SUPREME COURT OF THE UNITED STATES

No. 98–1648

GUY MITCHELL, ET AL., PETITIONERS *v.*
MARY L. HELMS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 28, 2000]

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, concurring in the judgment.

In 1965, Congress passed the Elementary and Secondary Education Act, 79 Stat. 27 (1965 Act). Under Title I, Congress provided monetary grants to States to address the needs of educationally deprived children of low-income families. Under Title II, Congress provided further monetary grants to States for the acquisition of library resources, textbooks, and other instructional materials for use by children and teachers in public and private elementary and secondary schools. Since 1965, Congress has reauthorized the Title I and Title II programs several times. Three Terms ago, we held in *Agostini* v. *Felton*, 521 U. S. 203 (1997), that Title I, as applied in New York City, did not violate the Establishment Clause. I believe that *Agostini* likewise controls the constitutional inquiry respecting Title II presented here, and requires the reversal of the Court of Appeals' judgment that the program is unconstitutional as applied in Jefferson Parish, Louisiana. To the extent our decisions in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), and *Wolman* v. *Walter*, 433 U. S. 229 (1977), are inconsistent with the Court's judgment today, I agree that those decisions should be overruled. I therefore concur in the judgment.

I

I write separately because, in my view, the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs. Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible. Although the expansive scope of the plurality's rule is troubling, two specific aspects of the opinion compel me to write separately. First, the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs. Second, the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case.

The clearest example of the plurality's near-absolute position with respect to neutrality is found in its following statement:

> "If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seek-

> ing to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." *Ante*, at 10 (citation omitted).

I agree with JUSTICE SOUTER that the plurality, by taking such a stance, "appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test for the establishment constitutionality of school aid." *Post*, at 35.

I do not quarrel with the plurality's recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. Our cases have described neutrality in precisely this manner, and we have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid. See, *e.g.*, *Agostini*, *supra*, at 228, 231–232; *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 10 (1993); *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, 487–488 (1986); *id.*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment); *Mueller* v. *Allen*, 463 U. S. 388, 397–399 (1983). Nevertheless, we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid. For example, in *Agostini*, neutrality was only one of several factors we considered in determining that New York City's Title I program did not have the impermissible effect of advancing religion. See 521 U. S., at 226–228 (noting lack of evidence of inculcation of religion by Title I instructors, legal requirement that Title I services be supplemental to regular curricula, and that no Title I funds reached religious schools' coffers). Indeed, given that the aid in *Agostini* had secular content and was distributed on the basis

of wholly neutral criteria, our consideration of additional factors demonstrates that the plurality's rule does not accurately describe our recent Establishment Clause jurisprudence. See also *Zobrest*, *supra*, at 10, 12–13 (noting that no government funds reached religious school's coffers, aid did not relieve school of expense it otherwise would have assumed, and aid was not distributed to school but to the child).

JUSTICE SOUTER provides a comprehensive review of our Establishment Clause cases on government aid to religious institutions that is useful for its explanation of the various ways in which we have used the term "neutrality" in our decisions. See *post*, at 12–17. Even if we at one time used the term "neutrality" in a descriptive sense to refer to those aid programs characterized by the requisite equipoise between support of religion and antagonism to religion, JUSTICE SOUTER's discussion convincingly demonstrates that the evolution in the meaning of the term in our jurisprudence is cause to hesitate before equating the neutrality of recent decisions with the neutrality of old. As I have previously explained, neutrality is important, but it is by no means the only "axiom in the history and precedent of the Establishment Clause." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 846 (1995) (concurring opinion). Thus, I agree with JUSTICE SOUTER's conclusion that our "most recent use of 'neutrality' to refer to generality or evenhandedness of distribution . . . is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious mission, but this neutrality is not alone sufficient to qualify the aid as constitutional." *Post*, at 17–18.

I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause. See *ante*, at 21–27. Although "[o]ur cases have permitted some government funding of secular functions performed by

sectarian organizations," our decisions "provide no precedent for the use of public funds to finance religious activities." *Rosenberger*, *supra*, at 847 (O'CONNOR, J., concurring). At least two of the decisions at the heart of today's case demonstrate that we have long been concerned that secular government aid not be diverted to the advancement of religion. In both *Agostini*, our most recent school-aid case, and *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968), we rested our approval of the relevant programs in part on the fact that the aid had not been used to advance the religious missions of the recipient schools. See *Agostini*, *supra*, at 226–227 ("[N]o evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students"); *Allen*, *supra*, at 248 ("Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion"). Of course, our focus on the lack of such evidence would have been entirely unnecessary if we had believed that the Establishment Clause permits the actual diversion of secular government aid to religious indoctrination. Our decision in *Bowen* v. *Kendrick*, 487 U. S. 589 (1988), also demonstrates that actual diversion is constitutionally impermissible. After concluding that the government-aid program in question was constitutional on its face, we remanded the case so that the District Court could determine, after further factual development, whether aid recipients had used the government aid to support their religious objectives. See *id.*, at 621–622; *id.*, at 624 (KENNEDY, J., concurring) ("[T]he only purpose of further inquiring whether any particular grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being used to further religion"). The remand would have been unnecessary if, as the plurality contends, actual

diversion were irrelevant under the Establishment Clause.

