial constitutionality of the Federal Adolescent Family Life Act ("AFLA"),¹¹⁸ a statute Congress enacted to address the problems caused by teenage sexuality, pregnancy, and parenthood. The AFLA provides funding for "public or nonprofit private organizations or agencies 'for services and research in the area of premarital adolescent sexual relations and pregnancy'"¹¹⁹ and permits religiously affiliated organizations to receive funds.¹²⁰ The Act expressly recognizes that religious organizations play an important role in dealing with teenage sexuality and requires grant applicants to describe how they will, "as appropriate in the provision of services[,] involve . . . religious and charitable organizations, voluntary associations, and other groups."¹²¹ Despite these features, the Court concluded that the statute is neutral with respect to recipients' religious status. "[N]othing on the face of the Act suggests the AFLA is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution,"¹²² and "nothing on the face of the [Act] indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions[.]" in which

from becoming subject to, simply by receiving CCDBG funds, any *non-CCDBG* federal restrictions on discrimination in employment on the basis of religion. Earlier versions of the legislation had specifically subjected recipients of CCDBG funds to other federal anti-discrimination laws. *See, e.g.*, S. 1885, *supra* note 43, § 20(c) (subjecting providers to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, The Rehabilitation Act of 1973, and Title VII of the Civil Rights Act of 1964, "notwithstanding the exemption in section 703 of such Act" for religious organizations). The language of the principle of construction and its qualification do not exempt nonsectarian programs operated by religious groups from the CCDBG's limited employment discrimination restrictions.

115. 42 U.S.C. § 9858(a)(3)(B).

116. *See supra* notes 87-88 and accompanying text (discussing congressional efforts to distance the government from private actors' religious discrimination).

117. *Bowen*, 487 U.S. 589 (1988).

118. 42 U.S.C. §§ 300z-300z-10 (1988).

119. *Bowen*, 487 U.S. at 593 (quoting S. REP. NO. 161, 97th Cong., 1st Sess. (1981)).

120. *Id.* at 598.

121. *Id.* at 596 (quoting 42 U.S.C. § 300z-5(a)(21) (Supp. III 1982)).

122. *Id.* at 608.

religion is so pervasive that a substantial portion of the institutions' functions are subsumed in their religious missions.¹²³

Under the Court's decision in *Bowen*, the CCDBG's grant and contract provisions would withstand facial constitutional scrutiny. These provisions are neutral with respect to recipients' religious status, and they do not indicate that a significant proportion of federal funds will flow to pervasively sectarian institutions.¹²⁴ In addition, the case for the facial validity of CCDBG grant and contract aid is even stronger than the case was for the AFLA. Unlike the AFLA, the CCDBG does not mandate the involvement of religious institutions. The CCDBG also includes specific Establishment Clause safeguards that are absent in the AFLA.¹²⁵

The constitutional question raised by the grant and contract provisions, therefore, is whether, as applied, they will offend the Establishment Clause.¹²⁶ The analysis depends on whether these provisions in practice result in the distribution of governmental assistance in violation of the Establishment Clause. As argued above, the CCDBG forbids grant and contract aid to sectarian programs. Without this prohibition, the law would violate constitutional mandates because the Court has consistently held that government aid may not be used for general subsidies to pervasively sectarian institutions. For example, in parochial school aid cases, the Court has always maintained that unrestricted financial assistance for the educational functions of "pervasively sectarian" schools violates the Establishment Clause. Such aid subsidizes a parochial school's religious mission because this mission is inseparable from its secular activities.¹²⁷ The Court has consistently characterized such aid as contrary to the constitutional prohibition against "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."¹²⁸ Under the Court's precedents, pervasively sectarian schools may receive only very specific, very limited forms of aid that do not subsidize their basic educational missions.¹²⁹

The Establishment Clause ideal of separation between church and state that underlies the prohibition on *unrestricted* financial aid to sectarian institutions was expressed in 1947 in the vivid rhetoric of *Everson v. Board of*

123. *Id.* at 610.

124. The statutory definition of "eligible child care provider" includes all public, private not-for-profit, and private for-profit providers. 42 U.S.C. § 9858n(5). Non-sectarian but religiously affiliated programs may receive all forms of CCDBG aid, and sectarian programs may receive child care certificates. *See supra* notes 5-6 and accompanying text. But nothing on the face of the statute indicates that a significant percentage of the CCDBG's aid will flow to pervasively sectarian institutions.

125. *See supra* notes 64-66, 73-86 and accompanying text; *infra* notes 251-52 and accompanying text.

126. Challenges may arise when a provider that has been denied CCDBG funding brings an administrative complaint against a state to the U.S. Department of Health and Human Resources, 42 U.S.C. § 9858g(b)(3); 45 C.F.R. § 98.93 (1992), or when a taxpayer brings a suit challenging the constitutionality of the statute.

127. *See infra* notes 136-39 and accompanying text.

128. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985) (citing, among other things, earlier parochial school cases); *see also Bowen v. Kendrick*, 487 U.S. 589, 611, 623 (1988).

129. *See infra* notes 176-90 and accompanying text.

Education.¹³⁰ While *Everson* in fact permitted a very limited form of aid—reimbursing parents for the expense of transporting their children to and from parochial schools—the decision fashioned a veritable verbal icon of church-and-state relations:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . *No tax in any amount, large or small, can be levied to support any religious activities or institutions* In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”¹³¹

The Court has affirmed this prohibition on direct unrestricted governmental aid in cases involving public funding of social services provided by sectarian organizations. In *Bradfield v. Roberts*, the Court considered the propriety under the Establishment Clause of government contracts with a religiously affiliated hospital in the District of Columbia.¹³² The Court approved the government’s pursuit of secular goals through contracts with the hospital because the institution by its charter and in its operation was a “secular corporation” pursuing “‘the specific and limited object of’ . . . opening and keeping a hospital in the city of Washington for the care of . . . sick and invalid persons.”¹³³ Noting that no allegation had been made that the hospital’s “work [was] confined to members of that church” or that the hospital had violated the secular purposes of its charter, the Court was not concerned that the hospital might be managed by members of the Catholic faith.¹³⁴

More recently, in *Bowen*, a 1988 case, the Court took a similar approach. The Court upheld the statute on its face because the law did not mandate or suggest that a significant percentage of the federal funds for social services would be disbursed to pervasively sectarian institutions. The opinion concluded by directing the trial court on remand to consider (1) whether aid “is flowing to grantees that can be considered ‘pervasively sectarian’ religious institutions, such as we have held parochial schools to be,” and (2) whether “in particular cases . . . aid has been used to fund ‘specifically religious activit[ies] in an otherwise substantially secular setting.’”¹³⁵

In its church-and-state jurisprudence, the Court has used the term “pervasively sectarian” to denominate organizations in which sectarian purposes and activities pervade and are inseparable from the organizations’ secular

130. *Everson*, 330 U.S. 1 (1947).

131. *Id.* at 15-16 (citation omitted) (emphasis added).

132. *Bradfield*, 175 U.S. 291 (1899).

133. *Id.* at 298-99.

134. *Id.*

135. *Bowen*, 487 U.S. 589, 621 (1988) (alteration in original) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

functions. Thus, the Court has treated parochial elementary and secondary schools as “pervasively sectarian” because their religious mission is intertwined with and subordinate to the school’s secular purposes.¹³⁶ While the Court has been somewhat vague about the evidence that demonstrates this feature of parochial schools, it has found the following facts to be significant: that a school has an express statement of religious purposes, is run by and receives money from a church, grants preferences in admissions to members of its denomination, has a faculty and student body composed largely of adherents, and includes prayer and attendance at services as part of the school program.¹³⁷ On the other hand, in its cases involving religiously affiliated institutions of higher education, the Court has declined to conclude that these institutions were pervasively sectarian, relying principally on the fact that they did not make religious indoctrination a *substantial* purpose or activity.¹³⁸ The Court also found it significant that non-adherents could be admitted and hired to teach and that the proportion of adherents in an institution’s student body was no greater than in the surrounding area.¹³⁹

The CCDBG ensures that grants and contracts for child care services will not be awarded to programs that are “pervasively sectarian” under the Court’s precedents. Although grant and contract recipient programs may share some features with the parochial schools examined by the Court, they are barred from receiving grant and contract aid if they have “*any* sectarian purpose or activit[ies]” at all.¹⁴⁰

While the CCDBG forbids pervasively sectarian programs from receiving grant and contract aid—aid that would generally subsidize their overall operations—it permits the receipt of such aid by nonsectarian programs that are owned or operated by pervasively sectarian organizations. Thus, a child care program that does not have sectarian purposes or engage in sectarian activities but is owned or operated by a church or parochial school may receive grant and contract aid. There remain substantial questions about the conditions under which it is constitutionally permissible and desirable for these religiously affiliated programs to receive such aid.¹⁴¹ The CCDBG’s

136. See, e.g., *Id.* at 609-10 (quoting *Hunt*, 413 U.S. at 743); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 384 (1985).

137. See *Aguilar v. Felton*, 473 U.S. 402, 412 (1985); *Ball*, 473 U.S. at 379, 384; *Wolman v. Walter*, 433 U.S. 229, 234-35 (1977); *MEEK v. Pittenger*, 421 U.S. 349, 366 (1975); *Sloan v. Lemon*, 413 U.S. 825, 830 (1973); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 476 (1973); *Everson v. Board of Educ.*, 330 U.S. 1, 3 (1947).

138. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755-59 (1976) (plurality opinion); *Hunt*, 413 U.S. at 743-44 (1973); *Tilton v. Richardson*, 403 U.S. 672, 685-87 (1971) (plurality opinion).

139. The Court in *Hunt* stated:

What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. On the record in this case there is no basis to conclude that the College’s operations are oriented significantly towards sectarian rather than secular education.

Hunt, 413 U.S. at 743-44 (citation omitted).

140. See *supra* notes 64-65 and accompanying text.

141. A range of views was reflected in the different versions of this legislation, see, e.g., *supra* notes 66, 79 and accompanying text, and by different interest groups involved in the legislative process. For

church-and-state provisions are addressed to this concern and represent a congressional endeavor to conform the grant and contract aid provisions to constitutional dictates. The question is whether Congress has succeeded in its effort.

To answer this question, one must turn to the Court's *Lemon* test.¹⁴² Despite commentators' criticisms of this test, and the Court's own self-doubts¹⁴³ and modified emphases in applying it,¹⁴⁴ this three-part "signpost"¹⁴⁵ or "guideline"¹⁴⁶ is still the starting point for Establishment Clause analyses in the area of government aid to religious institutions.¹⁴⁷

example, the American Civil Liberties Union enunciated a list of strict restrictions that it believed to be necessary:

Religious facilities sometimes house services like daycare . . . for the general public. Is it constitutional for these programs to receive government funds? . . . [G]overnment funding of public child care programs located in religious institutions is constitutional only if the following conditions are met: 1) The program must be supervised and run by a non-religious group; 2) the non-religious group must hire staff who have no association with the religious facility housing the program; 3) the program must have no religious content; 4) no religious symbols can be displayed in the vicinity of the program; 5) the program must admit children on a non-discriminatory basis, without regard to their religion[;] and 6) the government can pay only rent to the religious facility.

