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Revenue Bonds and Religious Education: The Constitutionality of Conduit Financing Involving Pervasively Sectarian Institutions

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NOTE

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Trent Collier

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INTRODUCTION

The Establishment Clause¹ — and particularly the issue of government funding of religious education² — is one of the murkiest areas

1. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

2. *See, e.g.*, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.2.6.2, at 1007 (1997) (noting that the Supreme Court’s decisions on government aid to religious elementary and secondary schools are often “difficult to reconcile”).

of Supreme Court jurisprudence.³ The Supreme Court has acknowledged as much,⁴ and the sharp divide in the Court's most recent forays into Establishment Clause territory illustrates the point that the current jurisprudential standards allow for a broad range of interpretation.⁵ There is some hope that the Supreme Court will provide further clarification of its Establishment Clause standard in the near future.⁶ For now, however, it appears that the dominant mode of Establishment Clause analysis is the examination of a government program's

3. See, e.g., F. King Alexander & Kinton W. Alexander, *The Reassertion of Church Doctrine in American Higher Education: The Legal and Fiscal Implications of the Ex Corde Ecclesiae for Catholic Colleges and Universities in the United States*, 29 J.L. & EDUC. 149, 157 (2000) (arguing that, rather than clarifying the "proper boundaries" between church and state, the Supreme Court "has managed to obscure it [sic], thus fueling the flames of controversy surrounding the issue of separation"); Ronna Greff Schneider, *Getting Help with Their Homework: Schools, Lower Courts, and the Supreme Court Justices Look for Answers Under the Establishment Clause*, 53 ADMIN. L. REV. 943, 995 (2001) (hypothesizing that a "consistent and clear Establishment Clause jurisprudence" may not be possible for the current Court).

4. See David H. McClamrock, Note, *The First Amendment and Public Funding of Religiously Controlled or Affiliated Higher Education*, 17 J.C. & U.L. 381, 383 (1991) (stating that "[t]he gloomy refrain, 'we can only dimly perceive the lines of demarcation' echoes through the procession of the Supreme Court cases concerning establishment-clause limits on aid to education" (quoting *Lemon v. Kurtzman*, 403 U.S. 603, 612 (1971))).

5. There are at least three distinct tests for evaluating government aid to religious institutions. See *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 704-06 (M.D. Tenn. 2000) (noting and describing the current Establishment Clause tests). (1) The pervasively sectarian test, see *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); (2) the *Agostini*/modified *Lemon* test, see *Mitchell v. Helms*, 530 U.S. 793 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); (3) the "endorsement" test, see *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring).

6. In September 2001, the Supreme Court granted certiorari to *Simmons-Harris v. Zelman*, in which the Sixth Circuit Court of Appeals held that Ohio's school voucher program violated the Establishment Clause of the First Amendment. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), cert. granted, 533 U.S. 976 (2001). The Court consolidated *Zelman* with *Taylor v. Simmons-Harris*, 533 U.S. 976 (2001), and *Hanna Perkins School v. Simmons-Harris*, 533 U.S. 976 (2001).

It is unlikely that the Supreme Court's adjudication of the school voucher issue will settle the conduit-financing issue. School vouchers involve an element of individual, private choice that differs significantly from that in conduit financing. Whereas school vouchers involve a concrete form of intervening private choice in the decisions of each individual student and his or her family, the private choices of bond purchasers in a revenue bond issuance are more restricted. See *infra* II.B; see also *Mitchell v. Helms*, 530 U.S. 793, 841 (2000) (O'Connor, J., concurring):

The plurality bases its holding that actual diversion is permissible on *Witters* and *Zobrest* [citation omitted]. 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. (citation omitted).

If the Court determines that school voucher programs are constitutional, therefore, this ruling would not necessarily mean that programs with more limited forms of private choice are constitutional as well.

purpose and effect, a test first articulated in 1970 in *Lemon v. Kurtzman*⁷ and modified over twenty years later in *Agostini v. Felton*.⁸

Generally, in assessing the constitutionality of government aid to religious institutions, the Court looks to the aid's purpose and effect.⁹ Any form of government aid must have a secular purpose and an effect that does not (1) result in indoctrination attributable to the government, (2) use religious criteria to identify potential recipients, or (3) lead to an excessive entanglement between church and state.¹⁰ In addition to this inquiry into a program's purpose and effect, the Court may consider whether the government aid has the purpose or effect of endorsing religion in the eyes of a reasonable observer.¹¹

As might be expected, lower courts have applied these guidelines to reach widely conflicting results. One particular controversy concerns the eligibility of "pervasively sectarian"¹² colleges to receive government loans funded by revenue bonds.¹³ Revenue bonds are often issued by specialized government agencies created and authorized by statute¹⁴ to issue municipal bonds in pursuit of a particular goal,¹⁵

7. 403 U.S. 602 (1970).

8. 521 U.S. 203 (1997).

9. The Court has emphasized that this analysis cannot be conducted mechanically. *See, e.g., Tilton*, 403 U.S. at 677 (plurality opinion) (stating that any Establishment Clause inquiry "must begin with the candid acknowledgment that there is no single constitutional caliper that can be used to measure the precise degree to which these three factors are present or absent").

10. *Mitchell*, 530 U.S. at 835 (O'Connor, J., concurring).

11. *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 599-600 (1989).

12. As described in Section I.B, *infra*, the Court has used the label of pervasive sectarianism to denote institutions in which sectarian and secular functions are so intertwined that the government cannot provide secular aid without simultaneously advancing the institution's religious agenda. *See Tilton*, 403 U.S. at 680 (plurality opinion).

13. Generally, municipalities may issue bonds to finance improvements or projects that are beyond their current means. *See generally* 64 AM. JUR. 2D *Public Securities and Obligations* § 11 (describing municipal bonds) [hereinafter *Securities and Obligations*]. The issuance of bonds must be authorized by state law. *Id.* § 50; *see also id.* § 75.

Revenue bonds may be distinguished from general obligation bonds in that, while general obligation bonds pledge the full faith and credit of the issuing government branch, revenue bonds are special obligations, secured only by the revenue generated by the sponsored project. *Id.* § 13 (describing general obligation and special obligation bonds). According to the U.S. Census Bureau, the majority of municipal issuances in the United States consists of revenue bonds. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 275 tbl. 432 (121st ed. 2001) [hereinafter 2001 STATISTICAL ABSTRACT].

14. *See, e.g., Educational Facilities Authority Act*, CAL. EDUC. CODE §§ 94100-94155 (West 1989 & Supp. 2002) (upheld against an Establishment Clause challenge in *California Educational Facilities Authority v. Priest*, 526 P.2d 513 (1974)); *Educational Facilities Authority Act*, S.C. CODE ANN. §§ 59-109-10 to -109-180 (Law Co-op 1990 & Supp. 2001) (upheld against an Establishment Clause challenge in *Hunt v. McNair*, 413 U.S. 734 (1973)); *Educational Facilities Authority Act*, VA. CODE ANN. §§ 23-30.39 to -30.58 (Law Co-op 2000 & Supp. 2001) (upheld against an Establishment Clause challenge in *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682 (Va. 2000)).

15. *See generally Public Securities and Obligations*, *supra* note 13, § 50.

such as the promotion of higher education.¹⁶ In such cases, the government agency (the “authority”) serves as a conduit, issuing the bonds on behalf of a particular private entity and loaning the revenue from the issuance to the private entity to finance a specific project or improvement.¹⁷ The parties to this transaction typically appoint a third party as trustee to “monitor[] the institution’s payments, creditworthiness, and compliance with terms of the loan,”¹⁸ thereby minimizing the role of the issuing authority in the transaction.¹⁹ This financing arrangement provides a distinct benefit to each party. Bond purchasers benefit because interest on certain municipal securities, including revenue bonds, may be exempt from federal income taxation.²⁰ Bond purchasers accept lower rates of return on the bonds due to this tax exemption²¹ and, therefore, a private entity may finance an improvement more cheaply than if the entity had borrowed from a private financial institution.²² By creating these incentives for both bond purchasers and private entities, revenue bonds advance the legislatively mandated agenda of the issuing authority and therefore benefit the state or local government.²³

16. See 2001 STATISTICAL ABSTRACT, *supra* note 13, at 275 tbl. 432 (comparing issuances by, inter alia, state and local authorities, states, and municipalities); see also ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE § 3.4 (1992) [hereinafter MUNICIPAL DEBT FINANCE LAW].

17. See, e.g., *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 716-17 (M.D. Tenn. 2000) (describing the issuance of revenue bonds); see also PAUL R. DEMURO ET AL., HEALTH LAW PRACTICE GUIDE § 29.33, (2001) (describing a standard conduit transaction between an issuer and a healthcare organization).

18. *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 687 (Va. 2000). This loan may be funded by a completed bond sale, see, e.g., *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 505 (6th Cir. 2001) (describing a revenue bond issuance in which proceeds from a completed bond sale were loaned to the private entity), or may consist of funds “borrowed” by an issuing authority from the trustee, wherein the authority then transfers its interest in the loan to the trustee. See *Steele*, 117 F. Supp. 2d at 717.

19. *Steele*, 117 F. Supp. 2d at 717.

20. See I.R.C. § 103 (1988) (providing that gross income does not include interest on state and local bonds, except as provided in § 103(b)).

21. See Stuart Lark & Mary Groves, *A Change of Focus at the Supreme Court May Lead to Wider Availability of Tax-Exempt Financing*, 11 J. TAX’N EXEMPT ORGS. 184, 184 (2000) (describing the issuance of tax-exempt revenue bonds).

22. See, e.g., Press Release, Americans United for Separation of Church and State, Virginia Supreme Court Hears Argument in Dispute over State aid for Pat Robertson’s Regent University (June 2, 2000) (estimating that the issuance considered in *Lynn* saved Regent University “about \$30 million in interest over the 30-year life of the loan”), at <http://www.au.org/press/pr6200.htm> (last visited Mar. 15, 2002) [hereinafter Regent Press Release]; see also Lark & Groves, *supra* note 21, at 184 (stating that, at times, “the lower interest rate is vital to making a project financially feasible”).

23. For example, the bond issuance in *Lynn* was issued by the Virginia College Building Authority, an agency created to “carry out the purposes of the Educational Facilities Authority Act.” See *Lynn*, 538 S.E.2d at 687 (citing Va. Code § 23-30.39 (internal quotation marks omitted)). The Virginia General Assembly passed this Act in order to “enable institutions for higher education in the Commonwealth to provide the facilities and structures

Recent decisions from the Virginia Supreme Court and the District Court for the Middle District of Tennessee illustrate the constitutional dilemma that arises when pervasively sectarian institutions participate in this sort of financing arrangement. Taxpayers in these states have challenged revenue bond issuances that benefit religious colleges and universities as a violation of the Establishment Clause's prohibition against laws "respecting an establishment of religion."²⁴ In *Lynn*, the Supreme Court of Virginia considered whether Regent University ("Regent") was eligible to use proceeds generated from the Virginia College Building Authority's issuance of revenue bonds to finance construction projects on its campuses. After determining that Regent was a pervasively sectarian institution²⁵ — in other words, that religion so infused Regent's curriculum that it was impossible for the government to separate its secular and religious functions when distributing aid²⁶ — the Virginia Supreme Court held that Regent could nevertheless participate in the revenue bond program without violating the Establishment Clause.²⁷ The court reasoned that, given this conduit-financing arrangement, any funds that Regent received were not government aid as such, that the program did not create an incentive for students to choose religious over secular education, and that Regent received government funds only as the result of bond purchasers' private choices.²⁸

The District Court for the Middle District of Tennessee heard a case factually similar to *Lynn* but reached the opposite conclusion.²⁹ In

which are sorely needed [to educate youth], all to the public benefit and good." *Id.* (quoting Va. Code § 23-30.39 (internal quotation marks omitted)); *see also* Lark & Groves, *supra* note 21 at 184 (describing the social rationale behind the charitable tax exemption).

24. U.S. CONST. amend. I.

25. *Lynn*, 538 S.E.2d at 697-98.

26. *Id.* at 697. Rather than relying on the Supreme Court's articulation of the pervasively sectarian standard, the Virginia Supreme Court looked to the literal meaning of the words: "'Pervasive' describes that which 'pervades or tends to pervade.'" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 868 (10th ed. 1999). 'Pervade' is defined as 'diffused throughout every part of.' 'Sectarian' means 'of, or relating to, or characteristic of a sect.'" *Id.* at 697 n.8 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY at 868, 1056 (10th ed. 1999)).

27. *Id.* at 699.

28. *See id.*

29. Prior to the Sixth Circuit's opinion in *Johnson v. Economic Development Corp.*, 241 F.3d 501 (6th Cir. 2001), one commentator had suggested that *Johnson* might resolve the *Steele/Lynn* split. *See* Stuart J. Lark, "Pervasively Sectarian" Institutions May Now Qualify for Tax-Exempt Financing, 12 J. TAX'N EXEMPT ORGS. 173 (2001). *Johnson* failed to meet this expectation, however, because the Sixth Circuit stressed that the school at issue in that case was a merely sectarian rather than a pervasively sectarian institution. *Johnson*, 241 F.3d at 510. Indeed, the Sixth Circuit expressed the belief that *Hunt's* prohibition against government aid to pervasively sectarian institutions via revenue bonds remained good law. *Id.* For factors informing the Sixth Circuit's determination that the school was merely sectarian, *see id.* at 516-17.

Steele v. Industrial Development Board,³⁰ the district court considered the constitutionality of a bond issuance benefiting David Lipscomb University (“Lipscomb”), an institution much like Regent in its integration of “Christian faith and practice with the pursuit of academic excellence.”³¹ As in *Lynn*, the district court found that Lipscomb was pervasively sectarian.³² Unlike the Virginia Supreme Court, however, the district court held that the revenue bonds were a direct benefit from the state and, consequently, that the bond issuance had the impermissible effect of advancing religion.³³

The only Supreme Court opinion to address this controversy directly appears, at first glance, to support the district court’s conclusion in *Steele*. In *Hunt v. McNair*,³⁴ the Supreme Court held that a revenue bond issuance benefiting a sectarian institution did not violate the Establishment Clause,³⁵ but noted that conduit financing *would* have the effect of advancing religion when used to fund a loan for a pervasively sectarian institution.³⁶ The underlying logic of *Hunt*, and the major constitutional concern of the pervasively sectarian standard, is that when a college is so sectarian in nature that its religious mission infuses any otherwise secular activity, it is impossible for the government to ensure that aid flows *only* to the institution’s secular functions.³⁷

While *Hunt*’s standard is unambiguous, the case may no longer be good law. In the almost thirty years since *Hunt*, the Supreme Court’s approach to Establishment Clause issues, as well as its understanding of when the government may provide aid to religious institutions, has undergone dramatic transformation.³⁸ In order to address the *Lynn/Steele* split, then, it is necessary to reconsider the constitutionality of conduit-financing arrangements that benefit private, pervasively sectarian colleges in light of the Court’s recent jurisprudence.