The plurality bases its holding that actual diversion is permissible on *Witters* and *Zobrest*. *Ante*, at 21–22. Those decisions, however, rested on a significant factual premise missing from this case, as well as from the majority of cases thus far considered by the Court involving Establishment Clause challenges to school-aid programs. Specifically, we decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use. See *Witters*, 474 U. S., at 488; *Zobrest*, 509 U. S., at 10, 12. Accordingly, our approval of the aid in both cases relied to a significant extent on the fact that "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, *supra*, at 487; see *Zobrest*, *supra*, at 10 ("[A] government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents"). This characteristic of both programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution. See, *e.g.*, *Witters*, *supra*, at 486–487; see also *Rosenberger*, *supra*, at 848 (O'CONNOR, J., concurring) (discussing *Witters*).

Recognizing this distinction, the plurality nevertheless finds *Witters* and *Zobrest*— to the extent those decisions might permit the use of government aid for religious purposes— relevant in any case involving a neutral, per-capita-aid program. See *ante*, at 32–33. Like JUSTICE SOUTER, I do not believe that we should treat a per-capita-aid program the same as the true private-choice programs considered in *Witters* and *Zobrest*. See *post*, at 37. First, when the government provides aid directly to the student beneficiary, that student can attend a religious school and

yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision. See *Rosenberger*, 515 U. S., at 848 (O'CONNOR, J., concurring) (discussing importance of private choice in *Witters*); *Witters*, 474 U. S., at 488 ("[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State"); *id.*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment) ("The aid to religion at issue here is the result of petitioner's private choice"). It is for this reason that in *Agostini* we relied on *Witters* and *Zobrest* to reject the rule "that all government aid that directly assists the educational function of religious schools is invalid," 521 U. S., at 225, yet also rested our approval of New York City's Title I program in part on the lack of evidence of actual diversion, *id.*, at 226–227.

Second, I believe the distinction between a per-capita school-aid program and a true private-choice program is significant for purposes of endorsement. See, *e.g.*, *Lynch* v. *Donnelly*, 465 U. S. 668, 692 (1984) (O'CONNOR, J., concurring). In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion. That the amount of aid received by the school is based on the school's enrollment does not separate the

government from the endorsement of the religious message. The aid formula does not— and could not— indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school, who each affirmatively choose to direct the secular government aid to the school and its religious mission. No such choices have been made. In contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Witters*, *supra*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment). Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

Finally, the distinction between a per-capita-aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies. This Court has "recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger*, 515 U. S., at 842; see also *ibid*. (collecting cases). If, as the plurality contends, a per-capita-aid program is identical in relevant constitutional respects to a true private-choice program, then there is no reason that, under the plurality's reasoning, the government should be precluded from providing direct money payments to religious organizations (including churches) based on the number of persons belonging to each organization. And, because actual diversion is permissible under the plurality's holding, the participating religious organizations (including churches) could use that aid to support religious indoctrination. To be sure, the plurality does not actually hold that its theory extends to direct money payments. See *ante*, at 20–21. That omission, however, is of little comfort. In its logic—

as well as its specific advisory language, see *ante*, at 20, n. 8– the plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives.

Our school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule. As I explained in *Rosenberger*, "[r]esolution instead depends on the hard task of judging– sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." 515 U. S., at 847 (concurring opinion). *Agostini* represents our most recent attempt to devise a general framework for approaching questions concerning neutral school-aid programs. *Agostini* also concerned an Establishment Clause challenge to a school-aid program closely related to the one at issue here. For these reasons, as well as my disagreement with the plurality's approach, I would decide today's case by applying the criteria set forth in *Agostini*.

II

In *Agostini*, after reexamining our jurisprudence since *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985), we explained that the general principles used to determine whether government aid violates the Establishment Clause have remained largely unchanged. 521 U. S., at 222. Thus, we still ask "whether the government acted with the purpose of advancing or inhibiting religion" and "whether the aid has the 'effect' of advancing or inhibiting religion." *Id.*, at 222–223. We also concluded in *Agostini*, however, that the specific criteria used to determine whether government aid has an impermissible effect had changed. *Id.*, at 223. Looking to our recently decided

cases, we articulated three primary criteria to guide the determination whether a government-aid program impermissibly advances religion: (1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion. *Id.*, at 234. Finally, we noted that the same criteria could be reviewed to determine whether a government-aid program constitutes an endorsement of religion. *Id.*, at 235.

Respondents neither question the secular purpose of the Chapter 2 (Title II) program nor contend that it creates an excessive entanglement. (Due to its denomination as Chapter 2 of the Education Consolidation and Improvement Act of 1981, 95 Stat. 469, the parties refer to the 1965 Act's Title II program, as modified by subsequent legislation, as "Chapter 2." For ease of reference, I will do the same.) Accordingly, for purposes of deciding whether Chapter 2, as applied in Jefferson Parish, Louisiana, violates the Establishment Clause, we need ask only whether the program results in governmental indoctrination or defines its recipients by reference to religion.

Taking the second inquiry first, it is clear that Chapter 2 does not define aid recipients by reference to religion. In *Agostini*, we explained that scrutiny of the manner in which a government-aid program identifies its recipients is important because "the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." 521 U. S., at 231. We then clarified that this financial incentive is not present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Ibid.* Under Chapter 2, the Secretary of Education allocates funds to the States based on each State's share of the

Nation's school-age population. 20 U. S. C. §7311(b). The state educational agency (SEA) of each recipient State, in turn, must distribute the State's Chapter 2 funds to local educational agencies (LEA's) "according to the relative enrollments in public and private, nonprofit schools within the school districts of such agencies," adjusted to take into account those LEA's "which have the greatest numbers or percentages of children whose education imposes a higher than average cost per child." §7312(a). The LEA must then expend those funds on "innovative assistance programs" designed to improve student achievement. §7351. The statute generally requires that an LEA ensure the "equitable participation" of children enrolled in private nonprofit elementary and secondary schools, §7372(a)(1), and specifically mandates that all LEA expenditures on behalf of children enrolled in private schools "be equal (consistent with the number of children to be served) to expenditures for programs . . . for children enrolled in the public schools of the [LEA]," §7372(b). As these statutory provisions make clear, Chapter 2 uses wholly neutral and secular criteria to allocate aid to students enrolled in religious and secular schools alike. As a result, it creates no financial incentive to undertake religious indoctrination.