ACLU Briefing Paper No. 3 (undated) (copy on file with the author).

Americans United for Separation of Church and State expressed a similarly restrictive view that "federal funds should not and cannot be used to assist church-affiliated day care programs." *The Act for Better Child Care Services: Summary of a Church-State Analysis 1* (undated paper released by the organization during the legislative process) (copy on file with the author). The organization argued that the only way to make legislation sound would be to exclude churches and other sectarian organizations as recipients of these funds or institute the following limitations on any church-related child care center:

1. Establish a separate corporation to govern the child care center[;]
2. Hire separate teaching and support staffs;
3. Move the child care center off church premises[;]
4. Conduct admissions and hiring on a nondiscriminatory basis.

Id. at 6.

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

143. See *infra* notes 144-45, 147, 191-92, 314 and accompanying text.

144. See *infra* notes 218-20, 314 and accompanying text.

145. In *Hunt*, the Supreme Court said: "With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three 'tests': purpose, effect, and entanglement." *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

146. In *Tilton*, Justice Burger explained:

Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired. And, as we have noted in *Lemon v. Kurtzman* and *Earley v. DiCenso*, [] candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Tilton v. Richardson, 403 U.S. 672, 678 (1971) (citations omitted).

147. Justice Blackmun reported in his concurrence in the recent *Lee v. Weisman* graduation prayer case that, "[s]ince 1971, the Court has decided 31 Establishment Clause cases. In only one instance . . . has the Court not rested its decision on the basic principles described in *Lemon*." *Lee v. Weisman*, 112 S. Ct. 2649, 2663 n.4 (1992).

A majority of the Court declined to reconsider the *Lemon* test in *Lee. Id.* at 2655.

This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens. . . . Thus we do not accept the invitation of the petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*.

The *Lemon* test requires a court to ask whether a governmental action lacks a secular purpose,¹⁴⁸ causes an excessive entanglement between government and religion, or has a primary effect of advancing religion.¹⁴⁹ The action at issue fails the test—and is unconstitutional under the Establishment Clause—if the answer to any of these questions is affirmative.

1. Whether the Program Lacks a Secular Purpose

In considering the first question posed by the *Lemon* test, the Court has found a secular purpose when the challenged action furthers public goals, such as providing health care to the poor or improving education, and does not single out religion for preferential treatment. This part of the test has not been a significant hurdle when government programs involving social services and education have distributed funds non-preferentially among secular and sectarian organizations. In such cases, including the ones involving aid to parochial schools, the Court has always discerned a secular purpose behind the government's largesse.¹⁵⁰ Indeed, the only time that the Court has invalidated a scheme of aid to religious institutions because of a lack of a secular purpose involved a tax measure that singled out religion for preferential treatment.¹⁵¹ The CCDBG has the secular purposes of assisting families with child care costs and improving the child care system, and it does not single out religious providers for preferential treatment. Under the Court's precedents, the CCDBG would undoubtedly pass the first part of the test.

2. Whether the Program Creates Excessive Entanglement

Under the entanglement prong of the *Lemon* test, the Court examines whether the government action at issue leads to excessively intimate relationships between church and state. There is no bright line test for

Id. (citations omitted). Justice Scalia, an advocate of abolishing *Lemon*, suggested that the Court had effectively rejected it: "The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." *Id.* at 2685 (Scalia, J., dissenting) (citation omitted).

More recently, however, in the aid-to-religious-institutions case of *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993), a majority of the Court again chose not to abandon the *Lemon* test. See also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993) (applying the *Lemon* test in a challenge by a church to a school district's refusal to allow the church to use school facilities to show film series on child-rearing).

148. In *Bowen*, the Court emphasized that the challenged statute did not lack a secular purpose. "The District Court . . . reason[ed] that even if it is assumed that the AFLA was motivated in part by improper concerns, the parts of the statute . . . were also motivated by other, entirely legitimate secular concerns." *Bowen v. Kendrick*, 487 U.S. 589, 603 (1988).

149. *Lemon v. Kurtzman*, 403 U.S. 602, 612-23 (1971).

150. See, e.g., *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383 (1985) ("As has often been true in school aid cases, there is not dispute as to the first test."); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Meek v. Pittenger*, 421 U.S. 349, 363 (1975); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973).

151. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); see also *infra* notes 284-85 and accompanying text.

determining when government and religious institutions have become too closely entangled, but two considerations are crucial. The Court seeks to prevent both an identification of government with religion and the intrusion of government into the affairs of religious institutions.

When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief . . . suffers, even when the governmental purpose underlying the involvement is largely secular. . . . “[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”¹⁵²

With respect to tax measures, entanglement issues are raised when religious institutions enjoy exemptions, and when they are subject to levies because in either case it may be necessary for the government to investigate the religious institutions’ affairs in order to administer the tax scheme. Because some degree of entanglement is therefore inevitable, and because historically the contacts necessitated by such tax measures have not threatened Establishment Clause values, the Court has not found excessive entanglement in either instance.¹⁵³ The Court has been more troubled by the possibility of excessive entanglement in programs that disburse government aid to religious institutions, especially when the recipient institutions are pervasively sectarian.¹⁵⁴ Such aid programs by their very nature require more extensive administrative contacts between church and state. The State must review applications, monitor performance, and implement safeguards to ensure that public funds are not spent for religious purposes.

Thus, in the 1985 case of *Aguilar v. Felton*, the Court invalidated on entanglement grounds New York City’s provision of federally funded Title I remedial education services on the premises of private schools,¹⁵⁵ more than 90% of which were parochial schools.¹⁵⁶ The services were provided by public school employees who were sent into parochial schools. The program included safeguards to ensure that public funds were not used to advance religion.¹⁵⁷ Justice Brennan wrote for the majority that the case involved “critical elements” of proscribed entanglement—provision of aid in a pervasively sectarian environment and in a form that requires “ongoing inspection.”¹⁵⁸ The Court found that “the detailed monitoring and close administrative contact required to maintain New York City’s Title I program can only produce ‘a kind of continuing day-to-day relationship which the [First Amendment’s] policy of neutrality seeks to minimize.’”¹⁵⁹

152. *Aguilar v. Felton*, 473 U.S. 402, 409-10 (1985) (alteration in original) (citation omitted).

153. See *infra* notes 277-89 and accompanying text.

154. E.g., *Aguilar*, 473 U.S. 409-14; *Wolman*, 433 U.S. at 254; *Meeke*, 421 U.S. at 370 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 614-22 (1971).

155. *Aguilar*, 473 U.S. at 409-14.

156. *Id.* at 406.

157. *Id.* at 406-07.

158. *Id.* at 412.

159. *Id.* at 414 (citation omitted).

The provision of CCDBG grant and contract aid to child care programs owned or operated by pervasively sectarian institutions raises similar entanglement issues, but they are mitigated by other circumstances. The CCDBG, like the program invalidated in *Aguilar*, allows aid to flow to pervasively sectarian organizations. In order to ensure that the funds are not used to advance religion, activities of administrators and staff members who provide child care services will require monitoring, although neither the statute nor the regulations prescribe mechanisms for the states to perform such monitoring. However, the child care activities funded by the CCDBG are more separate from the sponsoring organizations' sectarian activities than the educational programs at issue in *Aguilar*. And in sharp contrast to the situation in *Aguilar*, only a minority of private providers will be religiously affiliated.

The remedial instruction in *Aguilar* was part of the parochial schools' educational endeavors, which the Court considered inextricably intertwined with their religious mission.¹⁶⁰ Child care services funded under the CCDBG must be distinct from the sectarian activities of sponsoring organizations. The child care services sponsored by a parochial school will be farther removed from the school's regular elementary education program than the Title I remedial instruction program invalidated in *Aguilar*. The CCDBG, moreover, specifically forbids the expenditure of funds for "any instructional services which supplant or duplicate the program of any public or private school."¹⁶¹ And in cases in which the sponsoring organization neither is, nor operates, a parochial school, the connection between CCDBG-funded services and the sectarian activities of the sponsoring organization is likely to be still more attenuated than the connection that troubled the Court in *Aguilar*.

Furthermore, in *Aguilar*, more than 90% of the aided institutions were parochial schools. Given the current child care landscape, a minority of CCDBG grant and contract recipients are likely to have any degree of affiliation with a pervasively sectarian institution.¹⁶² Because of these differences, there is much less danger that the administrative contacts required by the CCDBG will lead to an identification between government and religion or to intrusions into the religious activities of pervasively sectarian sponsoring organizations. And the danger is so much less that the statute's grant and contract provisions should pass the entanglement part of the *Lemon* test under the Court's existing case law.

160. *Id.* at 412.

161. 42 U.S.C. § 9858k(b). The subsection provides:

(b) Tuition

With regard to services provided to students enrolled in grades 1 through 12, no financial assistance provided under this subchapter shall be expended for—

- (1) any services provided to such students during the regular school day;
- (2) any services for which such students receive academic credit toward graduation; or
- (3) any instructional services which supplant or duplicate the academic program of any public or private school.

162. See *supra* notes 22, 25-27.

In any event, the vitality of the entanglement test itself has become increasingly doubtful in the face of a critical assault by Chief Justice Rehnquist. Chief Justice Rehnquist has likened the test to a "Catch-22' paradox."¹⁶³ In his view, the *Lemon* test results in an otherwise constitutional program failing to pass constitutional muster simply because the government establishes safeguards to ensure that aid is not misused for religious purposes.¹⁶⁴ In dissenting opinions in *Aguilar*, Chief Justice Rehnquist and Justice O'Connor rejected the doctrinal underpinnings of the excessive entanglement test, arguing that a program should not be invalidated under the Establishment Clause merely because it includes state supervision designed to ensure that government funds are not used to advance religion.¹⁶⁵ This view seems to be in a period of ascendance on the Court. In *Bowen*, the majority opinion reiterated (in dicta) this criticism of the entanglement test.¹⁶⁶ That expression of dissatisfaction by a majority of the Court, as well as the departure from the Court of those justices who have been most sensitive to entanglement issues,¹⁶⁷ suggests that entanglement will not be significant in future cases. Any judicial relaxation of this part of the *Lemon* test should eliminate the possibility that the CCDBG will be found unconstitutional on entanglement grounds.

3. Whether the Program Has the Primary Effect of Advancing Religion

The remaining *Lemon* inquiry is whether a government action has a "primary" effect of advancing religion. In undertaking this inquiry, the Court has recognized that any government aid to a religious institution, however narrowly restricted, benefits the recipient's religious aims.¹⁶⁸ Nevertheless, the Court has allowed some types of aid. As the Court said of the aid approved in *Everson v. Board of Education*, for example, "payment of bus fares was of some value to the religious school, but was nevertheless not such support of a religious institution as to be a prohibited establishment of religion"¹⁶⁹ The Court has held that aid does not violate the Establishment Clause if the benefit it confers on religion is sufficiently slight or "indirect." Where the benefit to religion is more substantial—"direct" in the lexicon of the cases—the aid is impermissible.¹⁷⁰

163. *Aguilar*, 473 U.S. at 420 (Rehnquist, C.J., dissenting).