30. 117 F. Supp. 2d 693 (M.D. Tenn. 2000).

31. *Id.* at 694.

32. *Id.* at 710.

33. *Id.* at 720.

34. 413 U.S. 734 (1973).

35. *Id.* at 736.

36. *Id.* at 743.

Aid normally may be thought to have a primary effect of advancing religion 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 or when it funds a specifically religious activity in an otherwise substantially secular setting.

37. See, e.g., *id.* at 744 (noting that the issuance of revenue bonds would not support the school’s religious functions because any projects funded through revenue bonds could not be used for religious purposes); *id.* at 749 (stating that the Act under which the bonds are issued, as well as the Authority’s rules and the College’s proposal, all limit the government’s aid to “the secular aspects of this liberal arts college”).

38. See Section I.A. *infra*.

This Note argues that a government authority does not violate the Establishment Clause by issuing revenue bonds to finance a loan to a pervasively sectarian institution because such aid does not involve public funds, is neutrally available, and entails only a minimal and largely indirect relationship between the government and the pervasively sectarian institution.³⁹ Part I argues that, although *Hunt v. McNair* once settled this issue, subsequent Supreme Court decisions have undermined two logical predicates of the pervasively sectarian test, thereby requiring courts to use pervasive sectarianism as a factor in the overall Establishment Clause determination rather than as a presumptive invalidation of government aid. Part II explains that revenue bond issuances benefiting pervasively sectarian institutions do not advance religion according to the Supreme Court's current standard. Finally, Part III examines the ultimate church-state relationship in conduit financing, and argues that because recipients of revenue bonds do not receive public funds as such and because the government has only a minimal role in the bond issue, any church-state relationship arising from conduit financing arrangements does not rise to an unconstitutional level of entanglement. This Part also applies the endorsement test to show that the only act of real constitutional significance — the authority's approval of a revenue bond issuance that would benefit a pervasively sectarian institution — is not an endorsement of religion. This Note concludes that the unique character of a revenue bond issuance allows pervasively sectarian institutions to participate in this government activity without violating the Establishment Clause.

I. THE ONGOING EVOLUTION OF THE PERVASIVELY SECTARIAN TEST

This Part contends that the constitutional validity of revenue bond issuances benefiting pervasively sectarian institutions is an open question, despite a series of Supreme Court decisions that, at first glance, suggest the contrary. Section I.A outlines the basic constitutional principles and the application of those principles through the pervasively sectarian standard in *Tilton v. Richardson*,⁴⁰ *Hunt v. McNair*,⁴¹ and

39. This argument assumes that any university benefiting from conduit financing refrains (or agrees to refrain) from engaging in discrimination that would raise a separate Fourteenth Amendment or human rights issue. See Dave Ahearn, *Gay Rights Ruling May Break Impasse over Bond Issue for Georgetown U.*, BOND BUYER, Jan. 14, 1988, at 1 (reporting that Georgetown University's refusal to grant equal rights to gay student groups — a violation of a district human rights law — had impeded the approval of a revenue bond issuance for the university's benefit).

40. 403 U.S. 672 (1971).

41. 413 U.S. 734 (1973).

Roemer v. Board of Public Works.⁴² This Section argues that the main impetus behind the pervasively sectarian standard is twofold: it depends both on the presumption that an institution's religious functions are inseparable from its secular ones, and that actual diversion of government funds to religious indoctrination is always impermissible. Section I.B contends that the Court's Establishment Clause jurisprudence since the "*Tilton* trilogy"⁴³ has significantly undermined these predicates for the pervasively sectarian standard by overruling the presumption that certain institutions will divert secular aid to religious purposes and by allowing the diversion of government aid in certain cases. Thus, according to the Supreme Court's current standard, the question is not *whether* the government may aid pervasively sectarian institutions but rather *under what conditions* the government may aid such institutions.

A. *Diversion as the Root of the Pervasively Sectarian Inquiry*

This Section explores the jurisprudential origins of the pervasively sectarian test, and argues that it is based on two prior assumptions: first, that the religious and secular functions of certain institutions are inseparable and, second, that actual diversion of government aid is impermissible in all circumstances. The pervasively sectarian test has its roots in the fundamental mandate of the First Amendment: that the government "shall make no law respecting an establishment of religion."⁴⁴ Justice Black, writing for the Supreme Court, elaborated upon this principle in an oft-quoted passage from *Everson v. Board of Education*: the First Amendment means that a state cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."⁴⁵ Notwithstanding the absolutist language of *Everson*, the Supreme Court has never held that *all* financial aid to religious institutions violates the Establishment Clause.⁴⁶ Rather, the "crucial question" posed by the Establishment Clause is whether the *primary* effect

42. 426 U.S. 736 (1976).

43. Marjorie Reiley Maguire, Comment, *Having One's Cake and Eating It Too: Government Funding and Religious Exemptions for Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061, 1072 (using the "*Tilton* trilogy" label to describe *Tilton*, *Hunt*, and *Roemer*).

44. U.S. CONST. amend. I.

45. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

46. See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (plurality opinion of Burger, C.J.) (citing *Bradfield v. Roberts*, 175 U.S. 291 (1899), in which the Court upheld federal aid to a hospital run by a religious order).

of a legislative program advances religion.⁴⁷ The Court has answered this question by determining whether the legislative program will “result in government indoctrination,” “define its recipients by reference to religion,” or “create an excessive entanglement [between church and state].”⁴⁸

The Supreme Court developed the pervasively sectarian standard as a shortcut to the ultimate constitutional question of whether government aid advances religion. *Tilton v. Richardson*, which the Court decided on the same day in 1971 as *Lemon v. Kurtzman*,⁴⁹ marked the first application of the pervasively sectarian standard to a government program aiding religious universities. In *Tilton*, the Court considered the Higher Education Facilities Act of 1963, which provided federal grants and loans to colleges for the construction of academic facilities.⁵⁰ Taxpayers in Connecticut challenged the distribution of federal aid under this statute because of the participation of four “church-related” colleges and universities.⁵¹ A plurality of the Court found that the Act advanced a purely secular purpose,⁵² noting with approval that the Act itself required recipients to use federal funds for secular ends, and that past recipients were obligated to return the aid upon a finding that it had been diverted to religious uses.⁵³ In so holding, the plurality rejected the taxpayers’ contention that the nature of the recipient universities was such that it would be impossible for government aid to serve a purely secular purpose — that “religion so permeate[d] the secular education provided by church-related colleges and universities that their religious and secular educational functions [were] in fact inseparable.”⁵⁴ Chief Justice Burger, writing for the plurality, rejected the factual premise of this assertion by examining the recipient universities’ actual use of the federally funded buildings,⁵⁵ and by gauging the

47. *Id.* at 679.

48. See *Mitchell v. Helms*, 530 U.S. 793, 845 (2000) (O’Connor, J., concurring) (describing this three-pronged inquiry). This current test modifies the Court’s original test, first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and asks whether the statute in question has a secular purpose, whether its primary effect advances or inhibits religion, and whether the statute fosters an excessive entanglement between government and religion.

49. 403 U.S. 602 (1971). Both were decided on June 28, 1971. *Id.*; *Tilton*, 403 U.S. at 672.

50. *Tilton*, 403 U.S. at 675.

51. *Id.* at 676.

52. *Id.* at 680 (plurality opinion of Burger, C.J.).

53. *Id.* at 679-80 (plurality opinion).

54. *Id.* at 680 (plurality opinion).

55. *Id.* at 681 (plurality opinion):

Two of the five federally financed buildings involved in this case are libraries. The District Court found that no classes had been conducted in either of these facilities and that no restrictions were imposed by the institutions on the books that they acquired. There is no evidence to the contrary. The third building was a language laboratory at Albertus Magnus College. The evidence showed that this facility was used solely to assist students with their

degree to which religion restricted academic freedom at the recipient-universities.⁵⁶ The plurality found that religion had not, in fact, “seep[ed] into the use of any of these facilities,”⁵⁷ and that the schools allowed for a sufficient level of academic freedom.⁵⁸

Several aspects of the *Tilton* analysis are significant in light of the Supreme Court’s later Establishment Clause jurisprudence. First, the Court looked to the *actual* use of the federally financed buildings and rejected the validity of considering instead a “composite profile” of a sectarian institution.⁵⁹ Second, the Court’s inquiry into the religious character of the school was aimed at determining whether the school was so religious that the government could not ensure that secular aid remained secular once distributed to recipients. Thus, the key issue in the Court’s analysis — and the focus of what the Court would later formulate as the pervasively sectarian test — was the theoretical separability of religious and secular educational functions.⁶⁰ Third, it is significant that *Tilton* dismissed one of the arguments often made by opponents of government aid to religious institutions: that aiding the secular functions of a religious college would indirectly advance its religious functions by freeing resources for use in religious education. *Tilton* states that, where the government can directly aid a school’s secular functions without simultaneously giving direct aid to its religious functions, it is of no consequence that this aid may provide incidental benefit to the institution’s religious functions.⁶¹ This conclusion follows logically from the principle that the *Lemon/Agostini* test looks only to the primary effect of government aid.⁶²

While *Tilton* hinted at the relevance of pervasive sectarianism, *Hunt v. McNair*⁶³ cemented the principle that the pervasively sectarian test may serve as a shortcut for the *Lemon* inquiry. In *Hunt*, the Court applied the pervasively sectarian test in order to determine whether

pronunciation in modern foreign languages — a use which would seem peculiarly unrelated and unadaptable to religious indoctrination. Federal grants were also used to build a science building at Fairfield University and a music, drama, and arts building at Annhurst College.

56. *Id.* at 680-82 (plurality opinion).

57. *Id.* at 681 (plurality opinion). While the Supreme Court did not find that the participation of the “church-related colleges” violated the Establishment Clause, it did hold that the Act violated the First Amendment by limiting the government’s interest — and thus the requirement that the federally financed facilities be used only for secular purposes — to a twenty-year period. *Id.* at 683.

58. *Id.* at 681 (plurality opinion).

59. *See id.* at 682 (plurality opinion).

60. *Id.* at 680 (plurality opinion).

61. *See Hunt v. McNair*, 413 U.S. 734, 743 (1973) (citing *Tilton* for the proposition that “the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends”).

62. *Tilton*, 403 U.S. at 679 (plurality opinion).

63. *Hunt*, 413 U.S. 734 (1973).

government aid — in this case, a loan financed by a revenue bond issuance — was likely to be diverted to the institution's religious functions.⁶⁴ Because the revenue bond issuance considered in *Hunt* was not yet complete at the time of litigation, the Court was unable to examine the college's actual use of the loan and had to consider only whether the recipient college was "oriented significantly towards sectarian rather than secular education."⁶⁵ Justice Powell, writing for a majority of the Court, initially used *Tilton*'s pervasively sectarian analysis as a *prima facie* test for the advancement prong of the *Lemon* analysis:

Aid normally may be thought to have a primary effect of advancing religion 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 or when it funds a specifically religious activity in an otherwise substantially secular setting.⁶⁶

The Court concluded that neither the character of the recipient, the Baptist College at Charleston, nor Baptist College's likely use of the aid raised any constitutional concerns.⁶⁷

Hunt expanded on *Tilton* by applying the pervasively sectarian analysis to the entanglement prong of the *Lemon* test as well as to the advancement prong. The entanglement analysis, at least in its "administrative entanglement" mode,⁶⁸ begins with the same fundamental concern as the advancement analysis: the government may aid religious institutions only if those institutions refrain from using secular aid to indoctrinate students. The Court considered the degree to which the recipient college was sectarian in order to determine whether such diversion was likely.⁶⁹ In the Court's view, "the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution."⁷⁰ As the Court had already stated in *Lemon*, certain religious schools cannot participate in government programs without an oversight mechanism to ensure that government aid is not diverted to religious indoctrination.⁷¹ This degree of surveillance may lead to an unconstitutional degree of government-church entanglement.⁷² The Court found in *Hunt*, however, that no such wide-

64. *Id.* at 736.

65. *Id.* at 744.

66. *Id.* at 743.

67. *Id.* at 744.

68. For a description of the two modes of entanglement analysis in *Lemon*, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1588 (3d ed. 1996).

69. *Hunt*, 413 U.S. at 746 & n.8.

70. *Id.* at 746.

71. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

72. *See id.* ("The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.").

spread supervision was necessary to ensure that aid to Baptist College remained secular in effect.⁷³

Given *Hunt*'s holding that the Establishment Clause did not bar a merely sectarian university from benefiting from the issuance of revenue bonds,⁷⁴ its real significance for the present analysis is the implication that the Establishment Clause does prohibit a pervasively sectarian university from benefiting from revenue bonds.⁷⁵ The Supreme Court recognized the full import of *Hunt* three years later in *Roemer v. Board of Public Works*.⁷⁶ A plurality of the Court held in *Roemer* that a Maryland program providing an annual subsidy to colleges and universities — including four Roman Catholic colleges — did not violate the First Amendment.⁷⁷ Central to the Court's holding was the determination that the institutions at issue were not pervasively sectarian.⁷⁸ With regard to the advancement prong of the *Lemon* test, the Blackmun plurality stated that any aid "flowing directly to such 'religion pervasive institutions' [such as those considered in *Lemon* and *Meek v. Pittenger*]⁷⁹ had the primary effect of advancing religion."⁸⁰ As for the entanglement prong, the *Roemer* plurality found that "*Hunt* requires (1) that no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded."⁸¹

The significance of this precedent in a given case, of course, depends on whether the Court is likely to find that a particular institution is pervasively sectarian. Throughout the *Tilton* trilogy, the Court looked to a consistent set of factors in making this determination. The degree of academic freedom that prevails on the college or university's campus is central to the Court's analysis.⁸² In both *Tilton* and *Roemer*,

73. *Hunt*, 413 U.S. at 746.

74. *Id.* at 749.

75. See, e.g., Alexander & Alexander, *supra* note 3 at 164 (noting that *Hunt* "allowed for the possibility that an Establishment Clause violation may exist where public money is distributed to support institutions that are 'pervasively sectarian'").

76. 426 U.S. 736 (1976).

77. *Id.* at 767 (plurality opinion).

78. *Id.* at 762 (plurality opinion) (finding that the colleges provided "distinct and separable" secular educational functions).

79. 421 U.S. 349 (1975).

80. *Roemer*, 426 U.S. at 753 (quoting *Meek*, 421 U.S. at 366).

81. *Id.* at 755 (plurality opinion) (italics in original).