Agostini next requires us to ask whether Chapter 2 "result[s] in governmental indoctrination." 521 U. S., at 234. Because this is a more complex inquiry under our case law, it is useful first to review briefly the basis for our decision in *Agostini* that New York City's Title I program did not result in governmental indoctrination. Under that program, public-school teachers provided Title I instruction to eligible students on private school premises during regular school hours. Twelve years earlier, in *Aguilar* v. *Felton*, 473 U. S. 402 (1985), we had held the same New York City program unconstitutional. In *Ball*, a companion case to *Aguilar*, we also held that a similar program in Grand

Rapids, Michigan, violated the Constitution. Our decisions in *Aguilar* and *Ball* were both based on a presumption, drawn in large part from *Meek*, see 421 U. S., at 367–373, that public-school instructors who teach secular classes on the campuses of religious schools will inevitably inculcate religion in their students.

In *Agostini*, we recognized that "[o]ur more recent cases [had] undermined the assumptions upon which *Ball* and *Aguilar* relied." 521 U. S., at 222. First, we explained that the Court had since abandoned "the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.*, at 223. Rather, relying on *Zobrest*, we explained that in the absence of evidence showing that teachers were actually using the Title I aid to inculcate religion, we would presume that the instructors would comply with the program's secular restrictions. See *Agostini*, 521 U. S., at 223–224, 226–227. The Title I services were required by statute to be " 'secular, neutral, and nonideological.' " *Id.*, at 210 (quoting 20 U. S. C. §6321(a)(2)).

Second, we noted that the Court had "departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid." *Agostini*, *supra*, at 225. Relying on *Witters* and *Zobrest*, we noted that our cases had taken a more forgiving view of neutral government programs that make aid available generally without regard to the religious or nonreligious character of the recipient school. See *Agostini*, 521 U. S., at 225–226. With respect to the specific Title I program at issue, we noted several factors that precluded us from finding an impermissible financing of religious indoctrination: the aid was "provided to students at whatever school they choose to attend," the services were "by law

supplemental to the regular curricula" of the benefited schools, "[n]o Title I funds ever reach the coffers of religious schools," and there was no evidence of Title I instructors having "attempted to inculcate religion in students." *Id.*, at 226–228. Relying on the same factors, we also concluded that the New York City program could not "reasonably be viewed as an endorsement of religion." *Id.*, at 235. Although we found it relevant that Title I services could not be provided on a school-wide basis, we also explained that this fact was likely a sufficient rather than a necessary condition of the program's constitutionality. We were not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.*, at 229.

The Chapter 2 program at issue here bears the same hallmarks of the New York City Title I program that we found important in *Agostini*. First, as explained above, Chapter 2 aid is distributed on the basis of neutral, secular criteria. The aid is available to assist students regardless of whether they attend public or private nonprofit religious schools. Second, the statute requires participating SEA's and LEA's to use and allocate Chapter 2 funds only to supplement the funds otherwise available to a religious school. 20 U. S. C. §7371(b). Chapter 2 funds must in no case be used to supplant funds from non-Federal sources. *Ibid.* Third, no Chapter 2 funds ever reach the coffers of a religious school. Like the Title I program considered in *Agostini*, all Chapter 2 funds are controlled by public agencies— the SEA's and LEA's. §7372(c)(1). The LEA's purchase instructional and educational materials and then lend those materials to public and private schools. See §§7351(a), (b)(2). With respect to lending to private schools under Chapter 2, the statute specifically provides that the relevant public agency must retain title to the materials and equipment. §7372(c)(1). Together with the supplantation restriction, this provision

ensures that religious schools reap no financial benefit by virtue of receiving loans of materials and equipment. Finally, the statute provides that all Chapter 2 materials and equipment must be "secular, neutral, and nonideological." §7372(a)(1). That restriction is reinforced by a further statutory prohibition on "the making of any payment . . . for religious worship or instruction." §8897. Although respondents claim that Chapter 2 aid has been diverted to religious instruction, that evidence is *de minimis*, as I explain at greater length below. See *infra*, at 29–31.

III

Respondents contend that *Agostini* is distinguishable, pointing to the distinct character of the aid program considered there. See Brief for Respondents 44–47. In *Agostini*, federal funds paid for public-school teachers to provide secular instruction to eligible children on the premises of their religious schools. Here, in contrast, federal funds pay for instructional materials and equipment that LEA's lend to religious schools for use by those schools' own teachers in their classes. Because we held similar programs unconstitutional in *Meek* and *Wolman*, respondents contend that those decisions, and not *Agostini*, are controlling. See, *e.g.*, Brief for Respondents 11, 22–25. Like respondents, JUSTICE SOUTER also relies on *Meek* and *Wolman* in finding the character of the Chapter 2 aid constitutionally problematic. See *post*, at 28, 38.