164. *Id.* at 420-21 (Rehnquist, C.J., dissenting).

165. *Id.* at 420-21, 427-30 (Rehnquist, C.J., and O'Connor, J., respectively, dissenting).

166. *Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988).

167. Of the majority that invalidated a school aid program on entanglement grounds in *Aguilar*, 473 U.S. at 403, only Justices Stevens and Blackmun remain and they are all who remain of the minority that dissented in *Bowen*, 487 U.S. at 625.

168. *See, e.g.*, *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 393 (1985); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 775 (1973).

169. *Board of Educ. v. Allen*, 392 U.S. 236, 242 (1968).

170. *E.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466 (1993) (distinguishing "direct aid" from "attenuated" benefit to "incidental" beneficiary); *Ball*, 473 U.S. at 393 (explaining that the Court has distinguished between "indirect aid cases" and cases in which there is "direct and

A minority of justices have rejected this line-drawing exercise altogether. Retired Justice White consistently expressed the view that it is irrelevant because even government aid that benefits religion does not violate the Establishment Clause if it has a secular purpose and effect. Justice White has said that if government wants to pursue the secular purpose of promoting private school education by funding the secular functions of parochial schools, it is of no constitutional consequence that the aid also benefits the schools' inseparable sectarian functions.¹⁷¹ "That religion and private interest other than education may substantially benefit does not convert these laws into impermissible establishments of religion."¹⁷²

Although Justice Stevens joined the Court's line-drawing approach in *Grand Rapids School District v. Ball*,¹⁷³ he had previously dismissed such an analysis on the ground that *any* program of educational assistance to parochial schools unconstitutionally advances religion. "[A] state subsidy of sectarian schools is invalid regardless of the form it takes. The financing of buildings, field trips, instructional materials, educational tests, and schoolbooks are all equally invalid. For all give aid to the school's educational mission, which at heart is religious."¹⁷⁴ This view is, essentially, an economically logical "aid-to-the-enterprise theory,"¹⁷⁵ under which *any* aid to secular functions of a pervasively sectarian institution constitutes impermissible aid to religion.

The Court, rejecting both of these minority views, continues to undertake the line-drawing exercise, as evidenced by the recent decision in *Zobrest v. Catalina Foothills School District*.¹⁷⁶ In a series of parochial school aid

substantial" aid); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 658 (1980) (explaining that the Court has never invalidated payments on the ground that aid to one aspect of an institution frees it to spend resources on its religious purposes); *Meek v. Pittenger*, 421 U.S. 349, 359, 364-65 (1975) (distinguishing "indirect and incidental" benefits from "substantial" support); *Nyquist*, 413 U.S. at 775 (1973) (distinguishing aid that has an "indirect and incidental effect beneficial to religious institutions" from "direct aid to the sectarian" aspects of the institution).

171. During his years on the bench, Justice White expressed general support for government aid to parochial schools. In his *Nyquist* dissent, he wrote:

Positing an obligation on the State to educate its children, which every State acknowledges, it should be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools rather than to insist that if parents want to provide their children with religious as well as secular education, the State will refuse to contribute anything to their secular training.

Nyquist, 413 U.S. at 814-15; see also, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 664 (1971) (White, J., concurring in part and dissenting in part).

172. *Lemon*, 403 U.S. 602, 664 (White, J., concurring in part and dissenting in part).

173. *Ball*, 473 U.S. 373, 374 (1985).

174. *Wolman v. Walter*, 433 U.S. 229, 265 (1977) (Stevens, J., concurring in part and dissenting in part) (footnotes omitted); see also *Regan*, 444 U.S. at 670 (Stevens, J., dissenting). Justice Marshall also expressed a similar view, arguing that all educational assistance, as opposed to general welfare programs, should be invalid. *Wolman*, 433 U.S. at 229 (Marshall, J., concurring in part and dissenting in part). Also like Justice Stevens, Justice Marshall joined the majority's analysis in *Ball*, which distinguishes between direct and indirect aid. See also *Regan*, 444 U.S. at 662 (1980) (Justice Marshall joining Justice Blackmun's dissent that distinguished between direct and indirect aid).

175. Professors Nowak, Rotunda, and Young use this phrase to describe the grounds on which the Court invalidated the loan of instructional materials in *Meek*. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 1173 (4th ed. 1991).

176. *Zobrest*, 113 S. Ct. 2462 (1993).

cases, the Court engaged in this exercise and approved programs that aid parochial schools by funding bus fares to and from school;¹⁷⁷ loaning students secular textbooks approved by state officials;¹⁷⁸ providing diagnostic speech and hearing services and diagnostic psychological services;¹⁷⁹ offering off-site therapeutic and remedial services;¹⁸⁰ supplying standardized tests and scoring services for state-prepared examinations;¹⁸¹ reimbursing the costs of administering state-prepared tests;¹⁸² and providing a sign language interpreter for a deaf student.¹⁸³ On the other hand, it has invalidated programs that gave teachers salary supplements to conduct secular courses;¹⁸⁴ “purchased” secular educational services by reimbursing schools for teachers’ salaries, textbooks, and instructional materials;¹⁸⁵ funded administration of tests prepared by parochial schoolteachers;¹⁸⁶ awarded maintenance and repair grants;¹⁸⁷ loaned instructional materials and equipment;¹⁸⁸ furnished educational services such as counseling;¹⁸⁹ and provided field trip transportation.¹⁹⁰

Despite its commitment to the line-drawing task, the Court has found it a difficult one in practice. The Court has expressed doubts about the doctrinal integrity of its collage of cases in which the line between permissible and impermissible aid has often seemed dim and indistinct.¹⁹¹ Commentators also have questioned the logic of the distinctions made in these cases.¹⁹²

177. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

178. *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

179. *Wolman v. Walter*, 433 U.S. 229 (1977).

180. *Id.*

181. *Id.*

182. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

183. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993).

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

185. *Id.*

186. *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

187. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

188. *Meek v. Pittenger*, 421 U.S. 349 (1975).

189. *Id.*

190. *Wolman v. Walter*, 433 U.S. 229 (1977).

191. *See, e.g., Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383 (1985) (“tests ‘must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired’”) (quoting *Meek*, 421 U.S. at 359); *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (“in many of these decisions we have expressly or implicitly acknowledged that ‘we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law’”) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980) (“[N]ot to say that this case, any more than past cases, will furnish a litmus paper test to distinguish permissible from impermissible aid to religiously oriented schools”); *Hunt v. McNair*, 413 U.S. 663, 741 (1973) (the principles “are no more than helpful signposts”); *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (plurality opinion) (“[A]nalysis must begin with the candid acknowledgment that there is no single constitutional caliper that can be used to measure the precise degree” to which sponsorship, financial support, and active involvement are present).

192. Citing a number of articles, Justice Scalia opined in his concurrence in the recent case of *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993): “I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.” *Id.* at 2150 (citations omitted).

One scholar has opined, "Because the parochial aid cases are so inconsistent, they do not suggest any overall perspective other than rejection of both the separationist and accommodationist alternatives."¹⁹³ While it is true that the line between permissible and impermissible assistance is malleable and that on occasion the Court has subordinated its logic to its precedents,¹⁹⁴ the Court has nonetheless fashioned a workable analytical framework for developing in a common law fashion an evolving boundary between constitutional and unconstitutional aid. The fashioning and application of this framework has enabled it to promote Establishment Clause values while simultaneously balancing them with other social and political goals. Adopting either Justice White's or Justice Stevens' view would spare the Court from criticisms that its attempts to distinguish between permissible and impermissible aid are incoherent and unprincipled, but doing so would disable the Court from creating a doctrinal and political compromise under which it can allow some aid while nevertheless affirming the ideal that government must not fund religious activities.

The Court's analytical framework for deciding whether aid has a primary effect of advancing religion involves a three-part process. Aid is determined to be impermissible if it (1) directly promotes "religion by . . . providing a subsidy to the primary religious mission" of the institution,¹⁹⁵ (2) creates a substantial risk that government funds will be used for the inculcation of religion,¹⁹⁶ or (3) creates a symbolic link between government and religion.¹⁹⁷ The decision in *Grand Rapids School District v. Ball* elaborates this framework¹⁹⁸ and exemplifies how the Court applies it to a challenged program of assistance. In *Ball*, the Court invalidated the Grand Rapids,

193. Marshall, *supra* note 18, at 547. Marshall argues that "a symbolic understanding of establishment may appropriately provide a cohesive framework under which establishment jurisprudence may be remodeled." *Id.* at 498. *But see* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988).

The Supreme Court's establishment clause doctrine . . . has achieved a national resolution of church-state issues far superior to that which would prevail in its absence. In large part, this is due to institutional characteristics permitting the Court to make decisions that are politically and morally superior to the decisions reached by the majoritarian process.

Id. at 1193. *See generally infra* note 314.

194. In *Wolman*, 433 U.S. 229 (1977), the Court noted the inconsistency of its approval of textbook loans in *Board of Education v. Allen*, 392 U.S. 236 (1968), with its subsequent disapprovals of similar material.

Board of Education v. Allen has remained law, and we now follow as a matter of *stare decisis* the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes. In more recent cases, however, we have declined to extend that presumption of neutrality to other items in the lower school setting. It has been argued that the Court should extend *Allen* to cover all items similar to textbooks. When faced, however, with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles announced in our subsequent cases, we choose the latter course.

Wolman, 433 U.S. at 252 n.18 (emphasis added) (citations omitted).

195. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 382-85 (1985).

196. *Id.*

197. *Id.*

198. The Court recently failed to take advantage of an opportunity to reject this framework in *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2642, 2466-68 (1993).

Michigan, school district's "Community Education" program,¹⁹⁹ under which the school district provided instructional materials for and hired schoolteachers to teach after-school courses in the private schools in which they were employed during the day.²⁰⁰ The courses—arts and crafts, Spanish, drama, and humanities, for example²⁰¹—were ones that were "otherwise available at the public school, usually as part of [the public school's] more extensive regular curriculum."²⁰² The Court described forty of the forty-one benefited private schools as religious institutions similar to "the sectarian schools that have been the subject of our past cases—the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within that institution, the two are inextricably intertwined."²⁰³ The Community Education classes themselves were "largely composed of students who [were] adherents of the same denomination."²⁰⁴

The Court found that this in-kind aid to pervasively sectarian schools had a "primary effect" of advancing religion, in the same fashion as unrestricted financial aid.²⁰⁵ The Court likened the provision of instructional materials and teachers to the loans of instructional materials it had invalidated in earlier cases.²⁰⁶ The aid program made "no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.'"²⁰⁷ Because it provided teachers as well as teaching materials, the Court considered it to be even more substantial assistance to sectarian educational enterprises.²⁰⁸ The Court rejected the argument that the courses merely "supplemented" the schools' curricula and concluded that the consequence of accepting such an argument would be "to permit ever larger segments of the religious school curriculum to be turned over to the public school system."²⁰⁹

In addition to finding that the Community Education program advanced religion, the Court found, and placed by far its greatest emphasis on the fact, that the program created a substantial risk of government-funded inculcation

199. The text concentrates on the *Ball* analysis of the Community Education program because it is the most recent and the most fully articulated example of the Court's application of the second part of the *Lemon* test in a parochial school aid case. The *Ball* analysis of the Community Education program is also a particularly useful tool for evaluating various provisions of the CCDBG. *Ball* also involved and invalidated the Shared Time program, under which full-time employees of the public schools taught classes during the school day in non-public school, classes "intended to be supplementary to the 'core curriculum' courses that" the state required as part of an accredited school program." *Ball*, 473 U.S. at 375.