82. See *id.* at 756 (plurality opinion); *Hunt v. McNair*, 413 U.S. 734, 747 n.8 (1973); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971); see also *Hunt*, 413 U.S. at 747 (noting that the college in question did not place particular emphasis on sectarian education); Maguire, *supra* note 43 (arguing, inter alia, that academic freedom, itself a constitutional right, has played a vital role in the Supreme Court's Establishment Clause analysis).

the Court noted that the recipient institutions “subscribe[d] to, and abide[d] by, the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors.”⁸³ The Court also examined the institutions’ selection of faculty and students, looking favorably upon colleges and universities that hired faculty and admitted students without regard to religious affiliation.⁸⁴ In addition, the Court considered whether religious activities such as chapel attendance and prayer were mandatory, suggesting that a lack of compulsory religious exercises indicates that a school is merely sectarian rather than pervasively sectarian.⁸⁵ Finally, the Court inquired into the recipient-university’s “institutional autonomy,” or the degree to which religious authority dominates the university’s administration.⁸⁶ Even in the *Tilton* trilogy, mere affiliation with a religious order was not enough to justify a finding of pervasive sectarianism. Indeed, in *Tilton* and *Hunt*, the Court noted that a religious authority governed the institutions in question but, due to the other factors in the analysis, this governance did not rise to the level of pervasive sectarianism.⁸⁷ Religious governance appears to raise constitutional concerns only when it limits the field of academic inquiry, results in religious qualifications for admission to the academic community, or turns secular education into a vehicle for religious proselytization.⁸⁸

According to the Supreme Court’s analysis in *Roemer*, *Hunt*, and *Tilton*, the presence of these factors indicates that the institution in question is so religious in orientation that its religious and secular

83. *Roemer*, 426 U.S. at 756 (plurality opinion); *Tilton*, 403 U.S. at 681-82 (plurality opinion) (finding that, although the four colleges in question had “certain religious restrictions on what could be taught,” these policies were not enforced but were instead superseded by an “atmosphere of academic freedom”); see also Stephen V. Monsma, *The “Pervasively Sectarian” Standard in Theory and Practice*, 13 N.D. J.L. ETHICS & PUB. POL’Y 321 (1999); 15A AM. JUR. 2D *Colleges & Universities* § 39, at 310-11 (2000) (listing four factors relevant to the determination of whether a college or university is pervasively sectarian).

84. *Roemer*, 426 U.S. at 757-58 (plurality opinion); *Hunt*, 413 U.S. at 742, 743-44, 746; *Tilton*, 403 U.S. at 686 (plurality opinion).

85. *Roemer*, 426 U.S. at 755-56 (plurality opinion) (noting nonmandatory chapel and prayers in a “minuscule” percentage of classes); *Tilton*, 403 U.S. at 682 (plurality opinion) (observing that mandatory attendance at chapel was an element of the appellants’ “composite” institution but was not a requirement at the actual colleges and universities under consideration).

86. *Roemer*, 426 U.S. at 755 (plurality opinion) (quoting *Roemer v. Bd. Of Pub. Works*, 387 F. Supp. 1282, 1287 n.7 (D. Md. 1974) (internal quotation marks omitted)); *Hunt*, 413 U.S. at 747-48, *Tilton*, 403 U.S. at 686 (plurality opinion).

87. *Hunt*, 413 U.S. at 743 (noting, inter alia, that members of the college’s board of trustees were elected by the South Carolina Baptist Convention); *Tilton*, 403 U.S. at 686 (plurality opinion) (stating that each college in question was “governed by Catholic religious organizations”).

88. See, e.g., *Roemer*, 426 U.S. at 755-56 (plurality opinion); *Tilton*, 403 U.S. at 686-87 (plurality opinion). This principle is evident in the very definition of pervasive sectarianism, as it includes those universities where “a substantial portion of their functions are *subsumed in the religious mission.*” *Hunt*, 413 U.S. at 743 (emphasis added).

functions are inseparable, pushing the college or university outside the realm of secular academics. As the Court recognized in its later Establishment Clause cases, underlying this concept of pervasive sectarianism is the presumption that such institutions will use secular aid, intentionally or unintentionally, to support their sectarian activities.⁸⁹ The preceding analysis suggests that this presumption is based on the more fundamental notion that such diversion is always impermissible under the Establishment Clause. *Tilton*, *Roemer*, and *Hunt*, therefore, appear to offer a quick resolution to the present inquiry. If those decisions reflect the current Court's Establishment Clause standard, pervasively sectarian institutions are prohibited from participating in revenue bond issuances.

B. *Mitchell v. Helms*: *The Need to Revisit Hunt v. McNair*

There is a growing sense among observers of the Court's Establishment Clause jurisprudence that the *Tilton* trilogy's pervasively sectarian analysis may be obsolete.⁹⁰ Numerous commentators have noted that the Supreme Court's Establishment Clause standard has evolved a great deal over the last decade and that the Court may reshape the nature of Establishment Clause inquiry in the near future.⁹¹ These commentators find ample support for their position in *Mitchell v. Helms*,⁹² decided in June, 2000. In *Mitchell*, the Court approved of a federal program that loaned funds to local education agencies, which then provided educational materials such as audiovisual equipment to primary and secondary schools — including private, religious schools.⁹³ A plurality of the Court, in an opinion by Justice Thomas, emphasized the neutral, secular criteria by which the government distributed aid⁹⁴

89. See *Mitchell v. Helms*, 530 U.S. 793, 844-49 (2000) (O'Connor, J., concurring); see also Lark, *supra* note 29, at 179 (arguing that, in rejecting the presumption of divertibility in *Agostini*, Justice O'Connor eliminated the logical predicate of the pervasively sectarian doctrine).

90. See, e.g., Lark, *supra* note 29, at 179 (noting that the plurality in *Mitchell* expressly rejected the pervasively sectarian test and arguing that *Agostini* had already rejected the test's underlying presumption); Edsell M. Eady Jr. & James D. Nguyen, *Using "Benign Neutrality" to Bring Low-Cost Municipal Bond Financing to Church-Sponsored K-12 Schools*, CHURCH BUS. (Apr. 2000), available at <http://www.churchbusiness.com/articles/0411legal.html> (last visited Mar. 15, 2002) (promoting a "benign neutrality" analysis in place of the pervasively sectarian test).

91. See, e.g., Freedman, *supra* note 3; Ola Kinnander, *NABL Lawyers Optimistic About Future of Bonds for Religious Schools*, BOND BUYER, Feb. 20, 2001, at 5.

92. 530 U.S. 793 (2000) (holding that private Catholic schools could participate in a federal program providing secular educational materials to elementary and secondary schools); see also Freedman, *supra* note 3, at 329-30 (describing the procedural history of *Mitchell*).

93. *Mitchell*, 530 U.S. at 802-03 (plurality opinion).

94. See, e.g., *id.* at 810 (plurality opinion).

and the role of “numerous private choices” in allocating this aid,⁹⁵ ultimately holding that these two factors indicated the aid was neutral toward religion in the sense mandated by the First Amendment.⁹⁶

More significantly, the plurality claimed that it was time for the Court to overrule certain presumptions that, although once well established in the Court’s Establishment Clause jurisprudence, had subsequently eroded. The *Mitchell* plurality contended, first, that the rule against diversion⁹⁷ of government aid “is inconsistent with [the Court’s] more recent case law and is unworkable.”⁹⁸ When government aid is secular in content and neutrally available, the plurality viewed it as irrelevant to the constitutional analysis that recipients might divert that aid to religious education.⁹⁹ Noting that the Court had already expressed a lack of concern for divertibility in *Witters v. Washington Department of Services for the Blind*¹⁰⁰ and *Zobrest v. Catalina Foothills School District*,¹⁰¹ the plurality argued that, in any case, divertibility has no real connection to the core constitutional issue:

A concern for divertibility, as opposed to improper content, is misplaced not only because it fails to explain why the sort of aid that we have allowed is permissible, but also because it is boundless — enveloping all aid, no matter how trivial — and thus has only the most attenuated (if any) link to any realistic concern for preventing an “establishment of religion.”¹⁰²

The preceding analysis of the *Tilton* trilogy suggests that, in rejecting any concern for divertibility, the *Mitchell* plurality thereby did away with any possible rationale for applying the pervasively sectarian test.¹⁰³ The plurality indeed concluded that this test is outmoded,¹⁰⁴ but gave four different reasons for its obsolescence. First, the plurality

95. See, e.g., *id.* (plurality opinion) (“As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so ‘only as a result of the genuinely independent and private choices of individuals.’” (internal citations omitted)).

96. *Id.* at 829 (plurality opinion).

97. Diversion may be defined in this context as “the use of governmental aid to further a religious message.” *Id.* at 821 (plurality opinion).

98. *Id.* at 820 (plurality opinion).

99. *Id.* (plurality opinion).

100. 474 U.S. 481 (1986).

101. 509 U.S. 1 (1993).

102. *Mitchell*, 530 U.S. at 824 (plurality opinion).

103. See *supra* Part I.A.

104. *Mitchell*, 530 U.S. at 826 (“[T]here was a period when [pervasive sectarianism] mattered, particularly if the pervasively sectarian school was a primary or secondary school. But that period is one that the Court should regret, and it is thankfully long past.” (citation omitted)). Freedman states that this claim “abandoned years of established precedent.” Freedman, *supra* note 3, at 334.

noted its relevance was “in sharp decline,”¹⁰⁵ as the Court had not relied on divertibility as a factor in rejecting an aid program since 1985.¹⁰⁶ Second, the plurality argued that an aid recipient’s religious proclivities are irrelevant to the constitutional analysis.¹⁰⁷ That is, when the government advances its secular agenda with a program allocating aid on a neutral basis, “it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be.”¹⁰⁸ Third, the plurality contended that the pervasively sectarian label is “offensive,” as is judicial examination of an aid recipient’s religious beliefs.¹⁰⁹ In a final, related objection, the plurality argued that this categorization has a “shameful pedigree” of hostility toward Catholicism, concluding that a doctrine “born of bigotry” no longer has a place in the Court’s Establishment Clause jurisprudence.¹¹⁰

The plurality’s proposed mode of Establishment Clause analysis would mark a significant transition — or, for some commentators, a “[s]eismic disturbance”¹¹¹ — in the Court’s approach to government aid to religious schools. Indeed, a majority of the Justices expressed opposition to the plurality’s view of the Establishment Clause. Justice O’Connor’s concurrence, written in response to the “unprecedented breadth” of the plurality’s Establishment Clause standard,¹¹² argued that actual diversion of government aid to religious indoctrination is inconsistent with the Establishment Clause.¹¹³ She maintained that *Witters* and *Zobrest*, two cases relied upon by the plurality, permit diversion of government aid only because of the overriding role of individual choice in allocating that aid.¹¹⁴ For Justice O’Connor, diversion

105. *Mitchell*, 530 U.S. at 826 (plurality opinion).

106. *Id.* (plurality opinion).

107. *Id.* at 827-28 (plurality opinion).

108. *Id.* at 827 (plurality opinion).

109. *Id.* at 828 (plurality opinion).

110. *Id.* at 828-29 (plurality opinion).

111. Jason S. Marks, *Only a “Speed Bump” Separating Church and State?*, 57 J. MO. B. 36, 43 (2001); see also Charles J. Russo & David L. Gregory, *The Constitutional Vitality of Ex Corde Ecclesiae and A [sic] Response to the Alexander’s Despair*, 30 J.L. & EDUC. 307, 314-15(2001) (claiming that *Mitchell* “effectively dismantled” the metaphorical “wall of separation” between church and state).

112. *Mitchell*, 530 U.S. at 837 (O’Connor, J. concurring).

113. *Id.* at 840. Justice O’Connor cites *Bowen v. Kendrick*, 487 U.S. 589 (1988), as supporting this prohibition against diversion. *Mitchell*, 530 U.S. at 840 (O’Connor, J., concurring). She notes that, while the *Bowen* Court determined that the statute in question was constitutional “on its face,” *id.* at 841, the Court remanded the case for the district court to determine whether there was evidence of any *actual* diversion. This concern for actual diversion rather than potential or likely diversion is central to Justice O’Connor’s Establishment Clause analysis.

114. *Mitchell*, 530 U.S. at 841 (O’Connor, J., concurring).

violates the Establishment Clause when the government provides a “direct subsidy,” but may be permissible when the aid is “more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution.”¹¹⁵

Unlike Justice Souter, who argued in dissent that the assumptions underlying the pervasively sectarian standard have continuing relevance,¹¹⁶ Justice O’Connor rejected the presumption that certain religious schools will use government aid for religious purposes. She cited *Agostini* for the proposition 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.”¹¹⁷ While Justice O’Connor did not thereby overrule the root of the pervasively sectarian test — the belief that diversion is impermissible under all circumstances — her concurrence did reject one of the predicates for the test: the presumption that certain religiously affiliated institutions are inherently prone to diverting secular government aid to religious indoctrination.¹¹⁸

Mitchell points to several factors in the Court’s recent Establishment Clause jurisprudence suggesting that an institution’s pervasive sectarianism is only one factor for the Court to weigh in determining the constitutionality of government aid. Specifically, four trends in the Court’s Establishment Clause jurisprudence indicate the *Tilton* trilogy’s approach to aid benefiting pervasively sectarian colleges and universities warrants a fresh look.

First, as suggested by both the plurality and the concurring Justices in *Mitchell*, the Supreme Court has held that, in certain circumstances, actual diversion of government aid does not violate the Establishment Clause.¹¹⁹ Although Justices O’Connor and Breyer disagree with the

115. *Id.*

116. Justice Souter applies the pervasively sectarian standard, arguing that, where a school is unable to separate its religious teaching from secular education, “direct government subsidies to such schools are prohibited because they will inevitably and impermissibly support religious indoctrination.” *Id.* at 837 (Souter, J., dissenting).

117. *Id.* at 858 (O’Connor, J., concurring).

118. See Lark, *supra* note 29. Lark argues that, although Justice O’Connor did not reject the pervasively sectarian inquiry entirely, “[s]he did, however, reject the presumption on which the analysis depends” — namely, that secular aid will be diverted to religious uses at particular schools. *Id.* at 9. He notes later, however, that Justice O’Connor may invalidate a program if she found evidence of diversion: *Id.* This prediction is in line with the analysis in Section I.A, which contends that the pervasively sectarian test depends not only on the presumption that diversion is inevitable but also on the principle that such diversion is always impermissible. Because Justice O’Connor does not reject this latter principle as well, her *Mitchell* concurrence does not completely undermine the pervasively sectarian test. A majority of the Court, therefore, currently supports some sort of pervasive sectarianism inquiry.

119. See *Mitchell*, 530 U.S. at 820 (plurality opinion); *id.* at 855-56 (O’Connor, J., joined by Breyer, J., concurring).