At the time they were decided, *Meek* and *Wolman* created an inexplicable rift within our Establishment Clause jurisprudence concerning government aid to schools. Seven years before our decision in *Meek*, we held in *Allen* that a New York statute that authorized the lending of textbooks to students attending religious schools did not violate the Establishment Clause. 392 U. S., at 238. We explained that the statute "merely [made] available to all children the benefits of a general program to lend school

books free of charge," that the State retained ownership of the textbooks, and that religious schools received no financial benefit from the program. *Id.*, at 243–244. We specifically rejected the contrary argument that the statute violated the Establishment Clause because textbooks are critical to the teaching process, which in a religious school is employed to inculcate religion. *Id.*, at 245–248.

In *Meek* and *Wolman*, we adhered to *Allen*, holding that the textbook lending programs at issue in each case did not violate the Establishment Clause. See *Meek*, 421 U. S., at 359–362 (plurality opinion); *Wolman*, 433 U. S., at 236–238 (plurality opinion). At the same time, however, we held in both cases that the lending of instructional materials and equipment to religious schools was unconstitutional. See *Meek*, *supra*, at 362–366; *Wolman*, *supra*, at 248–251. We reasoned that, because the religious schools receiving the materials and equipment were pervasively sectarian, any assistance in support of the schools' educational missions would inevitably have the impermissible effect of advancing religion. For example, in *Meek* we explained:

> "[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize [the statute] as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion." 421 U. S., at 365–366 (quoting *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973)).

Thus, we held that the aid program "*necessarily results* in

aid to the sectarian school enterprise as a whole," and "*inescapably results* in the direct and substantial advancement of religious activity." *Meek*, *supra*, at 366 (emphases added). Similarly, in *Wolman*, we concluded that, "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid *inevitably flows* in part in support of the religious role of the schools." 433 U. S., at 250 (emphasis added).

For whatever reason, the Court was not willing to extend this presumption of inevitable religious indoctrination to school aid when it instead consisted of textbooks lent free of charge. For example, in *Meek*, despite identifying the religious schools' secular educational functions and religious missions as inextricably intertwined, 421 U. S., at 366, the Court upheld the textbook lending program because "the record in the case . . . , like the record in *Allen*, contains no suggestion that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes," *id.*, at 361–362 (citation omitted). Accordingly, while the Court was willing to apply an irrebuttable presumption that secular instructional materials and equipment would be diverted to use for religious indoctrination, it required evidence that religious schools were diverting secular textbooks to religious instruction.

The inconsistency between the two strands of the Court's jurisprudence did not go unnoticed, as Justices on both sides of the *Meek* and *Wolman* decisions relied on the contradiction to support their respective arguments. See, *e.g.*, *Meek*, 421 U. S., at 384 (Brennan, J., concurring in part and dissenting in part) ("[W]hat the Court says of the instructional materials and equipment may be said perhaps even more accurately of the textbooks" (citation omitted)); *id.*, at 390 (REHNQUIST, J., concurring in judgment in part and dissenting in part) ("The failure of the majority to justify the differing approaches to textbooks

and instructional materials and equipment in the above respect is symptomatic of its failure even to attempt to distinguish the . . . textbook loan program, which the plurality upholds, from the . . . instructional materials and equipment loan program, which the majority finds unconstitutional"). The irrationality of this distinction is patent. As one Member of our Court has noted, it has meant that "a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class." *Wallace* v. *Jaffree*, 472 U. S. 38, 110 (1985) (REHNQUIST, J., dissenting) (footnotes omitted).

Indeed, technology's advance since the *Allen*, *Meek*, and *Wolman* decisions has only made the distinction between textbooks and instructional materials and equipment more suspect. In this case, for example, we are asked to draw a constitutional line between lending textbooks and lending computers. Because computers constitute instructional equipment, adherence to *Meek* and *Wolman* would require the exclusion of computers from any government school aid program that includes religious schools. Yet, computers are now as necessary as were schoolbooks 30 years ago, and they play a somewhat similar role in the educational process. That *Allen*, *Meek*, and *Wolman* would permit the constitutionality of a school-aid program to turn on whether the aid took the form of a computer rather than a book further reveals the inconsistency inherent in their logic.

Respondents insist that there is a reasoned basis under the Establishment Clause for the distinction between textbooks and instructional materials and equipment. They claim that the presumption that religious schools will use instructional materials and equipment to inculcate religion is sound because such materials and equipment, unlike textbooks, are reasonably divertible to religious uses. For example, no matter what secular criteria

the government employs in selecting a film projector to lend to a religious school, school officials can always divert that projector to religious instruction. Respondents therefore claim that the Establishment Clause prohibits the government from giving or lending aid to religious schools when that aid is reasonably divertible to religious uses. See, *e.g.*, Brief for Respondents 11, 35. JUSTICE SOUTER also states that the divertibility of secular government aid is an important consideration under the Establishment Clause, although he apparently would not ascribe it the constitutionally determinative status that respondents do. See *post*, at 19, 25–30.

I would reject respondents' proposed divertibility rule. First, respondents cite no precedent of this Court that would require it. The only possible direct precedential support for such a rule is a single sentence contained in a footnote from our *Wolman* decision. There, the Court described *Allen* as having been "premised on the view that the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." *Wolman*, *supra*, at 251, n. 18. To the extent this simple description of *Allen* is even correct, it certainly does not constitute an actual holding that the Establishment Clause prohibits the government from lending any divertible aid to religious schools. Rather, as explained above, the *Wolman* Court based its holding invalidating the lending of instructional materials and equipment to religious schools on the rationale adopted in *Meek*— that the secular educational function of a religious school is inseparable from its religious mission. See *Wolman*, *supra*, at 250. Indeed, if anything, the *Wolman* footnote confirms the irrationality of the distinction between textbooks and instructional materials and equipment. After the *Wolman* Court acknowledged that its holding with respect to instructional materials and equipment was in tension with *Allen*, the Court explained the continuing

validity of *Allen* solely on the basis of *stare decisis*: "*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." *Wolman*, 433 U. S., at 252, n. 18. Thus, the *Wolman* Court never justified the inconsistent treatment it accorded the lending of textbooks and the lending of instructional materials and equipment based on the items' reasonable divertibility.