200. *Id.* at 377.

201. *Id.* at 376.

202. *Id.* at 377.

203. *Id.* at 384 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 657 (1971)).

204. *Id.* at 391.

205. *Id.* at 393-97.

206. *Id.* at 395.

207. *Wolman v. Walter*, 433 U.S. 229, 251 (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 (1973) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971))).

208. *Ball*, 473 U.S. at 395-96.

209. *Id.* at 397.

of religion.²¹⁰ The classes funded by the program were “largely composed of students who [we]re adherents of the same denomination.”²¹¹ Virtually every one of the Community Education instructors taught in the same school during the day, and many of them probably taught in those schools out of a desire to serve their religious denomination. During the regular school day, these teachers were expected to inculcate their students with religion, but immediately after school, with the same students and in the same classrooms, they were required to engage in purely secular education. Not questioning the teachers’ good faith attempts to achieve this transformation, the Court found a substantial risk that the expectations of the school day would “infuse” the after-school classes.²¹²

In contrast to these assessments of the Community Education program in *Ball*, when the Court in *Zobrest* examined the constitutionality of providing a sign-language interpreter to a deaf parochial school student, the five-member majority sharply distinguished such aid from direct, unrestricted financial aid to the educational functions of a parochial school:

[T]he programs in *Meek* and *Ball*—through direct grants of government aid—relieved sectarian schools of costs they otherwise would have borne in educating their students “This kind of direct aid,” we determined, “is indistinguishable from the provision of a direct cash subsidy to the religious school” The extension of aid to petitioners, however, does not amount to “an impermissible ‘direct subsidy’” of *Salpointe* For *Salpointe* is not relieved of an expense that it otherwise would have assumed in educating its students.²¹³

In addition, whereas the public aid invalidated in *Ball* primarily flowed to and benefited parochial schools, the Court found that the federal and state program at issue in *Zobrest* only incidentally benefited sectarian schools.²¹⁴ The function of the federal program in *Zobrest* “[wa]s hardly ‘to provide desired financial support for nonpublic, sectarian institutions.’”²¹⁵ Finally, the *Zobrest* majority was untroubled that the case involved placing a public employee in a pervasively sectarian setting because an interpreter, unlike a teacher, merely translates the material presented to the class and in the process “neither add[s] to nor subtract[s] from that environment.”²¹⁶

210. *Id.* at 385-87.

211. *Id.* at 391.

212. *Id.* at 386-87.

213. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2468-69 (1993) (citations omitted).

214. *Id.* at 2469.

215. *Id.* (citation omitted).

216. *Id.* at 2469. The *Zobrest* dissenters who discussed the constitutional issue, which they believed the Court should not have reached, vehemently disagreed with the point at which the majority drew the line between permissible and impermissible aid to a pervasively sectarian institution. Justice Blackmun, joined by Justice Souter, viewed the provision of an interpreter not only as a “conduit” for a parochial school’s education, and thus a form of assistance for the school’s “mission of religious indoctrination,” but also as a “graphic symbol of the concert of church and state” that may support and place an “imprimatur of governmental approval” upon the denomination operating the school. *Id.* at 2469 (Blackmun, J., dissenting). Nonetheless, all of the justices who addressed the constitutional issue adhered to the established notions that the government may not directly subsidize religious activity and that lines must be drawn between permissible and impermissible aid.

The third question in assessing whether aid advances religion, the question of whether the aid creates a symbolic link between government and religion, was not reached or discussed by the majority in *Zobrest*. In *Ball*, however, the Court addressed this question and found that the Community Education program created a symbolic link between government and religion that conveyed an endorsement of religion. “[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.”²¹⁷

This explication in *Ball* echoed and adverted²¹⁸ to the gloss upon, or modification of, the *Lemon* test advanced by Justice O’Connor in a case challenging a public holiday display that included a creche and a Christmas tree among other objects.²¹⁹ In her view of the test, its “effects” prong turns on whether the government practice communicates “endorsement” of religion, which in turn sends a “message to nonadherents that they are outsiders, not full members of the political community”²²⁰

The *Ball* opinion characterized the existence of a symbolic link as particularly problematic in situations involving “children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.”²²¹ Similarly, with respect to the endorsement concept, Justice O’Connor notes elsewhere the special significance of situations in which “government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.”²²² In the elementary school context of *Ball*, the Court found mixing public school classes with parochial school classes, in the parochial school, to be a symbol of state endorsement and an encouragement of the religious beliefs taught in the school.²²³

217. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985).

218. *Id.* at 389.

219. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring). The “endorsement test” was later relied upon by a majority of the Court in another holiday display case. *County of Allegheny v. ACLU*, 492 U.S. 573, 592-94, 598-602 (1989). However, Justice Kennedy—joined by Chief Justice Rehnquist, Justice White, and Justice Scalia—rejected the endorsement test in his separate opinion in that case. *Id.* at 668-69 (Kennedy, J., concurring in the judgment in part and dissenting in part). See James M. Lewis & Michael L. Vild, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671 (1990).

220. *Lynch*, 465 U.S. at 688; see also *County of Allegheny*, 492 U.S. at 624-27 (O’Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 67-70 (1985) (O’Connor, J., concurring).

221. *Ball*, 473 U.S. at 390. The Court shows the greatest concern with Establishment Clause issues when children are involved. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2657-58 (1992) (“[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools”).

222. *Wallace*, 472 U.S. at 81 (1985) (O’Connor, J., concurring).

223. *Ball*, 473 U.S. at 391-92.

4. Application of the *Ball* Analysis to Child Care

Under existing precedents, it is this three-part analytical framework that should be applied to determine whether it is constitutionally permissible to award CCDBG grant and contract aid to nonsectarian but religiously affiliated child care programs. To apply the framework to the receipt of aid by such programs, one must understand what eligible child care programs actually look like and how they operate. The following two programs, one real and one hypothetical, illustrate the two principal types of sponsoring sectarian organizations with which child care programs are affiliated: churches and parochial schools. They also illustrate two extremes with respect to the different degrees of connection that may exist between a nonsectarian program and its sponsoring sectarian organization.²²⁴ The first program, a child care center housed in a church, is typical of programs that have minimal administrative and programmatic contacts with their sponsoring organizations. The second, a hypothetical program, is a child care center run by a parochial school and is as closely tied to its sponsoring organization as the CCDBG grant and contract provisions permit.²²⁵

Woodside Child Care Center ("Woodside")

This after-school program located in the Woodside Methodist Church in Silver Spring, Maryland, has nondiscriminatory admission and employment practices and includes no sectarian activities. The center reports to the board of the church. It is considered part of the church for tax purposes and takes advantage of the church's tax-exempt status. However, it is administered by a director who is not affiliated with the church and who is supervised by a parent board. It makes an occupancy payment to the church that is calculated to cover the church's costs. Fewer than five of the approximately one hundred children enrolled in the after-school program attend the church.²²⁶ The church views its arrangement with the center as part of its social mission to serve the community in which it is located.

Hypothetical Program

This program offers preschool and before- and after-school care. It is administered by and housed in the same building as a pervasively sectarian parochial school, which has developed the child care program in response to perceived community needs. The program is planned as a secular one, with no religious purpose or activities, so that it may receive grants from or contract with the state agency administering CCDBG monies. Twenty-five percent of the places

224. Although information is limited and imperfect, there is undoubtedly a wide range of administrative and programmatic arrangements between nonsectarian programs and their sectarian sponsors. See *supra* notes 26-27 and accompanying text.

225. See *supra* notes 75, 83 and accompanying text; *infra* note 253 and accompanying text. It should be remembered that the data in those notes show that religiously affiliated but non-sectarian child care programs such as these two account for a distinct minority of child care places. The congressional debates over the CCDBG assumed that *all* religiously affiliated programs probably account for fewer than one-third of center-based providers, which in turn represent roughly only about one-third of child care services used by families and funded under the statute. *Supra* note 26.

226. Telephone Interview with Pam Yarrington, Director, Woodside Child Care Center (Oct. 28, 1991).

in the program are made available to children funded under CCDBG grants or contracts. These children are admitted to the CCDBG-funded slots on a nondiscriminatory, first-come, first-served basis, as required by the statute.²²⁷ In filling the other places, preference is given to children who themselves attend or whose siblings attend the parochial school, in accordance with the CCDBG provision that a preference may not be prohibited when a child or a child's family members "participate on a regular basis in other activities of the organization that *owns* or *operates* such provider."²²⁸

In hiring staff to work with the children, priority is given to employees of the school and to the family members of employees of the school, which itself can legally discriminate in hiring on the basis of religion.²²⁹ A religious preference is used in hiring the administrative director, who does not work directly with the children and who reports to the principal of the parochial school. Approximately 80% of the children and of the staff who work directly with them are members of the denomination with which the school is affiliated. Also, approximately 75% of the children and of the staff who work with them attend or are employed by the school.

In applying the Court's three-part framework to determine the constitutionality of grant and contract aid to religiously affiliated programs such as those described above, the first question is whether the aid has a "primary effect" of advancing religion. The after-school classes at issue in *Ball*, which were provided almost exclusively at parochial schools, were found to have a "primary effect" of advancing religion because of the substantial way in which they benefited the parochial schools' regular educational programs, programs that the Court considered to be inseparable from the schools' religious purposes.²³⁰ Because of the close connections between the schools' secular and religious educational functions, and between the after-school classes and the schools' regular educational activities, there was no way to guarantee that the public aid benefited only secular functions of the parochial schools.²³¹ The CCDBG aid, like the provision of after-school classes rejected in *Ball*, clearly benefits sectarian organizations. As in the cases of Woodside Center and the hypothetical program, the aid may help sponsoring organizations fulfill a social mission of service to the community. And, especially in cases like that of the hypothetical program, it may also enhance the sponsoring organizations' ability to attract and retain participants in its regular activities.

If child care is characterized by the courts as a pure social service rather than an educational one, then any benefits to sectarian organizations conferred

227. 42 U.S.C. § 9858(a)(2)(A).

228. *Id.* § 9858(a)(2)(B) (emphasis added).