Mitchell plurality as to the overall significance of *Witters* and *Zobrest* for the governing Establishment Clause test, both sides agree that *Witters* and *Zobrest* are, in fact, examples of permissible diversion of government aid.¹²⁰ For *Mitchell*'s plurality, a religious institution's sectarian use of ostensibly secular aid is permissible when diverted aid is itself devoid of religious content and the government has allocated aid without regard for recipients' religious affiliation.¹²¹ The concurring Justices take a somewhat harder line, arguing that the Court approved the diversion of government aid in *Witters* and *Zobrest* only because "[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."¹²² Despite this difference, the plurality and the concurring Justices both reject the rule "that all government aid that directly assists the educational function of religious schools is invalid."¹²³

In dismissing this rule, even if this rejection was subject to a number of qualifications, the Court undermined one of the fundamental predicates of the pervasively sectarian test. As described in Section I.A, the Court's reluctance to aid pervasively sectarian institutions is rooted in the principle that government aid must not, under any circumstances, fund religious activities.¹²⁴ It is this logic that supports the rule in *Hunt* "that no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and . . . that if secular activities *can* be separated out, they alone may be funded."¹²⁵ The Court's finding that diversion does not violate the Establishment Clause in certain circumstances means, at least, that a court faced with a revenue bond issuance benefiting a pervasively sectarian institution must determine anew the extent to which that transaction satisfies the requirements of neutrality and private choice.

Second, the Court's recent Establishment Clause jurisprudence highlights the fact that there may be variations in the distribution of government aid that mitigate constitutional concerns. This attention to the particular form of aid is nothing new in the Court's Establishment

120. *Mitchell*'s plurality makes this point as well. *Id.* at 820-21.

121. *Id.* at 820 ("So long as the governmental aid is not itself 'unsuitable for use in the public schools because of religious content' and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern." (internal citation omitted)).

122. *Id.* (O'Connor, J., joined by Breyer, J., concurring) (quoting *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (internal quotation marks omitted) (alteration in original)).

123. *Id.* at 842 (O'Connor, J., concurring) (quoting *Agostini v. Felton*, 521 U.S. 203, 225 (1997) (internal citation marks omitted)).

124. *See supra* Section I.A.

125. *Roemer v. Bd. Of Pub. Works*, 426 U.S.736, 755 (1976) (plurality opinion) (describing *Hunt*'s requirements).

Clause analysis. It was, after all, a determinative factor in the Court's holding in *Everson v. Board of Education* that a New Jersey program allowing a board of education to reimburse parents for their children's bus transportation to religious schools did not violate the Establishment Clause.¹²⁶ Possible variations in distribution of government aid have taken on increasing significance, however, as the Court's opinions in *Zobrest* and *Witters* stressed the importance of indirect distribution in rendering an otherwise impermissible diversion of government aid valid under the Establishment Clause.¹²⁷ The Court articulated the indirect/direct distinction in *Witters* as that between a transfer similar to a "hypothetical salary donation," in which a government employee donates a portion of her paycheck to a religious institution, and "an impermissible 'direct subsidy,'" in which the government provides financial assistance directly to that religious institution.¹²⁸ The former transaction, even when it results in indirect financial assistance to an institution's religious mission, passes constitutional muster because a private individual, rather than the government, has distributed government aid to that religious institution.¹²⁹ Although Justices have described the relevance of the form of distribution in different ways,¹³⁰ the Court has consistently found that the manner in which government aid reaches the beneficiary may take on an important role in the constitutional analysis.

While the Court considered a revenue bond issuance in *Hunt v. McNair*, the Court did not rely on the indirectness of a loan funded by revenue bonds in that case to determine that the aid in question was consistent with the Establishment Clause. In a lengthy footnote, however, the Court noted that government aid through revenue bonds was fundamentally unlike a direct subsidy.¹³¹ The "only state aid," according to the Court, is the initial "creation of an instrumentality" authorized to issue revenue bonds.¹³² Given the importance of the indirect

126. 330 U.S. 13, 18 (1947) (noting that the aid in question is received by parents rather than parochial schools); *see also* *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971) (distinguishing *Everson* and *Allen*).

127. *See* *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters*, 474 U.S. at 488.

128. *Witters*, 474 U.S. at 487.

129. *See id.*

130. Justice Souter, dissenting in *Mitchell*, framed this distinction in terms of a direct/indirect inquiry, which allows the Court to observe "distinctions between government schemes with individual beneficiaries and those whose beneficiaries in the first instance might be religious schools." *Mitchell v. Helms*, 530 U.S. 793, 888 (Souter, J., dissenting). *Mitchell's* plurality, on the other hand, prefers to view the direct/indirect distinction in terms of private choice. *Id.* at 816 (plurality opinion).

131. *Hunt v. McNair*, 413 U.S. 734, 745 n.7 (1973).

132. *Id.* The *Hunt* footnote is quoted in full in Section III.A. *See infra* text accompanying note 236.

character of government aid in *Zobrest* and *Witters*, the “special”¹³³ nature of loans funded by an issuance of revenue bonds may warrant renewed consideration.

Third, the Court has undermined two presumptions that had previously shaped Establishment Clause jurisprudence and the pervasively sectarian standard in particular. The Court expressly recognized the demise of these presumptions in *Agostini v. Felton*.¹³⁴ First, the Court discarded the assumption that the placement of government employees in parochial schools “inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.”¹³⁵ At first glance, this statement would seem to have little impact on the present analysis because the use of public employees by students at parochial schools is a different form of aid than a loan financed by tax-exempt revenue bonds. A closer look at the Court’s statement in *Agostini* suggests, however, that the Court is calling into question the validity of such presumptions in general. While the question posed in *Agostini* and *Zobrest* had to do with an individual’s compliance with the terms of her employment, this question is related to the issue of whether an *institution* will abide by the terms of its loan. There is no clear reason why *Agostini*’s evidentiary requirement should not extend to the latter as well as the former. In this sense, the Court’s elimination of the “symbolic union” presumption has important repercussions, as the Court is now less willing to *assume* that diversion of secular aid funded by a revenue bond issuance will take place at a pervasively sectarian institution, and will instead require evidence to that effect.¹³⁶

In addition, the Court rejected the rule “that all government aid that directly assists the educational function of religious schools is invalid.”¹³⁷ This conclusion stemmed from two prior determinations. The Court decided that allowing a student to use neutrally available government aid, such as *Zobrest*’s sign-language interpreter, at a religious school was “no different” from allowing a state employee to give a portion of her paycheck to a religious institution, given the intervening

133. *Id.*

134. 521 U.S. 203, 223-30 (1997).

135. *Id.* at 223.

136. In Justice O’Connor’s words, “In the absence of evidence to the contrary, we assumed instead that the interpreter [in *Zobrest*] would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said.” *Id.* at 224 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1997)).

137. *Id.* at 225. Although this section of *Agostini* may be read as “mark[ing] the death of the direct/indirect distinction,” see Freedman, *supra* note 3, 91 at 333, this “death” amounts only to the demise of the presumptive validity of indirect aid and the presumptive invalidity of indirect aid. The method of aid — indeed, its “directness” — still factors in the Court’s Establishment Clause analysis. *Id.*

role of private choice in either case.¹³⁸ The Court also determined that the presence of a government employee such as *Zobrest's* sign-language interpreter on the grounds of a religious school supported neither the presumption that the interpreter would indoctrinate the student by manipulating her role as an interpreter, nor the finding of a symbolic union between church and state.¹³⁹ In effect, the Court concluded that the First Amendment did not prevent a private individual from using secular, neutrally available government aid in the manner of her choice and that the Court could not presume, without evidence to the contrary, that a religious institution would take advantage of that individual's private choice to indoctrinate her. Although the provision of government aid therefore had the effect of facilitating religious education in some cases, it did so without violating the Establishment Clause.

Finally, the increasing importance of neutrality in the Supreme Court's Establishment Clause jurisprudence suggests that the constitutionality of revenue bond issuances benefiting pervasively sectarian institutions warrants a fresh look. In Justice O'Connor's words, the Court has "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."¹⁴⁰ Behind this "more forgiving view" is the rationale that, when the government makes a particular form of aid available to anyone regardless of his or her religious affiliation, the government does not have a meaningful role in any indoctrination that may take place as the result of the recipient's use of that aid.¹⁴¹ This factor, along with the aid recipient's intervening choice, contributed to a finding of constitutionality in *Witters*,¹⁴² *Zobrest*,¹⁴³ and *Agostini*,¹⁴⁴ and was trumpeted by the *Mitchell* plurality as central to the determination that a given form of government aid

138. *Agostini*, 512 U.S. at 226.

139. *Id.* at 226-27.

140. *Mitchell v. Helms*, 530 U.S. 793, 847 (2000) (O'Connor, J. concurring); see also *id.* at 809 (plurality opinion) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion.").

141. *Id.* (plurality opinion).

142. *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487-88 (1986) (finding that the program in question was generally available without regard to the sectarian or non-sectarian character of the institution benefited).

143. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1997) (stating that *Witters's* logic with regard to the program's neutrality could be applied in *Zobrest* "with equal force").

144. *Agostini*, 521 U.S. at 231-32 (noting that, like the aid approved in *Zobrest*, Title I remedial instructors are available to students "at whatever school they choose to attend").

does not violate the Establishment Clause.¹⁴⁵ In contrast, the neutral availability of revenue bonds played no role in *Hunt v. McNair*.¹⁴⁶

These four developments in the Supreme Court's Establishment Clause jurisprudence mean that the pervasively sectarian analysis may be out of step with the Court's current understanding of the Establishment Clause. That is not to say, however, that the concept of pervasive sectarianism is no longer significant in Establishment Clause analysis or that the degree of religiosity at an institution benefiting from a government program is irrelevant. Rather, the Court's renunciation of the principles upon which the pervasively sectarian standard is based means that pervasive sectarianism can no longer be applied as a presumptive disqualification of certain institutions from participation in government programs. Certain schools may raise special Establishment Clause concerns because, although courts must presume that these schools will abide by the contractual terms of government aid,¹⁴⁷ the court may find nevertheless that a religious agenda infuses every classroom and every ostensibly secular subject.¹⁴⁸ In such cases, a more nuanced inquiry is called for — one that reflects the current state of the Court's Establishment Clause jurisprudence.¹⁴⁹

II. AIDING RELIGIOUS UNIVERSITIES WITHOUT ADVANCING RELIGION

This Part argues that revenue bond issues benefiting pervasively sectarian colleges possess the neutrality and intervening private choices that the Supreme Court has required in its recent Establish-

145. See *Mitchell*, 530 U.S. at 809 (describing the roles of neutrality and private choice in the Court's prior Establishment Clause cases).

146. Admittedly, the present inquiry presents an issue somewhat different than the Supreme Court's prior neutrality cases. In *Zobrest*, *Witters*, and *Agostini*, the government aid was neutrally available to *individual students*, regardless of what school each chose to attend. *Zobrest*, 509 U.S. at 3 (aid in the form of a sign language interpreter); *Witters*, 474 U.S. at 483 (aid in the form of vocational rehabilitation assistance); *Agostini*, 521 U.S. at 209-10 (aid in the form of remedial instruction). In the case of conduit-financing transactions, the government aid — revenue bonds — would be neutrally available to *institutions*, regardless of religious affiliation. The neutral availability of government aid must, therefore, have a somewhat different effect in determining the constitutionality of revenue bond issuances benefiting pervasively sectarian institutions.

147. See *Mitchell*, 530 U.S. at 857-58 (O'Connor, J., concurring).

148. See *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d at 710-16 (M.D. Tenn. 2000) (describing Lipscomb University); *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 684-86 (Va. 2000) (describing Regent University).

149. As suggested by Section I.B, the Supreme Court has undermined the basis for defining pervasively sectarian institutions as those institutions where diversion is likely or where government aid would create a symbolic union between church and state. See *Agostini*, 521 U.S. at 223-30. Therefore, a pervasively sectarian institution may now be defined as an institution for which there is actual evidence that secular government aid would, in fact, subsidize religious indoctrination.

ment Clause jurisprudence. Neutrality is at the heart of the effect prong of the *Lemon/Agostini* test¹⁵⁰ and, as this Part shows, is relevant in several respects. Section II.A focuses on the neutral availability of conduit financing, highlighting the importance of this evenhandedness in the ultimate determination of constitutionality. Section II.B considers the role of private choice in revenue bond issuances, arguing that the intervening choice of private bond purchasers, although limited in scope, is further indication that these transactions are in accord with the Court's current Establishment Clause jurisprudence. Finally, Section II.C contends that revenue bond issuances benefiting pervasively sectarian institutions do not create an incentive for individuals to undergo religious indoctrination and, thus, that these transactions satisfy the definition-of-recipients prong of the *Agostini* test.

A. Revenue Bonds as Neutrally Available Government Aid

This Section argues that revenue bond issuances possess the neutrality that the Supreme Court has emphasized in its recent Establishment Clause jurisprudence, an important factor in the ultimate determination that these issuances do not violate the Establishment Clause's limitation on church-state interaction. The manner in which the government distributes aid — and, in particular, the degree to which such distribution is neutral toward religion — is important because of its relevance to the more fundamental issue of whether the government has a role in any religious indoctrination that may occur at the recipient institution.¹⁵¹ When the Court determines that the government has distributed aid without considering recipients' religious affiliation, this finding supports the conclusion that religious in-

150. The focus of this Part is the "effect" prong of the *Agostini* test. Supreme Court jurisprudence has shown that the "purpose" prong is so easily satisfied that it is of little consequence in the Establishment Clause analysis. See *Mitchell*, 530 U.S. at 808 (plurality opinion) (explaining that the Supreme Court did not consider the "purpose" of the program in question because plaintiffs did not challenge the District Court's holding that the program had a secular purpose); *Witters*, 474 U.S. at 485 ("Our analysis relating to the first prong of that test is simple: all parties concede the unmistakably secular purpose of the Washington program."); see also Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 795 (2001) (noting that the purpose prong of the *Lemon* test often had "no effect").

In the case of conduit financing, the act under scrutiny would be that which created the Authority. Such acts typically have a clear secular purpose, such as the promotion and improvement of higher-education facilities within the state. See, e.g., *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 515 (Cal. 1974) (describing the purpose of the California Educational Facilities Authority Act as "providing private institutions of higher education within the state an additional means by which to expand, enlarge, and establish dormitory, academic, and related facilities, to finance such facilities, and to refinance existing facilities" (quoting Cal. Educ. Code § 30301 (currently codified as amended at Cal. Educ. Code § 94100 (West Supp. 2002))); *Lynn*, 538 S.E.2d at 687 (describing Va. Code Ann. § 23-30.39).

151. *Mitchell*, 530 U.S. at 809 (plurality opinion) (discussing the "governmental indoctrination" prong of the *Agostini* test).

doctrination at the recipient institution does not result from government action.¹⁵² “Neutrality” in this context refers to a specific form of neutrality: an “evenhandedness of distribution.”¹⁵³ The Court’s inquiry does not concern the degree to which the government aid is *generally* neutral toward religion but instead focuses on whether the government allocates aid in a manner that is *itself* neutral toward religion.¹⁵⁴ By making aid available to applicants with a variety of views, religious or otherwise, the government avoids advancing any *particular* view.¹⁵⁵ Neutrality in this limited sense is a single factor for the Court to weigh along with the aid’s other qualities.¹⁵⁶

In its application of this neutrality standard, the Court has approved of government programs that offer aid to any applicant, of any religion, who meets purely secular criteria. In *Witters v. Washington Department of Services for the Blind*,¹⁵⁷ for example, the Court validated a state vocational assistance program that assisted individuals with visual handicaps in obtaining an education.¹⁵⁸ The basic standard of eligibility for the state aid was a visual impairment; the selection of aid recipients, therefore, had nothing to do with religion. Similarly, in

152. *Id.* at 809-10 (plurality opinion).