JUSTICE SOUTER's attempt to defend the divertibility rationale as a viable distinction in our Establishment Clause jurisprudence fares no better. For JUSTICE SOUTER, secular school aid presents constitutional problems not only when it is actually diverted to religious ends, but also when it simply has the capacity for, or presents the possibility of, such diversion. See, *e.g.*, *post*, at 28 (discussing "susceptibility [of secular supplies] to the service of religious ends"). Thus, he explains the *Allen*, *Meek*, and *Wolman* decisions as follows: "While the textbooks had a known and fixed secular content not readily divertible to religious teaching purposes, the adaptable materials did not." *Post*, at 28. This view would have come as a surprise to the Court in *Meek*, which expressly conceded that "the material and equipment that are the subjects of the loan . . . are 'self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use.'" 421 U. S., at 365 (quoting *Meek* v. *Pittenger*, 374 F. Supp. 639, 660 (ED Pa. 1974)). Indeed, given the nature of the instructional materials considered in *Meek* and *Wolman*, it is difficult to comprehend how a divertibility rationale could have explained the decisions. The statutes at issue in those cases authorized the lending of "periodicals, photographs, maps, charts, sound recordings, [and] films," *Meek*, *supra*, at 355, and "maps and globes," *Wolman*, *supra*, at 249. There is no plausible

basis for saying that these items are somehow more divertible than a textbook given that each of the above items, like a textbook, has a fixed and ascertainable content.

In any event, even if *Meek* and *Wolman* had articulated the divertibility rationale urged by respondents and JUSTICE SOUTER, I would still reject it for a more fundamental reason. Stated simply, the theory does not provide a logical distinction between the lending of textbooks and the lending of instructional materials and equipment. An educator can use virtually any instructional tool, whether it has ascertainable content or not, to teach a religious message. In this respect, I agree with the plurality that "it is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message." *Ante*, at 25. In today's case, for example, we are asked to draw a constitutional distinction between lending a textbook and lending a library book. JUSTICE SOUTER's try at justifying that distinction only demonstrates the absurdity on which such a difference must rest. He states that "[a]lthough library books, like textbooks, have fixed content, religious teachers can assign secular library books for religious critique." *Post*, at 38. Regardless of whether that explanation is even correct (for a student surely could be given a religious assignment in connection with a textbook too), it is hardly a distinction on which constitutional law should turn. Moreover, if the mere ability of a teacher to devise a religious lesson involving the secular aid in question suffices to hold the provision of that aid unconstitutional, it is difficult to discern any limiting principle to the divertibility rule. For example, even a publicly financed lunch would apparently be unconstitutional under a divertibility rationale because religious-school officials conceivably could use the lunch to lead the students in a blessing over the bread. See Brief for Avi Chai Foundation as *Amicus Curiae* 18.

To the extent JUSTICE SOUTER believes several related Establishment Clause decisions require application of a divertibility rule in the context of this case, I respectfully disagree. JUSTICE SOUTER is correct to note our continued recognition of the special dangers associated with direct money grants to religious institutions. See *post*, at 25–27. It does not follow, however, that we should treat as constitutionally suspect any form of secular aid that might conceivably be diverted to a religious use. As the cases JUSTICE SOUTER cites demonstrate, our concern with direct monetary aid is based on more than just diversion. In fact, the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition. See, *e.g.*, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 668 (1970) ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity"). Statements concerning the constitutionally suspect status of direct cash aid, accordingly, provide no justification for applying an absolute rule against divertibility when the aid consists instead of instructional materials and equipment.

JUSTICE SOUTER also relies on our decisions in *Wolman* (to the extent it concerned field-trip transportation for nonpublic schools), *Levitt* v. *Committee for Public Ed. & Religious Liberty*, 413 U. S. 472 (1973), *Tilton* v. *Richardson*, 403 U. S. 672 (1971), and *Bowen*. See *post*, at 28–30. None requires application of a divertibility rule in the context of this case. *Wolman* and *Levitt* were both based on the same presumption that government aid will be used in the inculcation of religion that we have chosen not to apply to textbook lending programs and that we have more generally rejected in recent decisions. Compare *Wolman*, *supra*, at 254; *Levitt*, *supra*, at 480, with *supra*,

at 16; *infra*, at 23. In *Tilton*, we considered a federal statute that authorized grants to universities for the construction of buildings and facilities to be used exclusively for secular educational purposes. See 403 U. S., at 674–675. We held the statute unconstitutional only to the extent that a university's "obligation not to use the facility for sectarian instruction or religious worship . . . appear[ed] to expire at the end of 20 years." *Id.*, at 683. To hold a statute unconstitutional because it lacks a secular content restriction is quite different from resting on a divertibility rationale. Indeed, the fact that we held the statute constitutional in all other respects is more probative on the divertibility question because it demonstrates our willingness to presume that the university would abide by the secular content restriction during the years the requirement was in effect. In any event, Chapter 2 contains both a secular content restriction, 20 U. S. C. §7372(a)(1), and a prohibition on the use of aid for religious worship or instruction, §8897, so *Tilton* provides no basis for upholding respondents' challenge. Finally, our decision in *Bowen* proves only that actual diversion, as opposed to mere divertibility, is constitutionally impermissible. See, *e.g.*, 487 U. S., at 621. Had we believed that the divertibility of secular aid was sufficient to call the aid program into question, there would have been no need for the remand we ordered and no basis for the reversal.