229. *Id.* § 9858(a)(3)(B). This section allows an organization to hire a qualified person "who is already participating on a regular basis in other activities of the organization that owns or operates" the child care provider instead of another qualified individual who does not participate in the organization. Neither the Constitution nor any federal statute prohibits a private organization from discriminating on the basis of religion. Title VII specifically exempts religious organizations' employment of individuals of a particular religion from the statute's anti-discrimination provisions. 42 U.S.C. § 2000e-1 (1988); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding the constitutionality of the exemption).

230. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 394 n.12, 394-96 (1985). For discussion of this case, see *supra* notes 196-210 and accompanying text.

231. *See Ball*, 473 U.S. at 394-96.

by CCDBG aid probably do not render the aid unconstitutional. The Court has taken a very different view of social services under the Establishment Clause. In the parochial school context, the Court has sanctioned the provision of government-funded social services to children in parochial schools because such services have been viewed as entirely distinct from the schools' sectarian educational purposes and activities. The Court has maintained that "general welfare services for children . . . may be provided by the State regardless of the incidental benefit that accrues to church-related schools."²³² Thus, the Court has found that the government's provision of health care services such as diagnostic speech and hearing services to parochial students on parochial school premises does not have the primary effect of advancing religion.²³³ And in *Zobrest*, the Court intimated that the provision of a sign language interpreter could be equated with the permissible provision of such services.²³⁴

The Establishment Clause does not per se bar religiously affiliated institutions from receiving grants to provide social services to the public.²³⁵ In *Bowen v. Kendrick*, the Court noted that it "ha[s] never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."²³⁶ The opinion referred to "the long history of cooperation and interdependency between governments and charitable or religious organizations" and cited a statement in a congressional report that "[c]haritable organizations with religious affiliations historically

232. *Wolman v. Walter*, 433 U.S. 229, 243 (1977) (quoting *Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975)).

233. In *Wolman*, the Court stated:

This Court's decisions contain a common thread to the effect that the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion. . . . The Court in *Meek* explicitly stated, however, that the provision of diagnostic speech and hearing services by Pennsylvania seemed "to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools."

Wolman, 433 U.S. at 242-44 (quoting *Meek*, 421 U.S. at 371 n.21). The first ground upon which the Court distinguished the diagnostic services from impermissible aid was that such services, "unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school." *Id.* at 244. The second ground, which would not be applicable to child care services in any event, was that "the diagnostician has only limited contact with the child. . . . The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student." *Id.*

234. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2462 (1993) (In characterizing the aid as a "neutral service," the Court cited *Wolman*, 433 U.S. at 244). In a footnote supporting the assertion that there is no absolute bar to placing public employees in parochial schools, the Court says *Wolman* "made clear that 'the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion,' even when those services are provided within sectarian schools." *Id.* at 2469 (citing *Wolman*, 433 U.S. at 244).

235. *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (holding that government may fund the provision of medical services for the poor by a religious hospital). These cases are discussed in Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L.Q. 343, 367-72 (1992).

236. *Bowen*, 487 U.S. at 609. This passage was also quoted in *Zobrest*, 113 S. Ct. at 2466.

have provided social services with the support of their communities and without controversy."²³⁷

One could argue that child care is more of a custodial service than an educational enterprise, particularly child care for infants and before- and after-school care for school-age children when such care is restricted to recreational activities and supervisory functions. But the history of the CCDBG and of preschool programs in this country reveal a widely held view that child care, like elementary and secondary education, is linked to the social, emotional, and *intellectual* development of children.²³⁸ Under the CCDBG, all child care programs, except before- and after-school ones, are denominated as "early childhood development programs," which are characterized in the statute as "services that are not intended to serve as a substitute for a compulsory academic program[] but that are intended to provide an environment that enhances the educational, social, cultural, emotional, and recreational development of children."²³⁹ Earlier versions of the legislation explicitly associated improvements in the quality of all child care, a goal of the CCDBG,²⁴⁰ with "strengthen[ing] our society by providing young children with the foundation on which to learn the basic skills necessary to be productive workers."²⁴¹

These visions of and hopes for child care have informed a national movement for preschool education, which has led to dramatic increases in recent years in preschool attendance by American children.²⁴² Of the national education goals adopted by the nation's governors and the President at the beginning of this decade, the first goal is that all children begin school ready to learn, and the first objective under that goal is that "[a]ll disadvantaged and disabled children will have access to high quality and developmentally appropriate preschool programs that help prepare children for school."²⁴³ The publicly funded Head Start program for disadvantaged children, which was recently expanded by Congress in an effort to reach all eligible children,²⁴⁴ is founded in part on the notion that educational services

237. *Bowen*, 487 U.S. at 609.

238. See *infra* notes 239-46 and accompanying text. For a discussion of the question of whether day care is a social service or a form of education, see Tobin, *supra* note 39, at 334-37.

239. 42 U.S.C. § 9858f(b)(1).

240. H.R. CONF. REP. NO. 964, *supra* note 38, at 669. "The purpose of this block grant program is to increase the availability, affordability, and quality of child care." *Id.*

241. S. 1885, *supra* note 43, § 2(a)(3); see also H.R. 3660, *supra* note 43 § 2(a)(3) (containing the same language).

242. Statistics suggest that:

families are enrolling their children in educational programs prior to school entry at an increasingly early age regardless of maternal employment. For example, in 1965, only 16% of 4-year-olds and 5% of 3-year-olds attended any type of preschool program. By 1989, enrollment had increased to just over half (51%) of all 4-year-olds and 27% of all 3-year-olds (U.S. Bureau of the Census, 1991).

WILLER ET AL., *supra* note 22, at 2.

243. THE STATE OF AMERICA'S CHILDREN 1991, *supra* note 8, at 37; see John E. Yang, *Bush Unveils Education Plan*, WASH. POST, Apr. 19, 1991, at A1.

244. The Augustus F. Hawkins Human Services Reauthorization Act of 1990, P.L. 101-501, 104 Stat. 1222 (1990).

for three- and four-year-olds can create a foundation for successful school careers.²⁴⁵ Similarly, one purpose of sectarian child care programs is to provide young children with religious education.²⁴⁶

Courts should consider child care services as sharing significant characteristics with educational ones, although they also share characteristics of social services. Because they are partly educational in nature, one cannot successfully argue that the CCDBG grant and contract aid does not advance religion on the grounds that the child care that it funds is purely a social service.

Even if child care is characterized as an educational service, however, the CCDBG passes constitutional muster: it does not directly promote religion by "providing a subsidy to the primary religious mission of the institution[]" ²⁴⁷ The benefits it confers can be distinguished from the benefits inherent in programs such as the Community Education plan, both because the CCDBG-funded services are separate and distinct from the organizations' regular activities, and because CCDBG aid is disbursed in a wholly different context, one in which only a minority of benefited programs are closely affiliated with sectarian organizations.²⁴⁸

Unlike the after-school classes in *Ball*, the child care services eligible for CCDBG grant and contract aid do not directly support the regular activities of sponsoring sectarian organizations. Child care programs like those described above offer a service that is *not* provided as part of regular school-day programs; child care programs eligible for grant and contract aid do not duplicate the regular sectarian activities of churches or other religious sponsoring organizations; and child care made available by sectarian sponsors is generally provided as a separate program on a fee-for-service basis to interested families.²⁴⁹

245. The current version of the Head Start statute refers in its statement of purpose and policy to the role that the program "has played in the effective delivery of comprehensive health, *educational*, nutritional, social, and other services to economically disadvantaged children and their families." 42 U.S.C. § 9831(a) (1988) (emphasis added). Recounting the beginnings of Head Start, Emily D. Cahan explains: "Early compensatory education seemed once again to promise to break the cycle of poverty Efforts to improve the poor child's physical health as well as to foster cognitive, social, and emotional development led to programs that combined medical and psychological services with educational enrichment." EMILY D. CAHAN, PAST CARING: A HISTORY OF U.S. PRESCHOOL CARE AND EDUCATION FOR THE POOR, 1820-1965, at 45 (National Center for Children in Poverty 1989). "The stated goal of Head Start is to provide economically disadvantaged children with an early socialization and education experience that will prepare them to begin elementary school on an equal footing with their more economically advantaged peers." AMERICA'S CHILDREN, *supra* note 7, at 167.

246. A National Council of Churches study notes: "A nursery school or child day care program with an explicit religious education component may be part of the mission undertaken by a parish. When this is the motivation, spiritual development will be central to the program." LINDNER ET AL., *supra* note 27, at 20.

247. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 388 (1985).

248. See *supra* notes 22, 26-27 and accompanying text.

249. In the National Council of Churches study, for example, "responses to the initial questionnaire indicated that 99% of all programs were open to all members of the community. . . . In short, the vast majority of church-housed child day care programs can be viewed as programs for the community, whether operated by a church or only based in church property." LINDNER ET AL., *supra* note 27, at 26. In a study of Catholic elementary school financing, average fees for after-school care were found to range from one to six dollars per hour. ROBERT J. KEALEY, UNITED STATES CATHOLIC ELEMENTARY SCHOOLS & THEIR FINANCES 22 (1989).

Also, unlike Grand Rapid's Community Education program and other invalidated assistance,²⁵⁰ the CCDBG includes guarantees that there will be a separation in the parochial school setting between funded child care services and a school's regular educational programs that *are* part of its sectarian mission. The statute specifies that funds for before- and after-school services for children in grades one through twelve may not be used by programs like that of the hypothetical child care center for "any services provided . . . during the regular school day," "any services for which . . . students receive academic credit toward graduation," or "any instructional services which supplant or duplicate the academic program of any public or private school."²⁵¹ These specific prohibitions, combined with the general prohibition against the use of grant and contract funds for sectarian activities, supply what the Court has indicated can be a crucial ingredient in constitutionally acceptable direct school aid plans. They constitute a strenuous effort to guarantee a separation between secular functions funded by the state and religious educational functions.²⁵² When child care services are available on the premises of churches or other sectarian sponsors, rather than in parochial schools, they are likely to be even more separate from the sponsoring organizations' other programs.

Finally, only a minority of child care programs that receive CCDBG grant and contract aid will be religiously affiliated. Among these, an even smaller number will be as closely integrated with the sponsoring sectarian organization as the hypothetical child care center. Many religiously affiliated child care programs, like Woodside Child Care Center, will not share staff with their sponsors, serve the same families as the sponsoring organization, or be administratively controlled by the sponsor.²⁵³ By contrast, in *Ball*, as in the cases of all the private school aid plans found unacceptable by the Court, the vast majority of recipients of aid were pervasively sectarian.²⁵⁴ The CCDBG

250. *Ball*, 473 U.S. at 387; see also *infra* note 252 and cases cited *supra* notes 184-90.

251. 42 U.S.C. § 9858k(b). Funds for preschool programs are not subjected to such restrictions, but by definition they are not duplicative of regular elementary school programs.

252. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 614-15 (1988) ("[I]f there were such a provision [preventing the use of federal funds for religious purposes], it would be easier to conclude that the statute on its face could not be said to have the primary effect of advancing religion . . ."); *Wolman v. Walter*, 433 U.S. 229, 251 (1977) (holding the program invalid because there "has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.'"); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) ("[N]o attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction."); cf. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2469 (1993) (sign-language interpreter "will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause").

253. See LINDNER ET AL., *supra* note 27, at 26, 52, 60. In this study:

56% of centers responding to the follow-up questionnaire are church-operated. In spite of this fact, only 28% of centers are directly subject to the policy decisions of church boards, at least from the perspective of center directors, which suggests that even church-operated centers are not tightly controlled by the church. Parents of children enrolled in the center are far more likely (54%) than church boards (28%) to play some formal role in program policy making.

Id. at 60; see *supra* notes 26-27, 224 and accompanying text.

254. See *supra* note 39.

does not operate to subsidize a class of beneficiaries that is primarily sectarian.

The second question in applying *Ball's* three-part framework to the provision of grant and contract aid to religiously affiliated but nonsectarian child care is whether this aid creates a substantial risk of government-funded religious indoctrination. Such a risk was present in *Ball* because the after-school program in effect replicated the circumstances of the regular school program, in that parochial schoolteachers provided educational services to parochial school students on parochial school premises.²⁵⁵ In the parochial schools' regular programs, teachers and students worked together to achieve religious goals, and the Court feared that the religious message would spill over into the after-school program.²⁵⁶ Even when a teacher attempts in good faith to avoid inculcation, the danger arises because "the pressures of the environment" might undermine the teacher's efforts.²⁵⁷ As the *Lemon* Court was aware, "the process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly,"²⁵⁸ which children attend from approximately the age of five or six to the age of ten or eleven.

The issue of whether government aid poses a substantial risk of government-funded inculcation of religion arises only in certain types of religiously affiliated programs eligible for CCDBG aid. Programs such as Woodside Center that are housed by, but not closely linked, administratively or programmatically, with a sponsoring church pose no real danger of government-funded religious inculcation. The children and the child care workers are not primarily adherents of the sponsoring organization's denomination, and they are not engaged together in sectarian activities at other times. At the other end of the spectrum, however, in programs like the hypothetical one, the issue does arise, at least with respect to its before- and after-school child care. With respect to the preschool portion of the hypothetical program, by definition there can be no overlap of students and, as a practical matter, few preschool staff members are likely to work in the regular school because the preschool operates at the same time as the regular school program. In addition, the preschool students, most of whom are younger than five years of age, are arguably less impressionable than children in the primary grades because the preschoolers are less likely to understand, absorb, and retain

255. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

In the course of an entanglement analysis in *Lemon*, the Court emphasized the particular risks inherent in supplementing salaries of instructors who teach secular subjects in parochial school environments. *Lemon v. Kurtzman*, 403 U.S. 602, 617-19 (1971). The Court wrote:

We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals.

With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.

Id. at 618-19.

256. *Ball*, 473 U.S. at 387.

257. *Id.* (quoting *Wolman v. Walter*, 433 U.S. 229, 247 (1977)).

258. *Lemon*, 403 U.S. at 616.

religious influences.²⁵⁹ The hypothetical program's before- and after-school services, however, create a situation that is undeniably similar to Grand Rapid's Community Education program. These parts of the hypothetical program are composed primarily of impressionable primary grade parochial school students and employees of the parochial school, who are engaged together in religious educational endeavors during the regular school day.²⁶⁰

Despite the considerable risk posed by these parts of the hypothetical program, they are less constitutionally threatening than programs invalidated by the Court because they differ from the invalidated programs in the significant ways discussed above.²⁶¹ The fact that the child care workers provide a type of service that is not offered during the regular school day should facilitate any transitions that they must make from religious educators to nonsectarian child care workers. Programs that are so closely tied to their sectarian sponsor also represent a minority of religiously affiliated nonsectarian providers, and religiously affiliated providers represent a minority of center-based providers.²⁶² Thus, because CCDBG grant and contract aid does not operate in the context of a largely religious system, it poses radically less danger of government-funded inculcation of religion than do the invalidated aid programs, which have disbursed public funds to private school systems dominated by religious institutions.²⁶³ Moreover, Congress has taken deliberate steps to reduce the danger of inculcation by prohibiting all but limited forms of religious discrimination in the admission of children and the employment of staff members who work directly with them.²⁶⁴

Finally, the CCDBG has an important, inherent safeguard against the risk of government-funded inculcation of religion. Unlike the private school aid schemes rejected by the Court, the statute creates a disincentive for programs operated by sectarian sponsors to apply for grant and contract aid. All child care programs, including *sectarian* programs, are eligible to redeem parent-held child care certificates. Inasmuch as these certificates may be used for sectarian care,²⁶⁵ sectarian organizations that own or operate child care programs do not have to choose between fulfilling their religious purposes and receiving CCDBG financial assistance. They are not forced to compromise their religious missions in order to benefit from the CCDBG.

259. Cf. Tobin, *supra* note 39 (discussing whether very young children could perceive or be affected by a symbolic link between government and religion).

[I]t is difficult to believe that significant numbers of children of preschool age would be sufficiently sophisticated to (1) know and understand that their day care arrangements were partially funded by a government certificate, and (2) to form a conceptual "symbolic link" between religion and government as a consequence of that awareness.

Id. at 334.

260. See the discussion of *Ball*, 473 U.S. 373, *supra* notes 215-21 and accompanying text.

261. See *supra* notes 248-52, 254 and accompanying text. One recent study estimated that only 3% of child care centers for children younger than six that are sponsored by religious organizations are sponsored by parochial schools. KISKER ET AL., *supra* note 26, at 33.

262. See *supra* notes 26-27, 75, 83, 224, 253 and accompanying text.

263. See *supra* note 39 and accompanying text.

264. See *supra* notes 92, 97, 99-111 and accompanying text.

265. For discussion of the constitutionality of these vouchers, see *infra* part III.C.

The last question the Court has posed in examining whether aid to religiously affiliated institutions has a primary effect of advancing religion is whether an impermissible symbolic link is created between government and religion. Obviously, whenever a public benefit is provided to any religiously affiliated activity, *some* link is established between the government and religion, from which *some* endorsement of religion could be inferred. The mere fact that a link exists, and that an inference of endorsement could be made, however, does not invalidate public assistance. If it did, no government aid to religiously affiliated organizations would be constitutional. The point at which the link becomes impermissible is a matter of degree.

In *Ball*, the Court found an impermissible link because the challenged programs established what was essentially a government enterprise located on the premises of pervasively sectarian elementary schools, a government enterprise conducted by and for participants in the pervasively sectarian schools' sectarian activities.²⁶⁶ The programs took "place in the same religious school building and [were] largely composed of students who [were] . . . adherents of the same denomination."²⁶⁷ "In this environment, the students would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes . . ."²⁶⁸ As in all Establishment Clause cases,²⁶⁹ the Court's concern was heightened by the age of the affected children: "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."²⁷⁰

CCDBG grant and contract aid distributed to religiously affiliated programs does not inject a government program into a sectarian environment; it simply subsidizes the tuition of income-eligible children attending private programs. Additionally, as argued above,²⁷¹ the subsidized child care services are separate and distinct from the religious activities of sponsoring organizations to a greater degree than were the after-school classes in *Ball*—a fact that further reduces the possibility that the children will perceive government endorsement of the sponsoring organizations' religious creeds.

266. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 376-79, 389-92 (1985). *Ball* is the first case involving aid to religious institutions in which the Court imported the notion of an impermissible symbolic link and found such a link. In *Bowen*, the Court rejected the trial court's finding of such a link in the distribution of AFLA funds to religious institutions. *Bowen v. Kendrick*, 487 U.S. 589, 613-14 (1988).

267. *Ball*, 473 U.S. at 391.

268. *Id.*

269. *See, e.g., Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992) (discussing "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (stating that the "Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools"); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (plurality opinion) (stating that "college students are less impressionable and less susceptible to religious indoctrination"); *see also supra* notes 220 and 258-59.

270. *Ball*, 473 U.S. at 390.

271. *See supra* notes 249-52 and accompanying text.

Because only a minority of recipients of CCDBG grant and contract aid will be religiously affiliated, there is little risk that the aid will be perceived *by the public* as an endorsement of religion. Furthermore, any possible risk is lessened by the restrictions imposed on religious discrimination in admissions and employment. Although the restrictions allow for a limited degree of religious discrimination, the symbolic effect of this discrimination is mitigated by the fact that the rule imposes a facially neutral criterion that gives religious organizations the same right to prefer their own members that secular sponsoring organizations already enjoy.²⁷² When the risk of a symbolic link is greatest—when a private program in the judgment of Congress acquires public characteristics because 80% or more of its budget is derived from public sources—then religious discrimination is prohibited in the admission of all children and in the employment of staff members who work directly with them.²⁷³

The CCDBG grant and contract aid provisions do not have a primary effect of advancing religion, do not create a substantial risk that government funds will be used for the inculcation of religion, and do not create a symbolic link between government and religion.

C. The Constitutionality of the Statute's Voucher Mechanism

The CCDBG voucher system raises substantial Establishment Clause concerns because it allows parents to use child care certificates to purchase secular *and sectarian* services from religiously affiliated providers. Such a use of public funds for sectarian services is similar to impermissible direct aid programs because it involves a public, unrestricted transfer of government revenues to sectarian institutions. As discussed above, the Establishment Clause prohibits general, unrestricted public subsidization of pervasively sectarian institutions because such subsidization amounts to government financing of religion.²⁷⁴

On the other hand, the voucher scheme is similar to permissible tax provisions that assist families with parochial school expenses because it distributes benefits neutrally between sectarian and nonsectarian institutions, and when its benefits flow to religious institutions, they do so as a result of the free choices of individual families rather than as a result of any governmental action. Constitutionally acceptable tax measures, like direct aid plans, do economically benefit sectarian institutions. As the Court has observed, "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children."²⁷⁵ Social and political experience, however, rather than economic logic, has led the Court to accept tax relief that benefits sectarian institutions.

272. See *supra* notes 83-84, 115 and accompanying text.

273. See *supra* notes 85, 112-14 and accompanying text.

274. For discussion of the impermissibility of direct, unrestricted financial aid, see *supra* notes 129-35 and accompanying text.

275. *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

Under the Court's jurisprudence, tax relief is permissible when it neutrally benefits sectarian and nonsectarian institutions.²⁷⁶ Thus, religious institutions may benefit indirectly from tax relief afforded an individual if the tax relief neutrally subsidizes both sectarian and nonsectarian activities. The Court has treated tax aid, which institutions and individuals avail themselves of privately, as formally and symbolically consistent with the principle that the state itself must not finance religious activity or otherwise endorse religion. No collected tax revenues—no public funds—are transferred from the government to religious institutions through tax relief.²⁷⁷ The government instead forgoes revenues that it would otherwise have collected.