153. *Id.* at 883 (Souter, J., dissenting); *see also Zobrest*, 509 U.S. at 10 (approving of a program “that distributes benefits neutrally to any child qualifying as ‘disabled’ under the Individuals with Disabilities Education Act, without regard to the ‘sectarian-nonsectarian, or public-nonpublic nature’ of the school the child attends”).

154. *Mitchell*, 530 U.S. at 883 (Souter, J., dissenting) The form of neutrality advocated by Justice Thomas in *Mitchell* is equality among secular and sectarian parties — a refusal to inquire into religious affiliation when distributing government aid. *See id.* at 809 (“[W]e have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion.”). Moreover, Justice Thomas stressed in *Mitchell* that neutrality *and* private choice are typically necessary to ensure that no religious indoctrination may be attributed to the government. *See, e.g., id.* at 811 (plurality opinion) (contending that “private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government” in *Zobrest*). Thus, Professor Chemerinsky’s fear that, under Justice Thomas’s *Mitchell* standard, “a school could begin each day with a prayer so long as every religion got its due,” is unfounded. *See* Erwin Chemerinsky, *Why the Rehnquist Court Is Wrong About the Establishment Clause*, 33 LOY. U. CHI. L.J. 221, 227 (2001). By requiring a period of religious reflection, this practice is not neutral toward secular or areligious interests, as *Mitchell* requires.

155. *Mitchell*, 530 U.S. at 809-10 (plurality opinion) (“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.”).

156. *Id.* at 2581 (Souter, J., dissenting). As this Section stresses, facial neutrality is only one consideration in the Court’s multi-layered analysis. A facially neutral program may still run afoul of the Establishment Clause by directly aiding an institution’s religious functions (e.g., if a state or municipality made direct grants available to all universities — including pervasively sectarian universities such as Regent University and Lipscomb University) or by creating an excessive entanglement between church and state (e.g., if a loan agreement between a conduit issuer and a pervasively sectarian university gave the state the power to veto any award of tenure at the recipient university).

157. 474 U.S. 481 (1986).

158. *Id.* at 482-83.

Agostini v. Felton, the Court found neutrality in a program that sent public school teachers into parochial schools to provide remedial education.¹⁵⁹ The Court noted that Title I, which created the program, made aid available to any child who lived in a low-income area and was unlikely to meet the state's educational performance standards.¹⁶⁰ Again, religious affiliation was not a factor in the allocation of government aid.

Revenue bond issuances such as those in *Lynn* and *Steele* possess the facial neutrality required by cases such as *Witters* and *Agostini* because the statutes authorizing revenue bond issuances allow for the inclusion of any private institution that can advance the conduit issuer's primary mission. In *Lynn*, for instance, the Educational Facilities Authority Act provided a loose standard of eligibility that did not single out religious colleges and universities as being especially qualified for this form of government aid,¹⁶¹ quite the contrary, in fact, as the statute disfavored religious education.¹⁶² Similarly, the statute creating the issuing authority in *Steele* was so decidedly neutral that the plaintiffs did not bother to challenge its facial neutrality.¹⁶³

The possibility remains that, despite the facial neutrality of the statutes authorizing revenue bond issuances, a particular conduit issuer could distribute aid with a bias toward religious universities. This

159. *Agostini*, 521 U.S. 203, 209 (1997).

160. *Id.* (citing 20 U.S.C. § 6315(b)(1)(B) (1994)).

161. The Educational Facilities Authority Act empowers the Authority to issue bonds for "any of its corporate purposes," which include aiding "institutions for higher education." *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 687 (quoting Va. Code Ann. §§ 23-30.39, -42(b) (2000) (internal quotation marks omitted)). An "institution for higher education" is "[a] nonprofit educational institution within the Commonwealth [of Virginia] whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education." *Id.* (quoting Va. Code Ann. § 23-30.41(e) (2000) (alteration in original) (internal quotation marks omitted)).

162. *See id.* (excluding from eligibility "any facility used or to be used for sectarian instruction or as a place of religious worship [or] any facility which is used or to be used primarily in connection with any part of the program or a school or department of divinity for any religious denomination" (quoting Va. Code Ann. § 23-30.41 (b) (internal quotation marks omitted))).

163. *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 723-24 (M.D. Tenn. 2000). As evidence of the statute's facial neutrality, the Court quoted the act's declaration of purpose:

It is the intent of the legislature by the passage of this chapter to authorize the incorporation in the several municipalities in this state of public corporations to finance, acquire, own, lease, and/or dispose of properties to the end that such corporations may be able to maintain and increase employment opportunities, increase the production of agricultural commodities, and increase the quantity of housing available in affected municipalities by promoting industry, trade, commerce, tourism, and recreation, agricultural and housing construction by inducing by inducing [sic] manufacturing, industrial, governmental, educational, financial, service, commercial, recreational and agricultural enterprises to locate in or remain in this state and further the use and production of its agricultural products and natural resources, and to vest such corporations with all powers that may be necessary to enable them to accomplish such purposes.

Id. (quoting Tenn. Code Ann. § 7-53-102(a) (1985) (internal quotation marks omitted)).

danger, inherent in any form of government aid, presents a different question from the constitutionality of such aid in principle. The Court's refusal to consider potential diversion of secular government aid to religious purposes suggests that the Court would likewise decline to consider administrative bias absent a specific allegation to that effect.¹⁶⁴ Any such bias would, of course, advance religion in violation of the Establishment Clause. The more pressing question is whether government aid violates the Establishment Clause when the government allocates aid evenhandedly to both secular and religious institutions. The facial neutrality of statutes authorizing such aid is one factor indicating that the government program does not contravene the Establishment Clause.

The neutrality of statutes authorizing conduit issuances is no superficial matter. It is evidence of the very rationale behind the legislative creation of such programs. This point is most obvious when one examines the revenue bond issuance from the perspective of the issuer.¹⁶⁵ In most cases, the state creates the conduit issuer to further a particular secular purpose.¹⁶⁶ The conduit issuer then offers to finance appropriate projects at any institution willing to aid the government in achieving its goal. When financing through the conduit issuer is available to all institutions, secular or religious, each resulting loan arrangement between the issuer and the benefiting institution will have the effect of promoting the government's secular purpose. The aid is neutral in the sense that it uses all qualifying private volunteers to further an overriding — and secular — government objective.

When the recipient institution is pervasively sectarian, however, the question arises whether aid is still neutral when it has the concomitant effect of advancing the recipient's religious agenda. This is the main charge of those who oppose revenue bond issuances that benefit religious institutions: that a facially neutral statute is decidedly *not* neutral when its aid lends direct support to religious activities.¹⁶⁷ The immediate flaw with this argument is that it conflates one kind of neutrality with another. As noted above, the issue under the government indoctrination prong of the *Lemon/Agostini* test is not whether the government aid is neutral toward religion in general but whether it is

164. See, e.g., *Roemer v. Bd. Of Pub. Works*, 426 U.S. 736, 761 (1976) (plurality opinion) (“It has not been the Court’s practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds.”).

165. Justice Thomas suggests and applies this perspective in *Mitchell*. See *Mitchell v. Helms*, 530 U.S. 793, 809-10 (2000) (plurality opinion).

166. With the bond issue under consideration here, that purpose is likely to be the promotion of higher education within the state.

167. See, e.g., *Steele*, 117 F. Supp. 2d at 716.

neutral toward applicants.¹⁶⁸ The statute's overall neutrality toward religion is the issue of ultimate constitutional concern and, as such, cannot be settled with a single prong of the multi-prong *Lemon/Agostini* test. The Court uses this more narrow form of neutrality in determining whether it may reasonably attribute religious indoctrination to the government.

Besides this confusion about the meaning of neutrality, this argument fails to account for the fact that the Court has permitted aid that does, in fact, advance religion in some way. For example, while the Court has prohibited the government from *directly* advancing the religious mission of sectarian institutions,¹⁶⁹ it has not extended this prohibition to indirect aid.¹⁷⁰ Indeed, the Supreme Court has rejected the idea that such a broad proscription is even possible.¹⁷¹ After all, *Everson v. Board of Education* held in 1947 that the First Amendment did not prohibit a board of education from reimbursing parents of children attending private schools for bus transportation costs.¹⁷² The Court reasoned that the state must at least permit religious institutions to benefit from public services such as police and fire protection that are available to all.¹⁷³ While "cutting off church schools from these services" would guarantee that the state had absolutely no role in the persistence of religious activities,¹⁷⁴ the Court concluded that the only

168. For a thorough overview of the different uses of the concept of "neutrality" in the Supreme Court's Establishment Clause jurisprudence, see Justice Souter's dissent in *Mitchell*, 530 U.S. at 878-84. He identifies three distinct uses of the term "neutral," corresponding roughly to three phases in the Court's Establishment Clause jurisprudence. As originally used in *Everson*, "neutrality" was "a term for government in its required median position between aiding and handicapping religion." *Id.* at 879. Next, the Court used "neutrality" to identify aid that was secular, or nonreligious, in content. *Id.* at 880. In this sense, neutrality connotes not the optimal government position vis-à-vis religion but the nature of permissible government aid. Finally, neutrality came to mean to "evenhanded," or a distribution of aid without regard to recipients' religious affiliation. *Id.* at 881. Justice Souter argues that the *Mitchell* plurality equates the third kind of neutrality with the first, improperly treating evenhandedness as a "stand-alone criterion." *See id.* at 883-84.

169. *See, e.g.,* *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) ("It is . . . well settled . . . that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 394 (1993)); *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971) (overturning a Pennsylvania program that partially reimbursed parochial schools for the costs of providing instruction in secular subjects and a Rhode Island program supplying direct financial support to teachers of secular subjects in private schools).

170. *See Witters*, 474 U.S. at 486-87.

171. *See, e.g.,* *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("We have never said that 'religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.'" (quoting *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988))).

172. 330 U.S. 1 (1947); *see also* Ronald D. Rotunda & John E. Nowak, *The Establishment of Religion*, 5 TREATISE ON CONSTITUTIONAL LAW § 21.4 (3d ed. 1999).

173. *Everson*, 330 U.S. at 17-18.

174. *Id.* at 18.

neutral position for the state toward religion is to provide those public services that allow religious institutions to function on a minimal level.¹⁷⁵ Anything less, the Court reasoned, would amount to hostility toward religion¹⁷⁶ — an impermissible result under the First Amendment. As indicated by *Everson*, the Supreme Court's Establishment Clause standard requires courts to ask not only *whether* government aid advances religion but *how* religion is advanced — and, more importantly, what role the government plays in that advancement.

Admittedly, the Court placed greater emphasis on the character of the recipients of government aid in its *Tilton*-era Establishment Clause jurisprudence, holding in *Lemon*, for example, that the government must limit aid to the beneficiary's "secular, neutral, or nonideological" functions.¹⁷⁷ The rule that the government must aid the secular without advancing the religious functions explains the Court's prior concern with pervasive sectarianism, as the Court reasoned that the government could not aid pervasively sectarian institutions without directly supporting their religious agenda.¹⁷⁸ In recent opinions, however, the Court has focused less on the religious character of aid recipients and more on the neutral and indirect nature of government aid.¹⁷⁹ In *Witters v. Washington Department of Services for the Blind*,¹⁸⁰ the Court approved aid that allowed an individual with a visual impairment to "study[] the Bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director."¹⁸¹ The aid in *Witters* not only facilitated one individual's religious instruction but, in financing the aid recipient's seminary training, contributed to the perpetuation of his religion.¹⁸² Nevertheless, the Court found that because the aid recipient chose to use "neutrally available state aid" to pay for his education at Inland Empire School of the Bible, it could not attribute the recipient's religious training to the government.¹⁸³

Witters highlighted the fact that neutral availability is a single factor in the overall determination of whether the government has played

175. *Id.*; see also Nowck & Rotunda *supra* note 172, § 21.4 (describing the *Everson* rationale).

176. *Everson*, 330 U.S. at 18 ("State power is no more to be used so as to handicap religions than it is to favor them.").

177. See *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

178. See *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

179. See *Lark & Groves*, *supra* note 21, at 188.

180. 474 U.S. 481 (1985).

181. *Id.* at 483.

182. The petitioner in *Witters* was training "to become a pastor, missionary, or youth director," *id.* at 489, indicating that his intention was to disseminate or at least perpetuate his religious beliefs.

183. *Id.* at 489.

a role in religious indoctrination. Thus, when the government distributes aid without regard to the religious affiliation of potential beneficiaries, this neutrality is one factor suggesting that the aid program is constitutional. Statutes empowering conduit issuers to issue revenue bonds on behalf of private entities possess this neutrality because they do not discriminate between potential recipients based on religious affiliation. This determination of facial neutrality is an initial step toward the ultimate goal of deciding whether pervasively sectarian institutions' participation in conduit financing arrangements is neutral in the sense mandated by the Establishment Clause.

B. Bond Purchasers and Private Choice

This Section contends that, although revenue bond issuances limit bond purchasers to choosing only whether to buy bonds for a predetermined beneficiary, this narrow choice nevertheless supplies the element of private choice that the Supreme Court has required in its recent Establishment Clause jurisprudence. The Court's private choice analysis focuses on the method through which the government allocates aid to a particular institution. The Court has approved government aid that is both neutral and distributed to religious institutions through the decisions of individual citizens,¹⁸⁴ thereby drawing a sharp distinction between aid programs that provide public funds directly to religious institutions¹⁸⁵ and those programs that distribute aid to individuals who then — independently and privately — may decide to use that aid toward religious education.¹⁸⁶ This rule is based on the rationale that, when a government program allocates aid to an individual who is then free to use this aid in the setting of his or her choice, any religious indoctrination to which the individual is subject is not attributable to the government.¹⁸⁷ These programs are an easy case, for both

184. See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); Indeed, the plurality in *Mitchell* not only recognized the connection between neutrality and private choice but emphasized the importance of both neutrality and private choice to the ultimate determination of constitutionality. See *Mitchell v. Helms*, 530 U.S. 793, 812 (2000) (noting the importance of neutrality, private choice, and “the relationship between the two.”); *id.* (finding that “neutrality and private choices together eliminated any possible attribution to the government.” (emphasis added)).

185. See, e.g., *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (grants to nonpublic schools).

186. See, e.g., *Zobrest*, 509 U.S. at 3 (grants to disabled students); see also CHEMERINSKY, *supra* note 2, at § 12.2.6.2 (describing the distinction between aid provided directly to an institution and aid distributed to students).