IV

Because divertibility fails to explain the distinction our cases have drawn between textbooks and instructional materials and equipment, there remains the question of which of the two irreconcilable strands of our Establishment Clause jurisprudence we should now follow. Between the two, I would adhere to the rule that we have applied in the context of textbook lending programs: To

establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes. See *Meek*, 421 U. S., at 361–362; *Allen*, 392 U. S., at 248. Just as we held in *Agostini* that our more recent cases had undermined the assumptions underlying *Ball* and *Aguilar*, I would now hold that *Agostini* and the cases on which it relied have undermined the assumptions underlying *Meek* and *Wolman*. To be sure, *Agostini* only addressed the specific presumption that public-school employees teaching on the premises of religious schools would inevitably inculcate religion. Nevertheless, I believe that our definitive rejection of that presumption also stood for– or at least strongly pointed to– the broader proposition that such presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause. In *Agostini*, we repeatedly emphasized that it would be inappropriate to presume inculcation of religion; rather, plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination. See 521 U. S., at 223–224, 226–227. We specifically relied on our statement in *Zobrest* that a presumption of indoctrination, because it constitutes an absolute bar to the aid in question regardless of the religious school's ability to separate that aid from its religious mission, constitutes a "flat rule, smacking of antiquated notions of 'taint,' [that] would indeed exalt form over substance." 509 U. S., at 13. That reasoning applies with equal force to the presumption in *Meek* and *Ball* concerning instructional materials and equipment. As we explained in *Agostini*, "we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid." 521 U. S., at 225.

Respondents contend that *Agostini* should be limited to its facts, and point specifically to the following statement

from my separate opinion in *Ball* as the basis for retaining a presumption of religious inculcation for instructional materials and equipment:

> "When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach." 473 U. S., at 399–400 (concurring in judgment in part and dissenting in part).

Respondents note that in *Agostini* we did not overrule that portion of *Ball* holding the Community Education program unconstitutional. Under that program, the government paid religious-school teachers to operate as part-time public teachers at their religious schools by teaching secular classes at the conclusion of the regular school day. *Ball*, 473 U. S., at 376–377. Relying on both the majority opinion and my separate opinion in *Ball*, respondents therefore contend that we must presume that religious-school teachers will inculcate religion in their students. If that is so, they argue, we must also presume that religious-school teachers will be unable to follow secular restrictions on the use of instructional materials and equipment lent to their schools by the government. See Brief for Respondents 26–29.

I disagree, however, that the latter proposition follows from the former. First, as our holding in *Allen* and its reaffirmance in *Meek* and *Wolman* demonstrate, the Court's willingness to assume that religious-school instructors will inculcate religion has not caused us to presume also that such instructors will be unable to follow secular restrictions on the use of textbooks. I would simi-

larly reject any such presumption regarding the use of instructional materials and equipment. When a religious school receives textbooks or instructional materials and equipment lent with secular restrictions, the school's teachers need not refrain from teaching religion altogether. Rather, the instructors need only ensure that any such religious teaching is done without the instructional aids provided by the government. We have always been willing to assume that religious-school instructors can abide by such restrictions when the aid consists of textbooks, which Justice Brennan described as "surely the heart tools of . . . education." *Meek*, *supra*, at 384 (concurring in part and dissenting in part). The same assumption should extend to instructional materials and equipment.

For the same reason, my position in *Ball* is distinguishable. There, the government paid for religious-school instructors to teach classes supplemental to those offered during the normal school day. In that context, I was willing to presume that the religious-school teacher who works throughout the day to advance the school's religious mission would also do so, at least to some extent, during the supplemental classes provided at the end of the day. Because the government financed the entirety of such classes, any religious indoctrination taking place therein would be directly attributable to the government. In the instant case, because the Chapter 2 aid concerns only teaching tools that must remain supplementary, the aid comprises only a portion of the teacher's educational efforts during any single class. In this context, I find it easier to believe that a religious-school teacher can abide by the secular restrictions placed on the government assistance. I therefore would not presume that the Chapter 2 aid will advance, or be perceived to advance, the school's religious mission.

V

Respondents do not rest, however, on their divertibility argument alone. Rather, they also contend that the evidence respecting the actual administration of Chapter 2 in Jefferson Parish demonstrates that the program violated the Establishment Clause. First, respondents claim that the program's safeguards are insufficient to uncover instances of actual diversion. Brief for Respondents 37, 42–43, 45–47. Second, they contend that the record shows that some religious schools in Jefferson Parish may have used their Chapter 2 aid to support religious education (*i.e.*, that they diverted the aid). *Id.*, at 36–37. Third, respondents highlight violations of Chapter 2's secular content restrictions. *Id.*, at 39–41. And, finally, they note isolated examples of potential violations of Chapter 2's supplantation restriction. *Id.*, at 43–44. Based on the evidence underlying the first and second claims, the plurality appears to contend that the Chapter 2 program can be upheld only if actual diversion of government aid to the advancement of religion is permissible under the Establishment Clause. See, *ante*, at 34–36. Relying on the evidence underlying all but the last of the above claims, JUSTICE SOUTER concludes that the Chapter 2 program, as applied in Jefferson Parish, violated the Establishment Clause. See *post*, at 38–46. I disagree with both the plurality and JUSTICE SOUTER. The limited evidence amassed by respondents during 4 years of discovery (which began approximately 15 years ago) is at best *de minimis* and therefore insufficient to affect the constitutional inquiry.