In *Walz v. Tax Commission*²⁷⁸ the Court upheld a law granting a property tax exemption for a class of nonprofit organizations that included churches.²⁷⁹ The Court reasoned that a tax exemption, as opposed to a direct money subsidy, did not advance religion; it is "not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."²⁸⁰ In contradistinction to grant programs, tax exemptions create only a minimal involvement between church and state. By restricting their "fiscal relationship," tax programs "tend[] to complement and reinforce the desired separation . . ."²⁸¹ The Court also noted that such exemptions predate the Constitution²⁸² and in practice have not "given the remotest sign of leading to an established church or religion and on the contrary . . . [have] operated affirmatively to help guarantee the free exercise of all forms of religious belief."²⁸³

The exemption at issue in *Walz* did "not single[] out one particular church or religious group or even churches as such . . .,"²⁸⁴ but in *Texas Monthly v. Bullock, Inc.*,²⁸⁵ the Court invalidated an exemption from sales and use taxes that was targeted *specifically* at periodicals distributed by a religious faith.²⁸⁶ Although there was no majority opinion, a majority of justices agreed that a statute lacks a secular purpose when it singles out religious literature for preferential treatment.²⁸⁷ In *Jimmy Swaggart Ministries v. Board of Equalization*,²⁸⁸ by contrast, the Court unanimously held there was

276. See *infra* notes 278-87 and accompanying text.

277. The only exception would arise in the case of a refundable tax credit, under which collected tax revenues are distributed to the person claiming the credit. 1 STAND. FED. TAX REP. (CCH), vol. 1, ¶ 4082 (1993).

278. *Walz*, 397 U.S. 664 (1970).

279. *Id.*

280. *Id.* at 675.

281. *Id.* at 676.

282. *Id.* at 676-77.

283. *Id.* at 678.

284. *Id.* at 673.

285. *Texas Monthly*, 489 U.S. 1 (1989).

286. *Id.*

287. *Id.* For a discussion of the implications of this ruling, see Wendy G. Shaller, *Churches and Their Envidable Tax Status*, 51 U. PITT. L. REV. 345, 359-64 (1990).

288. *Jimmy Swaggart Ministries*, 493 U.S. 378 (1990).

no excessive entanglement between government and religion when California *applied* a generally applicable sales tax to religious materials sold by a religious organization.²⁸⁹

The Court has relied on similar logic to approve tax schemes that subsidize families' school expenses, including expenses related to parochial school attendance. In *Mueller v. Allen*,²⁹⁰ the Court upheld a tax deduction for tuition, textbook, and transportation expenses that was available to all families. The law's challengers argued that the tax provision impermissibly advanced religion because it primarily benefited sectarian education. The expenses incurred by parents of public school students were negligible, and almost all of the children in private school attended religiously affiliated institutions.²⁹¹ The Court found that the tax deduction had a secular purpose and that it did not advance religion because it was only one among many deductions allowed by the state legislature and because it was neutrally available to all parents for all public and private school expenses.²⁹² Thus, it did not "confer any imprimatur" of state approval upon sectarian education.²⁹³ Similarly, the fact that "public funds become available only as a result of numerous private choices"²⁹⁴ was seen as a factor that mitigated against the possibility of any constitutionally impermissible imprimatur. The

289. *Id.* at 395-97 (finding that the statute does not require state involvement in organization's day-to-day activities or require state inquiry regarding religious content of materials or motive in selling them).

290. *Mueller*, 463 U.S. 388 (1983). Initially the Court took a more restrictive view. In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court invalidated a New York law that benefited parents at certain income levels whose children attended private elementary and secondary schools, 85% of which were religiously affiliated. *Id.* at 768. The law allowed parents to deduct a specified amount from their gross income. *Id.* at 765-67. The Court held that a tax benefit for parents who send their children to sectarian schools had the "purpose and inevitable effect" of aiding and advancing religion, and unlike the tax exemption for churches approved in *Walz*, providing the benefit would tend to "increase rather than limit the involvement between Church and State." *Id.* at 793. The Court's majority also emphasized that no historical precedent existed for the tax relief program, unlike the traditional tax provision at issue in *Walz*. *Id.* at 792. Although the Court in *Mueller* strove to reconcile its decision with *Nyquist*, it appears that the Court abandoned the approach it had taken in the earlier case.

291. Of the children in Minnesota attending private elementary and secondary schools, "about 95% of these students attended schools considering themselves to be sectarian." *Mueller*, 463 U.S. at 391. The Court rejected the idea that it should examine whether or not the tax in effect primarily benefited religious institutions:

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Id. at 401.

292. *Id.* at 396-99 (citation omitted). The Court emphasized also that its "decisions consistently have recognized that traditionally "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Id.* at 396 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983)).

293. *Id.* at 397 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

294. *Id.* at 399.

Court stressed the social desirability of private, and specifically of parochial, schools on the grounds that they relieve public school systems of a financial burden and offer educational alternatives to, and useful competition with, public schools.²⁹⁵ Under this reasoning, of course, the federal tax relief for child care expenses that benefits families with children in sectarian programs²⁹⁶ is also constitutional.

Mueller left open the question of whether its reasons for upholding tax relief would also validate voucher schemes in which individuals are permitted to redeem vouchers for sectarian services. Under voucher schemes, unlike tax relief plans, the government directly transfers collected revenues to religious institutions that have accepted government-issued vouchers. The Court came the closest to addressing this question in *Witters v. Washington Department of Services for the Blind*.²⁹⁷ In *Witters* a visually impaired man sought state vocational training funds to pay his tuition at a Christian college, where he was preparing for a religious career.²⁹⁸ The Court approved this use, in a nearly unanimous opinion by Justice Marshall, which reasoned that the aid was permissible because it would support religious activities only through the truly private and independent decisions of individuals.²⁹⁹ But Justice Marshall also stressed that the program was not one of the "ingenious" plans periodically before the Court for providing state funds to sectarian schools, that it did not tend to afford greater benefits to recipients enrolled in religious education programs, and that, "importantly," it would not lead to any significant portion of aid flowing to religious education.³⁰⁰ In addition, there was no evidence of any other application for funds for religious studies.³⁰¹ Thus, the Court's opinion suggests that a voucher scheme would be unconstitutional if a majority of, or probably even if a significant portion of, the aid it made available to individuals was used to underwrite religious activities.

The Court's suggestion is a desirable one. Voucher systems should be treated differently than tax measures because they convey a greater endorsement of religion. Voucher plans publicly transfer collected government revenues to religious institutions. Under a voucher plan, (1) parents present government-issued documents in full or partial payment for tuition to sectarian programs, which could comprise a significant minority or perhaps even a majority of private programs in a particular community, and (2) the programs then exchange the documents for direct cash payments from the government. Tax plans, on the other hand, are supported by tradition³⁰² and merely

295. *Id.* at 401-02. The Court is also likely to see utility in the largely private child care system, including its religiously affiliated sector.

296. *See supra* notes 31-36 and accompanying text.

297. *Witters*, 474 U.S. 481 (1986).

298. *Id.* at 482-83, 487.

299. *Id.* at 487 (eight justices joined in entire opinion, Justice O'Connor joined in parts I and III).

300. *Id.* at 488.

301. *Id.*

302. *See generally supra* notes 282-83, 90 and accompanying text; Conkle, *supra* note 193, at 1186 ("Tax exemptions for religious organizations . . . involve only indirect financial assistance and are supported by a tradition that predates our national founding and that extends to all corners of American

permit individuals to retain money that would otherwise be paid to the government. They operate by means of a private and confidential system of forms completed by individuals in their homes for processing by the government behind closed doors. Thus, vouchers, unlike tax assistance, publicly connect church and state, symbolically and administratively, in a way that is more akin to direct government aid than to neutrally available tax benefits.

The CCDBG's child certificate scheme violates the Establishment Clause because it publicly transfers government funds directly to religious institutions. Even if allowing the use of parent-negotiated certificates for sectarian care institutions does not appear to a "reasonable observer" as the government "endorsing a religious practice or belief,"³⁰³ it puts a state imprimatur on religious activities. However, *Zobrest v. Catalina Foothills School District* suggests that today's Court is likely to approve the use of child care certificates for sectarian services.³⁰⁴ In a footnote in *Zobrest*, the Court

government.").

303. *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment).

304. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); see Tobin, *supra* note 39 (arguing that the vouchers are constitutional under existing precedents). *But see* Boothby, *supra* note 95 (arguing that child care vouchers are unconstitutional).

If the Court chooses to approve the CCDBG's vouchers for sectarian child care programs, it need not also approve vouchers for parochial elementary and secondary schools. The Court could rely on legally significant distinctions between the current child care system and the private elementary and secondary education system. By doing so, the Court would continue to uphold the symbolic importance of drawing a line between permissible and impermissible aid.

Allowing the use of certificates for sectarian child care would be more in keeping with Establishment Clause doctrines and would cause less political divisiveness than allowing the use of vouchers for parochial elementary and secondary schools. First, most center-based child care, which accounts for only a part of available services, is not religiously affiliated, and among religiously affiliated centers, only a minority may actually offer sectarian programs, see *supra* notes 22, 26-27 and accompanying text, whereas in the parochial school aid cases, the Court has described situations in which the majority of private schools are sectarian. See *supra* note 39. In the latter settings, vouchers would primarily support pervasively sectarian institutions and would aid a core purpose of providing religious education throughout childhood. In the child care setting, a much smaller percentage of funds would flow to religious programs, and a significant portion of those funds would be paid to infant and preschool care programs, in which, given the tender age of the children, religious indoctrination may be both less relevant and less efficacious than it is in elementary and secondary parochial schools. See *supra* note 259 and accompanying text.

Secondly, child care certificates may have a less significant Establishment Clause effect because the vouchers would not be used in the context of, and would not affect, an existing, state-sponsored, universally available child care system. The certificates, redeemable at any registered family day care home or center-based facility, allow the parents who hold them a wide range of choices rather than giving them an opportunity to leave a pluralistic, nonsectarian, state-run school system in order to enter an alternate, primarily sectarian system. For both these sets of reasons, the child care certificates do not pose the same level of "political divisiveness" concerns that the Court has expressed in, and limited to, the area of government aid to parochial schools. See *supra* note 39 and accompanying text for discussion of political divisiveness.