187. See, e.g., *Mitchell*, 530 U.S. at 811 (plurality opinion) (describing the logic of the neutrality/private choice standard); *Zobrest*, 509 U.S. at 3 (approving federal provision of a sign-language interpreter to a student at a Catholic high school); *Witters*, 474 U.S. at 483 (approving aid for a visually impaired student at a private, Christian college).

the neutrality of the government aid and the individual's role in determining the ultimate destination of the government aid are clear.¹⁸⁸

Programs in which the private choice played a subtler role have also passed constitutional muster. In *Agostini v. Felton*,¹⁸⁹ the Supreme Court considered Title I of the Elementary and Secondary Education Act of 1965, which provided federal funds to "local educational agencies."¹⁹⁰ These local agencies were to use this aid to finance remedial education and counseling programs.¹⁹¹ In its use of Title I funds, the Board of Education of the City of New York, a local educational agency, sent public teachers to religious schools to provide instruction in secular subjects.¹⁹² The Court found the role of private choice in this program "indistinguishable" from its role in the *Zobrest* and *Witters* programs: "Both programs make aid available only to eligible recipients. That aid is provided to students at whatever school they choose to attend."¹⁹³ *Agostini* makes clear, then, that *Witters* and *Zobrest* do not stand for the proposition that private choice is present *only* when the government provides a benefit to an individual who then allocates that aid to the school of his choice. Rather, the private choice analysis requires courts to determine whether government aid runs to religious institutions as the result of individual choices — even if the institution then applies that aid collectively.¹⁹⁴ As the plurality stated in *Mitchell*, private choice is most apparent when government aid is given directly to individuals who then allocate that aid to religious institutions, but "there is no reason why the Establishment Clause requires such a form."¹⁹⁵

Lynn and *Steele* evince a sharp difference of opinion over whether government loans funded by revenue bonds involve an element of private choice. In *Lynn*, the Virginia Supreme Court found private choice in the fact that all funds flowing to the recipient college were raised through the conduit issuance of revenue bonds, and, thus, consisted entirely of the private assets of bond purchasers. The court reasoned that "[i]f no private investors purchase bonds issued on behalf

188. See, e.g., *Zobrest*, 509 U.S. 1, 10 (1993); *Witters*, 474 U.S. at 488 (1985); see also *Monsma*, *supra* note 83, at 323 (identifying the neutrality/public choice combination as one of "two lines of legal reasoning" that the Court has utilized in approving government aid to sectarian institutions).

189. 521 U.S. 203 (1997).

190. *Agostini*, 521 U.S. at 209-10.

191. *Id.* at 209 (citing 20 U.S.C. § 6315(c)(1)(A)).

192. *Id.* at 210.

193. *Id.* at 228.

194. See *id.* (noting that the distinction between a benefit flowing to one individual and a benefit flowing to multiple individuals is constitutionally insignificant).

195. *Mitchell v. Helms*, 530 U.S. 793, 816 (2000).

of Regent, no funds flow to Regent.”¹⁹⁶ According to the Virginia Supreme Court’s logic in *Lynn*, it is the intervening private choice of investors, rather than that of the government authority, that allocates government aid to the recipient institution.¹⁹⁷ The court found that, because this decision concerns a potential investment, bond purchasers are more likely to consider “market factors and personal circumstances” than religious considerations.¹⁹⁸ In contrast, *Steele* rejected altogether the contention that bond purchasers contribute a private choice element to the constitutional analysis. For the district court, it is the Board (the conduit issuer) rather than the private investor who determines which institutions may benefit from government-issued revenue bonds.¹⁹⁹ Unlike the petitioners in *Zobrest* and *Witters*, bond purchasers “could not select which institution they wanted to receive the funds.”²⁰⁰ In other words, a purchaser seeking to benefit from the tax-free interest of revenue bonds is stuck with the recipient institutions selected by the conduit issuer. According to *Steele*’s analysis, then, revenue bond transactions involve an intervening third party but fail to leave that party any meaningful choice in the allocation of aid.

Notwithstanding the district court’s conclusion in *Steele* that the private choice of bond purchasers has limited significance for the constitutional inquiry, this choice nevertheless fulfills an important role in the distribution of government aid. Indeed, the Virginia Supreme Court found in *Lynn* that, although the bond purchaser’s private choice consists simply of deciding whether or not to purchase bonds issued on behalf of a particular institution, this restricted choice was enough for Establishment Clause purposes.²⁰¹ A binary, “yes-or-no” choice differs in an obvious sense from the private choice of *Zobrest* and *Witters*, in which the government predetermines only the form of aid and allows individuals to distribute it to whom they choose. Nevertheless, the *Lynn* court found that this limited form of private choice is in accord with the logic of the private choice analysis,²⁰² a conclusion that holds up when one considers the primary role of private choice in the Supreme Court’s Establishment Clause jurisprudence. Private

196. Va. Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682, 698 (Va. 2000).

197. *Id.*

198. *Id.* at 699; see also DENNIS ZIMMERMAN, THE PRIVATE USE OF TAX-EXEMPT BONDS 74-75 (Urban Institute Press, 1991) (“Tax-exempt bonds are purchased primarily by households, commercial banks, property and casualty insurance companies, and open-end bond funds. All of these investors are motivated primarily by the tax-exempt interest. These investors tend to move in and out of the municipal bond market as their need for sheltering income from taxation rises and falls and the tax treatment of the interest income changes.”).

199. *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, at 724-25 (M.D. Tenn. 2000).

200. *Id.* at 725.

201. *Lynn*, 538 S.E.2d at 698-99.

202. *Id.*

choice, according to the *Mitchell* plurality, prevents the government from “grant[ing] special favors that might lead to a religious establishment,”²⁰³ and counters any tendency for government programs to favor “pre-existing recipients.”²⁰⁴ More fundamentally, private choice ensures that religious indoctrination is an individual rather than governmental choice.²⁰⁵

Given this understanding of the function of private choice, *Lynn*’s binary choice fails in one respect. A yes-or-no choice clearly cannot allocate government aid (entitlement to benefit from a revenue bond issue) to those colleges and universities whose proposals have been rejected by the conduit issuer. Aside from the usual market forces, then, bond purchasers’ choices do not have the effect of redistributing aid. They can, however, achieve other important goals. These intervening choices operate as a public check on the government, allowing investors to veto any attempt by the government to grant “special favors” to particular religious organizations.²⁰⁶ Moreover, the bond purchasers’ role undermines the appearance of government endorsement,²⁰⁷ and, as the Virginia Supreme Court noted in *Lynn*, guarantees that no money is loaned to religious institutions unless private investors have consented — and have supplied the necessary funds.²⁰⁸

Ultimately, investors’ private choices are only relevant to the constitutional analysis insofar as they distance the government from any religious indoctrination that may take place at a recipient institution,²⁰⁹ and, in this regard, the Court has looked to private choice and neutral availability together.²¹⁰ In the case of revenue bond issuances, acts authorizing government authorities to release revenue bonds possess the facial neutrality called for by the Supreme Court’s modern Establishment Clause jurisprudence.²¹¹ The private choice of the bond purchasers, although more narrow in scope than the private choice in *Zobrest* and *Witters*, is a check against government bias, ensuring that the government’s role in allocating aid is not exclusive. Revenue bond issuances therefore include an important, though limited, element of private choice.

203. *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion).

204. *Id.* (plurality opinion).

205. *Id.* at 811(plurality opinion) (stating that private choice in *Zobrest* ensured that any government worker found in a sectarian institution was there “only as a result of the private decision of individual parents” (internal citation omitted)).

206. *Id.* at 810 (plurality opinion).

207. *See id.* at 810.

208. *See supra* note 196.

209. *See Mitchell*, 530 U.S. at 810-11 (plurality opinion).

210. *Id.* (plurality opinion).

211. *See, e.g., Va. Coll. Bldg. Auth. v. Lynn*, 583 S.E.2d 682, 687 (Va. 2000) (citing Va. Code §§ 23-30-39, -42).

C. Neutral Distribution of Aid and Incentive

This Section argues that, because any institution may benefit from a revenue bond issuance, this form of government aid does not create an incentive for students to undergo religious indoctrination. The Supreme Court examines the method by which an aid program defines its recipients in determining whether it violates the Establishment Clause.²¹² At first blush, this prong seems to ask the same question as the initial neutrality test. Indeed, the definition of recipients prong “looks to the same set of facts” as the neutrality test.²¹³ This incentive inquiry, however, “uses those facts to answer a somewhat different question: whether the criteria for allowing the aid ‘create[s] a financial incentive to undertake religious indoctrination.’”²¹⁴ The Court has articulated an almost bright-line rule in this area: no incentive is present when the government allocates aid without concern for the religious affiliation of potential aid recipients.²¹⁵

In applying this rule, the Court has upheld aid programs that assist all eligible students at any school, religious or secular.²¹⁶ In *Agostini*, for example, the Court concluded that the Board of Education’s Title I services did not create an incentive for students to undertake religious indoctrination because Title I services were available to all children “no matter what their religious beliefs or where they go to school.”²¹⁷ Similarly, the Court found no incentive in *Witters* because the government program did not provide any particular benefits to individuals who chose to attend a sectarian institution.²¹⁸

The application of this rule to revenue bond issuances differs in some respects from its use in *Zobrest*,²¹⁹ *Witters*,²²⁰ and *Agostini*.²²¹ In

212. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 231 (1997).

213. *Mitchell*, 530 U.S. at 813 (plurality opinion); see also *Agostini*, 521 U.S. at 230-31 (noting that the criteria used to determine whether the recipient’s use of government aid to indoctrinate could be attributed to the state are also pertinent to the issue of whether the program creates a “financial incentive to undertake religious indoctrination”).

214. *Mitchell*, 530 U.S. at 813 (plurality opinion) (quoting *Agostini*, 521 U.S. at 231 (alteration in original)).

215. *Agostini*, 521 U.S. at 231; see also *Mitchell*, 530 U.S. at 813 (plurality opinion) (describing *Agostini*’s incentive analysis as a “rule”).

216. *Agostini*, 521 U.S. at 231 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Mueller v. Allen*, 436 U.S. 388, 398-399 (1983); *Bd. of Ed. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243-44 (1968); *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 16-18 (1947)).

217. *Id.* at 232 (citing 20 U.S.C. § 6312(c)(1)(F)).

218. *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986). Instead, the program allowed participants to choose from “a huge variety of possible careers, of which only a small handful are sectarian.” *Id.*; see also *Zobrest*, 509 U.S. at 10 (finding no incentive where students could use a government-paid interpreter at the school of their choice).

219. See *Zobrest*, 509 U.S. at 10.

220. See *Witters*, 474 U.S. at 488.

Zobrest and *Witters*, the central issue was whether the government aid to the individual student created an incentive for the student to choose religious indoctrination at a sectarian school.²²² Revenue bond issuances benefiting religious universities require courts to consider instead whether the government aid (a loan financed with revenue bonds) to the *school* creates an incentive for the student to choose the recipient school. The incentive analysis, therefore, asks the following in this case: Since revenue bond issuances allow benefiting universities to improve facilities, does this aid attract students to the university, thereby contributing to the indoctrination of students who would otherwise have attended another university?

Lynn, applying the *Agostini* rule, found that the program did not create an incentive because it was open to “all qualifying institutions of higher education without regard to religious affiliation.”²²³ The court reasoned that, because any university could take advantage of this special form of financing, there was no reason to believe that pervasively sectarian institutions were more likely to participate and therefore more likely to gain a competitive advantage (with cheaper loans) over nonsectarian institutions.²²⁴ This conclusion is in line with the Supreme Court’s current standard. The *Agostini* rule looks only at whether the aid is neutrally available.²²⁵ That the aid may then benefit the recipient institution — and consequently make the university more attractive to potential students — is irrelevant to the Court’s analysis. Because any university can finance construction and improvements in the same way, pervasively sectarian institutions have no particular competitive advantage. In short, the *Agostini* rule looks only at neutrality and statutes authorizing these conduit issuances neither favor nor disfavor religion.

III. THE LIMITED CHURCH-STATE RELATIONSHIP IN CONDUIT FINANCING

This Part contends that the ultimate relationship between a state or municipality and a religious university benefiting from a revenue bond-funded loan is so attenuated that, in light of the neutrality established in Part II, such aid does not raise any legitimate Establishment Clause concerns. Section III.A argues that, because a loan funded by a revenue bond issuance does not include any public funds, the only government aid to the recipient institution is that the university — due

221. See *Agostini*, 521 U.S. at 232.

222. See *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 488.

223. *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 698 (Va. 2000).

224. See *id.*

225. *Agostini*, 521 U.S. at 231.

to the tax exemption accorded to revenue bond purchasers — may finance an improvement at a lower cost than if that entity had obtained a private loan. This benefit, as well as the government's involvement in allocating and monitoring the benefit, is too indirect to constitute excessive entanglement. Section III.B examines the church-state relationship in conduit bond issuances benefiting pervasively sectarian transactions through the lens of the endorsement test, demonstrating that an authority's decision to issue revenue bonds on behalf of a pervasively sectarian university is not an act of government endorsement.²²⁶

A. *Excessive Entanglement: Government Loans Without Public Funds*

This Section demonstrates that the church-state relationship in conduit-financing arrangements involving pervasively sectarian universities is too attenuated to violate the excessive entanglement prong of the *Agostini* test. Generally, the excessive entanglement test calls for the Court to examine “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.”²²⁷ The Court's excessive entanglement inquiry concerns two distinct forms of entanglement: administrative and political entanglement.²²⁸ Administrative entanglement may be present where “[a] comprehensive, discriminating, and continuing state surveillance” is required to ensure that secular aid remains secular in effect.²²⁹ Political entanglement, on the other hand, is possible where government aid to religious institutions is likely to bring about “political division along religious lines.”²³⁰

As the Court acknowledged in *Agostini*, this entanglement inquiry has relaxed to some degree in recent Establishment Clause cases.²³¹ “Administrative cooperation” and political divisiveness are now “insufficient by themselves to create an ‘excessive entanglement.’”²³² Thus, even the need for the government to monitor the distribution and subsequent use of government aid in order to make certain that

226. See, e.g., *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 592 (1989) (describing the “endorsement” test).

227. *Agostini*, 521 U.S. at 232 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971) (internal quotation marks omitted)).

228. *STONE ET AL.*, *supra* note 68, at 1588.

229. See *Lemon*, 403 U.S. at 619.

230. *Id.* at 622.

231. *Agostini*, 521 U.S. at 233-34.

232. *Id.* at 234.

no diversion occurs does not necessarily lead to excessive entanglement under the Court's current Establishment Clause standard. Moreover, in rejecting the presumption that recipients will divert public aid to further religious indoctrination, the Court has "discard[ed] the assumption that *pervasive* monitoring [of aid recipients] is required."²³³ Because the Supreme Court has not found an excessive church-state entanglement in any post-*Agostini* cases, it is unclear what factors are necessary to establish an excessive church-state entanglement. The *Agostini* dictum,²³⁴ however, leaves open the possibility that the presence of administrative cooperation, political divisiveness, as well as some form of monitoring or oversight, would violate this prong of the *Lemon/Agostini* test if the Court deemed this combination of factors to be excessive.