The plurality and JUSTICE SOUTER direct the primary thrust of their arguments at the alleged inadequacy of the program's safeguards. Respondents, the plurality, and JUSTICE SOUTER all appear to proceed from the premise that, so long as actual diversion presents a constitutional problem, the government must have a failsafe mechanism

capable of detecting *any* instance of diversion. We rejected that very assumption, however, in *Agostini*. There, we explained that because we had "abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required." 521 U. S., at 234 (emphasis in original). Because I believe that the Court should abandon the presumption adopted in *Meek* and *Wolman* respecting the use of instructional materials and equipment by religious-school teachers, I see no constitutional need for *pervasive* monitoring under the Chapter 2 program.

The safeguards employed by the program are constitutionally sufficient. At the federal level, the statute limits aid to "secular, neutral, and nonideological services, materials, and equipment," 20 U. S. C. §7372(a)(1); requires that the aid only supplement and not supplant funds from non-Federal sources, §7371(b); and prohibits "any payment . . . for religious worship or instruction," §8897. At the state level, the Louisiana Department of Education (the relevant SEA for Louisiana) requires all nonpublic schools to submit signed assurances that they will use Chapter 2 aid only to supplement and not to supplant non-Federal funds, and that the instructional materials and equipment "will only be used for secular, neutral and nonideological purposes." App. 260a–261a; see also *id.*, at 120a. Although there is some dispute concerning the mandatory nature of these assurances, Dan Lewis, the director of Louisiana's Chapter 2 program, testified that all of the State's nonpublic schools had thus far been willing to sign the assurances, and that the State retained the power to cut off aid to any school that breached an assurance. *Id.*, at 122a–123a. The Louisiana SEA also conducts monitoring visits to each of the State's LEA's— and one or two of the nonpublic schools covered by the relevant LEA— once every three years. *Id.*, at 95a–96a.

In addition to other tasks performed on such visits, SEA representatives conduct a random review of a school's library books for religious content. *Id.*, at 99a.

At the local level, the Jefferson Parish Public School System (JPPSS) requires nonpublic schools seeking Chapter 2 aid to submit applications, complete with specific project plans, for approval. *Id.*, at 127a; *id.*, at 194a–203a (sample application). The JPPSS then conducts annual monitoring visits to each of the nonpublic schools receiving Chapter 2 aid. *Id.*, at 141a–142a. On each visit, a JPPSS representative meets with a contact person from the nonpublic school and reviews with that person the school's project plan and the manner in which the school has used the Chapter 2 materials and equipment to support its plan. *Id.*, at 142a, 149a. The JPPSS representative also reminds the contact person of the prohibition on the use of Chapter 2 aid for religious purposes, *id.*, at 149a, and conducts a random sample of the school's Chapter 2 materials and equipment to ensure that they are appropriately labeled and that the school has maintained a record of their usage, *id.*, at 142a–144a. (Although the plurality and JUSTICE SOUTER claim that compliance with the labeling requirement was haphazard, both cite only a statewide monitoring report that includes no specific findings with respect to Jefferson Parish. *Ante*, at 34–35 (citing App. 113a); *post*, at 42 (same).) Finally, the JPPSS representative randomly selects library books the nonpublic school has acquired through Chapter 2 and reviews their content to ensure that they comply with the program's secular content restriction. App. 210a. If the monitoring does not satisfy the JPPSS representative, another visit is scheduled. *Id.*, at 151a–152a. Apart from conducting monitoring visits, the JPPSS reviews Chapter 2 requests filed by participating nonpublic schools. As part of this process, a JPPSS employee examines the titles of requested library books and rejects any book whose title

reveals (or suggests) a religious subject matter. *Id.*, at 135a, 137a–138a. As the above description of the JPPSS monitoring process should make clear, JUSTICE SOUTER's citation of a statewide report finding a lack of monitoring in some Louisiana LEA's is irrelevant as far as Jefferson Parish is concerned. See *post*, at 42 (quoting App. 111a).

Respondents, the plurality, and JUSTICE SOUTER all fault the above-described safeguards primarily because they depend on the good faith of participating religious school officials. For example, both the plurality and JUSTICE SOUTER repeatedly cite testimony by state and parish officials acknowledging that the safeguards depend to a certain extent on the religious schools' self-reporting and that, therefore, there is no way for the State or Jefferson Parish to say definitively that no Chapter 2 aid is diverted to religious purposes. See, *e.g.*, *ante*, at 34–35, n. 15; *post*, at 42–43. These admissions, however, do not prove that the safeguards are inadequate. To find that actual diversion will flourish, one must presume bad faith on the part of the religious school officials who report to the JPPSS monitors regarding the use of Chapter 2 aid. I disagree with the plurality and JUSTICE SOUTER on this point and believe that it is entirely proper to presume that these school officials will act in good faith. That presumption is especially appropriate in this case, since there is no proof that religious school officials have breached their schools' assurances or failed to tell government officials the truth. Cf. *Tilton*, 403 U. S., at 679 ("A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional").