These distinctions between the effects of child care and school vouchers would make it possible to uphold the CCDBG device without either approving all vouchers, or taking the further step of adopting a "nonpreferentialist" view that direct government aid to religion is permissible if it is supplied in a neutral fashion. The Court could approve the child care certificates on the ground that, in the context of our present child care landscape, they do not constitute either a government advancement, or endorsement, of religion.

noted that there could be no possible constitutional infirmity if funds were paid directly to parents who in turn hired the sign language interpreter for their son. "[R]espondent readily admits, as it must, that there would be no problem under the Establishment Clause if the IDEA funds instead went directly to James' parents"305 In the text of the opinion, the *Zobrest* majority, which included now-retired Justice White,³⁰⁶ vigorously endorsed *Mueller* and the "virtually identical reasoning" of *Witters*.³⁰⁷ The *Zobrest* opinion stressed that the two key factors in both cases were (1) the general availability of aid, without regard to either the public or private or the sectarian or nonsectarian nature of the benefited institution, and (2) the fact that funds flowed to sectarian institutions only as a result of the private choice of an individual.³⁰⁸

This characterization in *Zobrest* echoes the concurrences of Justice Powell and Justice O'Connor in *Witters*, which respectively rejected and de-emphasized the suggestion by Justice Marshall that the identity of the ultimate beneficiaries of aid is relevant.³⁰⁹ Instead, Justice Powell maintained that the critical factors supporting the decision in *Witters* were that benefits were equally available to parents of public and private school children and that "any benefit to religion resulted from the 'numerous private choices of individual parents of school-age children.'"³¹⁰ Justice O'Connor approved Justice Powell's analysis³¹¹ and added, in the language of her endorsement test: "No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief."³¹²

If the Court permits all vouchers, the equation of vouchers with permissible tax assistance will represent an erosion of the rule that the government should not fund religion, and of the ideal that religious endeavors should be independent, private, and voluntarily funded. It would be preferable to either reject such use of vouchers, including child care certificates, or to permit only the use of child care certificates for sectarian services while maintaining limitations on vouchers in the elementary and secondary school context.

305. *Zobrest*, 113 S. Ct. at 2469 n.11.

306. Justices Scalia, Kennedy, and Thomas, all of whom had not participated in either *Mueller* or *Witters*, joined Chief Justice Rehnquist and Justice White in the majority opinion. *Id.* at 2462.

307. *Id.* at 2466-67.

308. *Id.*

309. In a footnote, Justice Powell argues:

Contrary to the Court's suggestion, see *ante* at 488, this conclusion does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training. Over 90% of the tax benefits in *Mueller* ultimately flowed to religious institutions. Compare *Mueller v. Allen*, 463 U.S.[] at 401, with *id.*[], at 405 (Marshall, J., dissenting). Nevertheless, the aid was thus channeled by individual parents and not by the State, making the tax deduction permissible under the "primary effect" test of *Lemon*.

Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 491 n.3 (1986).

310. *Witters*, 474 U.S. at 491 (quoting *Mueller*, 463 U.S. at 399).

311. In her concurrence, Justice O'Connor wrote:

As Justice Powell's separate opinion persuasively argues, the Court's opinion in *Mueller v. Allen*, 463 U.S. 388 (1983), makes clear that 'state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries.' *Ante*, at 490-91 (Powell, J., concurring) (footnote omitted).

Witters, 474 U.S. at 493.

312. *Witters*, 474 U.S. at 493.

Thus, a majority of today's Court may be prepared to extend the reasoning of *Mueller* to the use of vouchers to pay for sectarian child care.

CONCLUSION

Providing CCDBG grant and contract aid to religiously affiliated nonsectarian child care programs is constitutional under the Court's existing Establishment Clause jurisprudence. With this form of aid available—as well as support through tax measures—federal, state, and local governments may provide substantial support for religiously affiliated child care programs without violating current Establishment Clause doctrines and the principles they embody. The CCDBG's use of vouchers for sectarian child care services, on the other hand, undermines Establishment Clause ideals by permitting direct government funding of sectarian activities.

The status of the Court's precedents in the area of government aid to religious institutions is uncertain and unstable, especially given the changing composition of the Court.³¹³ New law may emerge, permitting increased aid to such institutions and modifying constraints formerly established by the Court.³¹⁴ In refashioning Establishment Clause principles for government aid

313. With the departure of Justice Marshall from the Court in 1991, only three of the justices in the *Ball* majority remain. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985). With Justice White's retirement this year, Chief Justice Rehnquist is the only remaining justice of the two who wanted to approve the *Ball* Community Education program. *Id.* at 398-401; see *infra* notes 311-12 and accompanying text.

314. In *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993), the most recent aid-to-religious-institutions case, the Court chose not to reject the *Lemon* test, although it did emphasize the reasoning of the *Mueller* and *Witters* cases rather than merely applying a straightforward *Lemon* analysis. Similarly, in *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141 (1993), involving a church's request to show films in a public school facility, the Court's majority did not repudiate the *Lemon* test and noted that providing access for the church would not violate the test. *Id.* at 2148 n.7.

In Establishment Clause cases that have not involved aid to religious institutions, Chief Justice Rehnquist and Justices Kennedy and Scalia have, in separate opinions, proffered alternative visions of the Establishment Clause. Recommending that the *Lemon* test be abandoned, Chief Justice Rehnquist stated that he rejects the "wall of separation" ideal of *Everson v. Board of Education*, 330 U.S. 1 (1946), in favor of the notion that the Establishment Clause prohibits only the designation of a national church or the assertion of a governmental preference for one denomination over another. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, C.J., dissenting). Also advocating the abandonment of *Lemon*, Justice Scalia—joined by Chief Justice Rehnquist and Justices White and Thomas—stated in dissent in *Lee v. Weisman* that the Establishment Clause was adopted to prohibit an establishment of religion at the federal level, an establishment that would require church attendance and impose civil disabilities on dissenters. *Lee v. Weisman*, 112 S. Ct. 2649, 2683 (1992) (Scalia, J., dissenting). In *Lamb's Chapel*, Justice Scalia, once again joined by Justice Thomas, said that giving the church access to the school facilities in that case would not violate the Establishment Clause "because it does not signify state or local embrace of a particular religious sect." *Lamb's Chapel*, 113 S. Ct. at 2151 (Scalia, J., concurring).

Justice Kennedy expounded his general theory of the Establishment Clause in the case of a public holiday display that included religious symbols. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Joined by Chief Justice Rehnquist and by Justices White and Scalia, Justice Kennedy did not recommend abandoning the *Lemon* test but contended that the Court's precedents prohibit the government from (1) coercing anyone to support or participate in religion, or (2) giving such substantial benefits to religion that it establishes or tends to establish a state religion. *Id.* at 659 (Kennedy, J., concurring in part and dissenting in part) (also rejecting the endorsement concept); see also *Lamb's Chapel*, 113 S. Ct. at 2149 (Kennedy, J., concurring in part and concurring in the judgment). Read literally, this assertion, like Justice Scalia's implicit and Chief Justice Rehnquist's explicit rejection of

to religious institutions, however, it seems unlikely that the Court will retreat from the basic premise, affirmed in its two most recent cases in this area, that government funds should not be expended for religious goals and activities. In *Zobrest*, the Court distinguished the aid it upheld in that case from an impermissible direct cash subsidy to a religious school.³¹⁵ Two of the dissenters pronounced: "'Although Establishment Clause jurisprudence is characterized by few absolutes,' at a minimum 'the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.'" ³¹⁶ Earlier, in *Bowen v. Kendrick*,³¹⁷ the Court made it clear that the Establishment Clause would be violated if the federal aid in question was actually used to further religion.³¹⁸

the "wall of separation" ideal, suggests a sweeping revision of the Court's current Establishment Clause jurisprudence. Yet it is not entirely clear whether Justice Kennedy's assertion would affect the Court's basic premise that public funds may not be expended for religious activities, the premise accepted by all of these justices in *Bowen v. Kendrick*, 487 U.S. 589 (1988). If the "benefits to religion" do not include direct, "nonpreferential," and secularly motivated government funding of religious activities, then Justice Kennedy's assertion does not undermine the Court's premise, and lines must still be drawn between aid that directly funds religious observance and aid that indirectly benefits religion in other ways. Similarly, if the use of government funds for religious activities constitutes coercing taxpayers to support religion, then the Establishment Clause would continue to prohibit such use of public monies, and it would still be necessary to draw lines between permissible and impermissible aid. See Laycock, *supra* note 14, at 40 (observing that "it is common ground that taxation is coercive").

For Justice Souter's exposition of his views that the Establishment Clause *does* apply to "governmental practices that do not favor one religion or denomination over others" and that "coercion of religious conformity, over and above state endorsement of religious exercise or belief," is not "a necessary element of an Establishment Clause violation," see *Lee*, 112 S. Ct. at 2667-78 (Souter, J., concurring, joined by Justices Stevens and O'Connor). For a discussion of Justice O'Connor's views, see *supra* notes 219-20, 222 and accompanying text.

In response to questioning in her Senate confirmation hearings about the criticisms of the *Lemon* test, Justice Ginsburg said:

Senator, I don't have a satisfactory alternative. I can't tell you—I think this is a very difficult, very difficult area. I can only say that I am open to arguments, to ideas. But at this moment, as I said yesterday, it's very easy to criticize. It's not so easy to offer an alternative.

Capitol Hill Hearing, Hearing of the Senate Judiciary Committee, Confirmation of Ruth Bader Ginsburg as Supreme Court Justice, Federal Information Systems Corporation, Federal News Service, July 21, 1993, at 29.

For recent scholarly commentary on general theories of the Establishment Clause, see, for example, Conkle, *supra* note 193; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992); Marshall, *supra* note 18; McConnell, *Religious Participation in Public Programs*, *supra* note 96.

315. *Zobrest*, 113 S. Ct. at 2465-69.

316. *Id.* at 2473 (Blackmun, J., dissenting, joined by Souter, J.) (quoting *Ball*, 473 U.S. at 385).

317. *Bowen*, 487 U.S. 589.

318. The opinion concluded by directing the trial court on remand to consider (1) whether aid "is flowing to grantees that can be considered 'pervasively sectarian' religious institutions, such as we have held parochial schools to be," and (2) whether "in particular cases . . . aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'" *Id.* at 621 (citations omitted).

Justice Kennedy joined the majority in that case but wrote a concurrence, joined by Justice Sotomayor, to "discuss one feature of the proceedings on remand." *Id.* at 624. Kennedy wrote that when a government program distributes benefits neutrally among religious and non-religious applicants it is not unconstitutional merely because the statute allows payments to a pervasively sectarian institution for the provision of *secular social services*. He agreed, however, that if funds are actually being used to further religion, then the Establishment Clause has been violated. *Id.* at 624-25.

If the Court does not abandon this premise—which excludes the payment of direct, unrestricted aid to pervasively sectarian organizations—it will continue to draw a line between permissible and impermissible aid, even if it redraws its existing line in a way that allows more assistance, possibly even permitting types of plans that it has rejected in the past. If the Court instead rejects the premise that government should not fund religious activities, we will lose the constitutive exercise³¹⁹ of debating and deciding upon the line between permissible and impermissible aid, the exercise fruitfully undertaken in the enactment of the CCDBG. Such action by the Court would be unfortunate because the line-drawing effort itself, wherever and however ably it ultimately marks the boundary, serves the purpose of publicly promoting the central Establishment Clause principle that a separation between the public sphere of government and the private sphere of religion is an important means of securing religious liberty.

319. As scholar Harry H. Wellington observes, “[w]hat the Court decides is both derived from public values and in turn shapes public values. It is this interaction—this complex and robust dialogue—that ultimately makes the final meaning of our fundamental law” HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION* 158 (1990).