The first element of the excessive entanglement test, the nature of the institution, is a given for purposes of this Note: the universities at issue are so sectarian in nature that it is impossible for the government to aid only their secular functions, despite the fact that any government aid would be purely secular in content.²³⁵ Having determined the nature of the institutions likely to benefit from this government aid, it is possible to turn to the second element of the excessive entanglement inquiry: the nature of government aid involved in revenue bond issuances. Justice Powell, writing for a majority in *Hunt v. McNair*, provided an apt description of the type of aid at issue:

The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, *the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available.* The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit."²³⁶

233. *Id.*

234. *Id.*

235. See *Steele v. Indus. Dev. Bd.*, 117 F. Supp 2d 693, 734 (M.D. Tenn. 2000) (finding that Lipscomb University is pervasively sectarian); *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 698 (Va. 2000) (finding that Regent University is pervasively sectarian according to the standard articulated in *Tilton*); As Part I argues, the Court's *Tilton*-era standard would have presumptively disqualified such an institution from government aid.

236. 413 U.S. 734, 745 n.7 (1973) (citations omitted) (emphasis added).

Justice Powell's characterization of the state aid provided by a conduit issuer makes an important distinction for the present analysis: the aid at issue does not involve any public funds. That is, a loan funded directly²³⁷ or indirectly²³⁸ by revenue bonds does not include any taxpayer dollars. It is not the loan to the pervasively sectarian institution, therefore, that raises constitutional concerns. Rather, according to Justice Powell, the only state aid is the creation of the conduit issuer itself and the possibility that a particular institution may borrow at a more favorable rate than that available through private financing.

When constitutional inquiry focuses on this difference between funding with revenue bonds and private financing, two key factors come into focus. First, any benefit received by a religious university stems from the independent benefit received by both private bond purchasers and the issuing authority. Indeed, it is only by making a cheaper loan available to private entities such as religiously oriented universities that an issuing authority is able to promote its legislative agenda at all.²³⁹ This fact does not support the argument that *only* bondholders, rather than the pervasively sectarian university, benefit from the conduit issuance.²⁴⁰ A loan funded by revenue bonds, because it is a relatively inexpensive form of financing, provides a clear financial benefit to the university on whose behalf the bonds were issued. It does, however, mean that a recipient university is not the *only* beneficiary and may not even be the *primary* beneficiary.

Second, any benefit received by a religious university is due to the tax exemption granted to private bond purchasers.²⁴¹ The benefit is not

237. *E.g.*, *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 505 (2001) (describing a revenue bond issuance in which proceeds from a completed bond sale were loaned to the recipient entity).

238. *See, e.g.*, *Steele*, 117 F. Supp. 2d at 717 ("In reality, the government Authority issuing the bonds does not involve itself in all the financial details of the transaction. Instead, the Authority arranges to borrow the bond proceed amount from a bank at the time of the bond issuance. The Authority names the bank as the trustee of the bond issue, and the bank disperses the money 'borrowed' by the Authority to the Entity. In return, the Authority assigns its interest in the loan to the Entity to the bank, so that the Entity is repaying the bank directly.").

239. *See Hunt*, 413 U.S. at 739 (noting the role of the income tax exemption to the issuing authority).

240. The defendants in *Steele* had advanced this claim. *See Steele*, 117 F. Supp 2d at 717-18. In response, the court found that "[a]lthough the bond holders did benefit financially from the tax-exempt nature of the municipal bonds, that is not the only benefit that accrued in this case Lipscomb has repeatedly stated that it received a substantial benefit from the tax-exempt bonds . . . and that it could not have completed the project if it had not been granted the benefit . . ." *Id.*; *see also* Jeffrey Selingo, *Judge Rejects Tax-Free Bonds for Religious University*, CHRON. OF HIGHER EDUC. Nov. 10, 2000, at A3 (noting that Lipscomb University's lawyer, Bradley McClean, argued that the district court "improperly applied [the 'pervasively sectarian' test] because bondholders, not the university itself, directly received the tax benefits").

241. *See supra* text accompanying note 20.

a direct grant or subsidy but is instead derived from an *exemption* from a government-imposed burden. Admittedly, the difference between a loan funded by revenue bonds and a loan obtained on the private market may be significant. According to one estimate, for example, the revenue bond issue approved in *Lynn* saved Regent “about \$30 million in interest over the 30-year life of the loan.”²⁴² Because this gain results from the government’s consent to excuse private bond purchasers from a governmentally imposed loss, however, it cannot be equivalent to a direct grant or subsidy. *Walz v. Tax Commission* mandates this conclusion.²⁴³ In holding that the New York City Tax Commission did not violate the First Amendment by granting property tax exemptions to religious organizations, Chief Justice Burger, writing for the Court, found a fundamental difference between exemptions from taxation and direct subsidies: “The grant of a tax exemption 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. . . . There is no genuine nexus between tax exemption and the establishment of religion.”²⁴⁴ The gain realized by religious universities in revenue bond issuances is an even more indirect economic benefit²⁴⁵ than that contemplated in *Walz*, as revenue bonds exempt the interest realized by the bond purchaser — and not the profit realized by the recipient university — from taxation.

Despite the clarity of *Hunt* and *Walz*, opponents of transactions such as those at issue in *Lynn* and *Steele* have attempted in various ways to characterize the government assistance in these cases as a form of direct aid. In *Steele*, the District Court for the Middle District of Tennessee supported its finding that loans funded by revenue bonds are a form of direct aid by arguing that the Supreme Court itself had recognized such aid as direct.²⁴⁶ The court contended that, in *Rosenberger v. Rector of the University of Virginia*,²⁴⁷ the Supreme Court cited *Hunt* “as one of the cases correctly cited by the Court of Appeals establishing ‘the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.’”²⁴⁸ Given that the Court

242. Regent Press Release, *supra* note 22, at 1.

243. 397 U.S. 664 (1970); *see also* Lark, *supra* note 29, at 177 (predicting that the *Mitchell* plurality, if faced with the constitutional issue presented in cases such as *Steele* and *Lynn*, “would conclude that the program is an indirect tax exemption governed by *Walz*”).

244. *Walz*, 397 U.S. at 675.

245. *Id.* at 674-75.

246. *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 719-20 (M.D. Tenn. 2000).

247. 515 U.S. 819 (1995).

248. *Steele*, 117 F. Supp. 2d at 720 (quoting *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 842 (1995)). The passage from *Rosenberger* reads: “The Court of Appeals (and the dissent) are correct to extract from our decisions the principle

expressly noted in *Hunt* that aid funded by a revenue bond issuance is not financial aid at all — direct or indirect²⁴⁹ — it is likely that the Court was stating in *Rosenberger* that *Hunt*, like *Roemer* and *Tilton*, recognizes the general principle that direct aid to sectarian institutions entails special Establishment Clause dangers.

Those opposed to bond issuances benefiting pervasively sectarian institutions have also attempted to raise a constitutional issue by disregarding the significance of the revenue bond issuance itself. In *Steele*, for instance, the court found that the money received by Lipscomb through the bond issuance was, in essence, nothing more than a loan: “Lipscomb went to the Board in order to get a low-interest government loan, and that is exactly what it received.”²⁵⁰ The bond issuance, in the court’s analysis, was “simply the financing tool through which the government was able to collect funds sufficient to meet the \$15,000,000 agreed to in the loan.”²⁵¹ Even assuming that the government aid consisted of the entire loan rather than only the difference between revenue bond-funded financing and private financing as suggested above, there is a flaw in the district court’s characterization. Because the substance of the loan, the money itself, came from private investors rather than the government, the loan is not *from* the government. As the Supreme Court noted in *Hunt*, the government is a conduit in the loan transaction,²⁵² channeling money from bond purchasers to the recipient entity. Although an entity such as Lipscomb may approach a government authority seeking a relatively low-cost loan, the authority was initially set up by the state legislature in order to promote and facilitate such transactions. A pervasively sectarian university seeking a cost-effective method of financing an improvement can only approach a conduit issuer because the state legislature initially made such an authority available for parties considering projects meeting the legislature’s secular agenda. In this light, it is unreasonable to view the transaction solely as one that benefits the recipient university; the authority — and thus the state — receives a deliberately sought-after benefit as well.

that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions” *Rosenberger*, 515 U.S. at 842. (citing *Hunt v. McNair*, 413 U.S. 734, 742 (1973)).

249. *See Hunt*, 413 U.S. at 745 n.7 (“Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality . . .”).

250. *Steele*, 117 F. Supp. 2d at 717.

251. *Id.*; *see also id.* at 720 (finding that the loan was a direct benefit to Lipscomb University because the government “chose to provide Lipscomb with low-interest financing through a loan agreement”).

252. *See Hunt*, 413 U.S. at 745 n.7 (noting with apparent approval that a lower court viewed the state’s role in a revenue bond issuance “as that of a ‘mere conduit’” (quoting *Hunt v. McNair*, 187 S.E.2d 645, 650 (S.C. 1972))).

Critics have also argued that the actual benefit received by a recipient university as defined in the *Hunt* footnote — the difference between the revenue bond-financed loan and a private loan — is itself a form of direct aid because the state is deprived of the tax revenue it would have acquired had the university been forced to seek out private sources of financial assistance.²⁵³ That is, due to the tax-free interest on revenue bonds, the state loses revenue that would have been paid on the interest of a private loan.²⁵⁴ This position has little merit in light of the Supreme Court's decision in *Walz v. Tax Commission*.²⁵⁵ The Court ruled in *Walz* that a tax exemption is *not* a form of direct aid to religious organizations because an exemption only requires the government to refrain from imposing a burden on the church.²⁵⁶ Because no public funds are transferred in a loan funded by revenue bonds, the tax exemption is only an indirect economic benefit.²⁵⁷

Granted, the exemption in a revenue bond issuance differs from the exemption considered in *Walz* in two senses. A revenue bond issuance requires a different sort of activity from the government. The government does not “simply abstain” from taxing the recipient institution but instead authorizes and structures a transaction having that effect.²⁵⁸ The difference between this authorization and the legislative action behind a tax exemption of the kind considered in *Walz*, however, is not great considering that both exemptions require explicit legislative authorization.²⁵⁹ Revenue bond issuances merely require one additional authorization — that of the authority empowered to issue such bonds — before the administration of the transaction is

253. See Memorandum in Support of Plaintiff's Motion for Summary Judgment at 6 & n.7, *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501 (6th Cir. 2001) (No. 99-1884) [hereinafter Petitioner's Brief].

254. See *id.* at 6-7:

The issuance of tax-exempt revenue bonds . . . for the benefit of a religious school is not an “indirect tax benefit,” but instead is a *direct subsidy* in the form of substantially lower interest payments on the loan. And this direct subsidy to the religious school is indeed paid for by “public funds” in the form of lost revenue to the [state] treasury from the non-tax-exempt interest it would have received had the construction been financed by a commercial loan.

Cf. Walz, 397 U.S. 664, 667 (1970):

The essence of the appellant's contention was that the New York City Tax Commission's grant of an exemption to church property indirectly requires the appellant to make a contribution to religious bodies and thereby violates provisions prohibiting establishment of religion under the First Amendment which under the Fourteenth Amendment is binding on States.

255. 397 U.S. 664 (1970).

256. *Id.* at 675.

257. See *id.* at 674.

258. *Cf. id.* at 675 (describing a tax exemption as the state “simply abstain[ing]” from imposing a financial burden).

259. See *id.* at 666-67 (citing N.Y. CONST. art. XVI, § 1, which authorizes the tax exemption).

turned over to other parties such as the trustee and underwriter.²⁶⁰ Second, revenue bond issuances differ from a tax exemption such as that evaluated in *Walz* because revenue bond issuances exempt the interest gained by bond purchasers rather than any funds received by the religious institution itself. Any benefit derived by religious institutions, however, stems directly from the tax exemption accorded to bond purchasers. The tax exemption therefore benefits the religious institution receiving a less expensive loan as much as it does the bond purchasers who directly benefit from the exemption — and *only* because of the exemption given to bond purchasers.

Some commentators have concluded that the government's indirect aid via the issuance of revenue bonds directly assists the recipient institution in its religious mission because, in providing financial support to an institution's secular functions, this aid allows the institution to devote more of its financial resources to indoctrination.²⁶¹ The Court has unfailingly rejected this line of reasoning.²⁶² Indeed, if the argument had any merit, the Court could never have approved aid to the secular functions of even merely sectarian schools, as any such aid would have the effect of leaving the school with more resources to spend on religious indoctrination.

As *Hunt* makes clear then,²⁶³ the nature of government aid in a revenue bond issuance is limited to the creation of the authority empowered to issue revenue bonds and the subsequent difference between the cost of a loan funded by revenue bonds and the likely cost of a private loan. This difference is attributable solely to the tax exemption for interest received by bond purchasers and, according to *Walz*, a tax exemption is at best an indirect economic benefit.²⁶⁴

Under the final element of the excessive entanglement analysis, it is necessary to consider the relationship between church and state that ensues from a revenue bond-funded loan. While a revenue bond issuance clearly involves some degree of interaction between a pervasively sectarian institution and the government through the conduit issuer, church-state interaction qua church-state interaction does not neces-

260. See *infra* Part III.B.

261. See *Tilton v. Richardson*, 403 U.S. 672, 693 (1971) (Douglas, J., dissenting in part) (arguing that “[m]oney not spent for one purpose becomes available for other purposes”).

262. See *Roemer v. Bd. Of Pub. Works*, 426 U.S. 736, 747 (1976) (plurality opinion) (stating that, while the Court acknowledges that aiding a religious institution's secular functions will free resources for “sectarian ends,” the Court “never has held that religious activities must be discriminated against” by denying secular aid.); see also *Tilton*, 403 U.S. at 679 (plurality opinion) (“[B]us transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of government assistance have been upheld.” (citing, *inter alia*, *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968))).

263. 413 U.S. 734, 745 n.7 (1973).

264. *Walz*, 397 U.S. at 674.

sarily violate the Establishment Clause. As the Court stated in *Agostini*, “Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two.”²⁶⁵ Rather, the church-state entanglement must be excessive in order to violate the Establishment Clause.²⁶⁶ The Court has placed great emphasis on the frequency and extent of contact between the government and the religious authority behind a school or institution of higher education in determining whether administrative entanglement is excessive. In *Lemon*, the Court found excessive entanglement where the possibility for diversion of government aid to religious indoctrination necessitated a “comprehensive, discriminating, and continuing state surveillance.”²⁶⁷ Although the Court has subsequently rejected the presumption that prompted the need for continuing surveillance in *Lemon*,²⁶⁸ this development leaves untouched the principle that sufficiently intrusive surveillance is a form of excessive entanglement. Thus, the Court has approved of aid distributed in the form of a “one-time, single-purpose” grant²⁶⁹ and aid distributed annually with only “‘quick and non-judgmental’” audits of a sectarian university’s use of government aid.²⁷⁰

The general extent of a state or municipality’s entanglement with the religious authorities behind a pervasively sectarian institution is extremely limited, as the following description of a typical conduit issuance shows.²⁷¹ The initial act in transactions such as those detailed in *Lynn* and *Steele* is the legislative creation of an agency (an “authority”) authorized to issue revenue bonds.²⁷² The borrowing party (the “entity”) then approaches the authority with a proposed project

265. 521 U.S. 203, 233 (1997) (internal citation omitted).