The evidence proffered by respondents, and relied on by the plurality and JUSTICE SOUTER, concerning actual diversion of Chapter 2 aid in Jefferson Parish is *de mini-*

mis. Respondents first cite the following statement from a Jefferson Parish religious school teacher: "Audio-visual materials are a very necessary and enjoyable tool used when teaching young children. As a second grade teacher I use them in all subjects and see a very positive result." App. 108a. Respondents' only other evidence consists of a chart concerning one Jefferson Parish religious school, which shows that the school's theology department was a significant user of audiovisual equipment. See *id.*, at 206a–208a. Although an accompanying letter indicates that much of the school's equipment was purchased with federal funds, *id.*, at 205a, the chart does not provide a breakdown identifying specific Chapter 2 usage. Indeed, unless we are to relieve respondents of their evidentiary burden and presume a violation of Chapter 2, we should assume that the school used its own equipment in the theology department and the Chapter 2 equipment elsewhere. The more basic point, however, is that neither piece of evidence demonstrates that Chapter 2 aid actually was diverted to religious education. At most, it proves the possibility that, out of the more than 40 nonpublic schools in Jefferson Parish participating in Chapter 2, aid may have been diverted in one school's second-grade class and another school's theology department.

The plurality's insistence that this evidence is somehow substantial flatly contradicts its willingness to disregard similarly insignificant evidence of violations of Chapter 2's supplantation and secular-content restrictions. See *ante*, at 16, n. 7 (finding no "material statutory violation" of the supplantation restriction); *ante*, at 37 (characterizing violations of secular-content restriction as "scattered" and "*de minimis*"). As I shall explain below, I believe the evidence on all three points is equally insignificant and, therefore, should be treated the same.

JUSTICE SOUTER also relies on testimony by one religious school principal indicating that a computer lent to her

school under Chapter 2 was connected through a network to non-Chapter 2 computers. See *post*, at 45 (citing App. 77a). The principal testified that the Chapter 2 computer would take over the network if another non-Chapter 2 computer were to break down. *Id.*, at 77a. To the extent the principal's testimony even proves that Chapter 2 funds were diverted to the school's religious mission, the evidence is hardly compelling.

JUSTICE SOUTER contends that *any* evidence of actual diversion requires the Court to declare the Chapter 2 program unconstitutional as applied in Jefferson Parish. *Post*, at 45, n. 27. For support, he quotes my concurring opinion in *Bowen* and the statement therein that "*any* use of public funds to promote religious doctrines violates the Establishment Clause." 487 U. S., at 623 (emphasis in original). That principle of course remains good law, but the next sentence in my opinion is more relevant to the case at hand: "*[E]xtensive* violations— if they can be proved in this case— will be highly relevant in shaping an appropriate remedy that ends such abuses." *Ibid.* (emphasis in original). I know of no case in which we have declared an entire aid program unconstitutional on Establishment Clause grounds solely because of violations on the miniscule scale of those at issue here. Yet that is precisely the remedy respondents requested from the District Court and that they were granted by the Court of Appeals. See App. 51a; *Helms* v. *Picard*, 151 F. 3d 347, 377 (CA5 1998), amended, 165 F. 3d 311, 312 (CA5 1999). While extensive violations might require a remedy along the lines asked for by respondents, no such evidence has been presented here. To the contrary, the presence of so few examples over a period of at least 4 years (15 years ago) tends to show not that the "no-diversion" rules have failed, but that they have worked. Accordingly, I see no reason to affirm the judgment below and thereby declare a properly functioning aid program unconstitutional.

Respondents' next evidentiary argument concerns an admitted violation of Chapter 2's secular content restriction. Over three years, Jefferson Parish religious schools ordered approximately 191 religious library books through Chapter 2. App. 129a–133a. Dan Lewis, the director of Louisiana's Chapter 2 program, testified that he discovered some of the religious books while performing a random check during a state monitoring visit to a Jefferson Parish religious school. *Id.*, at 99a–100a. The discovery prompted the State to notify the JPPSS, which then reexamined book requests dating back to 1982, discovered the 191 books in question, and recalled them. *Id.*, at 130a–133a. This series of events demonstrates not that the Chapter 2 safeguards are inadequate, but rather that the program's monitoring system succeeded. Even if I were instead willing to find this incident to be evidence of a likelihood of future violations, the evidence is insignificant. The 191 books constituted less than one percent of the total allocation of Chapter 2 aid in Jefferson Parish during the relevant years. *Id.*, at 132a. JUSTICE SOUTER understandably concedes that the book incident constitutes "only limited evidence." *Post*, at 44. I agree with the plurality that, like the above evidence of actual diversion, the borrowing of the religious library books constitutes only *de minimis* evidence. See *ante*, at 37.

Respondents' last evidentiary challenge concerns the effectiveness of Chapter 2's supplantation restriction in Jefferson Parish. Although JUSTICE SOUTER does not rest his decision on this point, he does "not[e] the likelihood that unconstitutional supplantation occurred as well." *Post*, at 46, n. 28. I disagree. The evidence cited by respondents and JUSTICE SOUTER is too ambiguous to rest any sound conclusions on and, at best, shows some scattered violations of the statutory supplantation restriction that are too insignificant in aggregate to affect the constitutional inquiry. Indeed, even JUSTICE SOUTER concedes

in this respect that "[t]he record is sparse." *Post*, at 47, n. 28.

* * *

Given the important similarities between the Chapter 2 program here and the Title I program at issue in *Agostini*, respondents' Establishment Clause challenge must fail. As in *Agostini*, the Chapter 2 aid is allocated on the basis of neutral, secular criteria; the aid must be supplementary and cannot supplant non-Federal funds; no Chapter 2 funds ever reach the coffers of religious schools; the aid must be secular; any evidence of actual diversion is *de minimis*; and the program includes adequate safeguards. Regardless of whether these factors are constitutional requirements, they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion. For the same reasons, "this carefully constrained program also cannot reasonably be viewed as an endorsement of religion." *Agostini*, 521 U. S., at 235. Accordingly, I concur in the judgment.