266. *Id.*

267. 403 U.S. 602, 619 (1971); *see also id.* at 622 (finding excessive entanglement where the government’s inspection of a religiously oriented school’s financial records would foster “an intimate and continuing relationship between church and state”).

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

269. *Tilton*, 403 U.S. at 688.

270. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 764 (plurality opinion) (quoting *Roemer v. Bd. Of Pub. Works*, 387 F. Supp. 1282, 1296 (D. Md. 1974)).

271. The following passage describes the most common elements of a revenue bond issuance as reflected in case law and certain secondary sources. It is possible that a given issuance will vary to some degree.

272. *See, e.g., Hunt v. McNair*, 413 U.S. 734, 736-39 (1973)) (describing the issuance of revenue bonds by South Carolina’s Educational Facilities Authority pursuant to S.C. CODE ANN. 22-41.4 (currently codified at S.C. CODE ANN. §§ 59-101-10 to -109-180 (Law Co-op. 1990) & Supp. 2001)); *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 700-01 (M.D. Tenn. 2000) (discussing the issuance of revenue bonds by a Tennessee industrial development board pursuant to TENN. CODE ANN. § 7-53-101(11)(A)(vii) (Supp. 1990); *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 687 (Va. 2000) (discussing the issuance of revenue bonds by Virginia’s Educational Facilities Authority pursuant to VA. CODE ANN. § 23-30.42 (Michie 2000)).

seeking a revenue bond-funded loan to finance it.²⁷³ The authority approves the revenue bond issuance, sometimes after a public hearing²⁷⁴ or with independent approval of the issuance from a third party.²⁷⁵ A trustee is responsible for supervising the entity's adherence to the loan agreement, receiving payments from the entity, and representing the interests of bondholders.²⁷⁶ An underwriter purchases unsold bonds from the authority and subsequently resells them on the bond market to individual purchasers.²⁷⁷

The authority is not required to monitor the entity's compliance with the terms of the loan agreement and, moreover, is not obligated to ensure that the entity does not use secular aid for sectarian purposes. Likewise, the authority plays no role in redistributing payments from the private entity to bondholders. The government's involvement therefore amounts to little more than the initial creation of the issuing authority and the subsequent approval of the transaction.²⁷⁸ This involvement is far closer to that approved in *Tilton* than to the continuing surveillance rejected in *Lemon*.²⁷⁹

In assessing the degree of political entanglement, the essential question is whether the aid under consideration would lead to "political division along religious lines."²⁸⁰ With revenue bond issuances such as those under consideration here, the Court is unlikely to reach such a finding. Colleges and universities have traditionally been subject to greater leniency in the Supreme Court's Establishment Clause juris-

273. See *Hunt*, 413 U.S. at 738 (describing the proposal submitted by Baptist College at Charleston to South Carolina's Educational Facilities Authority); *Steele*, 117 F. Supp. 2d at 694 (noting that Lipscomb University asked the industrial development board for a "\$15 million, low-interest loan"); *Lynn*, 538 S.E.2d at 688 (describing Regent University's application to the Educational Facilities Authority).

274. See, e.g., *Steele*, 117 F. Supp. 2d at 693 (noting that the industrial development board held two public hearings prior to approving Lipscomb University's proposal).

275. See, e.g., *id.* at 702-03 (describing the mayor's role in certifying that the proposed bond issuance would be exempt from federal taxation).

276. ROBERT LAMB, ET AL. *THE HANDBOOK OF MUNICIPAL BONDS AND PUBLIC FINANCE* 868 (1993) (defining "trustee").

277. See *id.* at 24.

278. The issuance in *Hunt* varied slightly from the transaction discussed in this Section. In *Hunt*, "the College would convey the project to . . . the Authority, which would lease the property so conveyed to the College. After payment in full of the bonds, the project would be reconveyed to the College." *Hunt*, 413 U.S. at 738. Neither the *Lynn* nor *Steele* transactions included this kind of conveyance.

279. See *MUNICIPAL DEBT FINANCE LAW*, *supra* note 16, § 3.4.3 (applying the "excessive entanglement" inquiry and concluding — even without considering the role of a trustee in supervising the beneficiary university in lieu of the conduit issuer — that the government's role "seems to entangle church and state no more than the planning that precedes direct grants of government funds to sectarian institutions, where the Supreme Court has approved the relationship" (citing *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976))).

280. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

prudence than primary or secondary schools.²⁸¹ In addition, the Court noted in *Roemer* the fact that “more than two-thirds” of private colleges have no religious affiliation, apparently reasoning that when the government extends aid to all private colleges, such aid will not give the impression that the government is promoting religious education in particular.²⁸²

In the case of revenue bond issuances, moreover, a rule excluding consideration of an applicant’s religious orientation is less likely to lead to “political division along religious lines”²⁸³ than a rule authorizing the government to inquire into an applicant’s religious affiliation. If a conduit issuer must bar institutions such as Lipscomb and Regent from participating in revenue bond financing, that authority would have to inquire into each applicant’s religious affiliation, gauging the degree to which religion permeates a university’s curriculum and assessing the likelihood that secular aid would be diverted to religious purposes.²⁸⁴ Moreover, the Authority may have to conduct this inquiry in the context of a public hearing, a possibility that could produce the “political division along religious lines” that the Court envisioned with trepidation in *Lemon*.²⁸⁵ Even if state authorities were able to conduct such inquiry without bias, it is inevitable that rejection of an institution’s proposal based on its religious affiliation would lead to litigation, as this determination would rest on a subjective characterization of the extent to which religion pervades an applicant’s curriculum. In contrast, if state authorities issued revenue bonds without regard to a beneficiary’s religious orientation, political division would be less likely because any applicant could make a proposal to an issuing authority without having to justify its religious — or secular — orientation. Once the Court recognizes the participation of pervasively sectarian institutions in such financing arrangements as in accord with the First Amendment, any litigation arising from an authority’s approval of a revenue bond issuance is unlikely to center on the applicant’s religious persuasion.

281. See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 687-88 (1971) (plurality opinion) (reasoning that the “potential for divisive religious fragmentation” at a college or university is mitigated by the fact that a college or university is likely to have a diverse student body); see also CHEMERINSKY, *supra* note 2, § 12.2.6.3 (describing the Court’s “more lenient” stance toward aid that benefits colleges and universities).

282. *Roemer*, 426 U.S. at 765-66 (plurality opinion).

283. *Lemon*, 403 U.S. at 622.

284. See *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 701 (M.D. Tenn. 2000) (stating that, before approving a bond issuance, the industrial development board must determine that the bonds will advance a “legitimate public purpose” — a finding that would be impossible if the issuance violated the Establishment Clause).

285. 403 U.S. at 622.

B. *The Conduit Issuer's Approval Under the Endorsement Analysis*

This Section shows that, besides satisfying the *Lemon/Agostini* effect analysis, revenue bond issuances benefiting pervasively sectarian institutions also comply with the endorsement test.²⁸⁶ Although the Court has long considered whether a government action endorses religion, Justice O'Connor articulated a "sound analytical framework"²⁸⁷ for an endorsement test in *Lynch v. Donnelly*,²⁸⁸ which the Court adopted in 1989 in *County of Allegheny v. American Civil Liberties Union*.²⁸⁹ The underlying logic of the endorsement test is that the Establishment Clause prohibits the government from "appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"²⁹⁰ When applying this test, the Court considers whether a particular government act has endorsed, favored, or promoted religion in general or a specific religious orientation.²⁹¹ The Court views the government act under inquiry from the perspective of a "reasonable observer,"²⁹² asking whether the government has "*discriminate[d] in favor of private religious . . . activity.*"²⁹³

While the Court has typically applied the endorsement test in the context of the placement of a physical display such as a crèche on government property,²⁹⁴ it is possible to apply the test to a less tangible act such as the authorization of a revenue bond issuance.²⁹⁵ This analysis presents certain challenges in this more abstract context. As articulated in *Lynch* and *Allegheny*, the endorsement analysis requires that a court consider the symbol constituting the would-be endorsement in

286. See, e.g., *Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 592 (1989) (describing the "endorsement" test).

287. *Id.* at 595 (opinion of Blackmun, J.).

288. 465 U.S. 668 (1984) (holding that the city of Pawtucket, Rhode Island, did not violate the Establishment Clause by including a crèche in its Christmas display).

289. 492 U.S. 573 (1989).

290. *Id.* at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

291. *Id.* at 592-94; see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (plurality opinion) ("Our cases have accordingly equated 'endorsement' with 'promotion' or 'favoritism.'").

292. *Allegheny*, 492 U.S. at 620 (quoting *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in judgment) (internal quotation marks omitted)).

293. *Pinette*, 515 U.S. at 764 (plurality opinion).

294. See, e.g., *Allegheny*, 492 U.S. 573 (1989) (crèche and menorah); *Lynch*, 465 U.S. 668 (crèche).

295. Indeed, the District Court for the Middle District of Tennessee noted in *Steele* that the Sixth Circuit has substituted the endorsement analysis for the "effects" prong of the *Lemon* test. *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 731 (M.D. Tenn. 2000).

context — its “physical setting” and “unique circumstances.”²⁹⁶ In *Steele*, the District Court for the Middle District Of Tennessee applied this test by focusing on the Official Statement released pursuant to the issuance of revenue bonds.²⁹⁷ The court noted that the Official Statement “places the government’s role first and then describes the university, the project, and the uses of the funds provided through the bond proceeds,” adding that the description of the university goes into the school’s religious orientation in depth.²⁹⁸ Based on this review of the Official Statement, the court concluded that “[t]he structure and content of the Official Statement indicates to the reasonable observer that the Board . . . is endorsing the sectarian beliefs and teachings of Lipscomb University.”²⁹⁹

Because the standard in *Lynch* and *Allegheny* requires that the court place the offending act or object in its context and that the court view the would-be endorsement in its *actual* setting,³⁰⁰ *Steele*’s endorsement inquiry is inadequate for two reasons. First, an Official Statement’s context is a proposed municipal bond issuance. Thus, this document has a particular reasonable observer as its intended audience: a prospective bond purchaser engaged in making an investment decision. Just as a reasonable observer in an art museum appreciates a religious work of art *as art*,³⁰¹ a reasonable observer of an Official Statement must view this document as a solicitation for a financial transaction rather than a statement of the government’s position concerning religion. Second, the endorsement analysis should take into account that the Official Statement is one of a multitude of such documents released by the development authority. This conclusion follows from Justice O’Connor’s art museum illustration in *Lynch*.³⁰² Because a museum includes a variety of paintings of secular and re-

296. *Allegheny*, 492 U.S. at 595 (plurality opinion) (quoting *Lynch* (internal quotation marks omitted)); *see also Lynch*, 465 U.S. at 692 (O’Connor, J., concurring).

297. 117 F. Supp. 2d at 733-34.

298. *Id.* at 733 (noting that the Official Statement provides: “As stated in its 1990-91 school catalog, the supreme purpose of the University is ‘to teach the Bible as the revealed will of God to man and as the only and sufficient rule of faith and practice, and to train those who attend in a pure Bible Christianity’”).

299. *Id.* at 734. The court suggests, however, that it might have reached a different outcome had the Official Statement included a disclaimer. *Id.*

300. *See Allegheny*, 492 U.S. at 595 (Blackmun, J.); *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring).

301. *See Lynch*, 465 U.S. at 692 (O’Connor, J., concurring) (“Although the religious and indeed sectarian significance of the creche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display — as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion.”).

302. *Id.* at 692 (O’Connor, J., concurring).

ligious content, a single religious painting does not convey a message of endorsement.³⁰³ A court applying the reasonable observer test to an official statement, therefore, must consider that document in its particular setting.³⁰⁴ A reasonable observer would have no reason to view any single official statement as a government endorsement of the recipient university's religious orientation because the observer would be aware of issuances benefiting other universities with alternative religious and secular orientations.

An official statement is part of a complex financial transaction and, as such, a court applying the reasonable observer analysis must look beyond the pages of the official statement to the statutory authorization for the transaction and the ensuing relationships between issuer, beneficiary, and trustee.³⁰⁵ In this context, a reasonable observer may view the bond issuance benefiting a pervasively sectarian university in the context of the legislature's desire to promote higher education,³⁰⁶ the neutral availability of revenue bond financing,³⁰⁷ and the government's de minimis involvement in any given transaction.³⁰⁸ That this government aid is available and, in fact, utilized by institutions representing a wide variety of religious viewpoints should suggest to a reasonable observer that the government does not endorse or favor the religion of any single participant. From this perspective, religion is wholly irrelevant.

In the final analysis, the endorsement analysis is satisfied only if an authority empowered to issue revenue bonds does *not* take an applicant's religious orientation into account in determining whether to authorize a bond issuance. In concluding, as the district court did in *Steele*, that the authority must exclude certain applicants because of their religious beliefs and the extent to which these beliefs inform their actions in ostensibly secular affairs, the court would require the government to disfavor certain religious persuasions. This result makes an

303. *Id.* (O'Connor, J., concurring).

304. *Allegheny*, 492 U.S. at 595 (Blackmun, J.).

305. Whether or not a government action is an endorsement "depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.'" *Id.* (Blackmun, J.) (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). The purpose of an official statement for a proposed revenue bond issuance depends upon the statutory authorization for the issuance and the nature of the ensuing transaction.

306. See *Steele v. Indus. Dev. Bd.*, 117 F. Supp. 2d 693, 700 (M.D. Tenn. 2000) (quoting TENN. CODE ANN. § 7-53-101(11)(A)(vii) (2000 Supp.)) (stating that the board issuing revenue bonds to Lipscomb University as powered "to approve tax-exempt bonds for various public works and projects, including 'any nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution'" (alteration in original)).

307. See, e.g., *id.*

308. See *supra* Section III. A.

applicant's religious affiliation relevant to its "standing in the political community," a practice the Supreme Court has recognized as plainly contrary to the basic mandate of the Establishment Clause.³⁰⁹

CONCLUSION

Constitutional scholar Erwin Chemerinsky has protested what he identifies as the Supreme Court's recent tendency to place near exclusive emphasis on neutrality in the distribution of government aid, arguing that such a standard violates the "values of the Establishment Clause":

First, freedom of conscience would be offended because people would be forced to support and subsidize religions that they do not believe in, even if all religions are treated equally. Second, treating all religions equally does not address the need to make all feel comfortable with their government. Those who disavow any religious belief would be forced to support all religions; indeed, they would be surrounded with parochial schools supported by their tax dollars. . . . Third, [neutrality does not] protect religions from the intrusion of government involvement. Justice Thomas' equality theory would mean that the government would be enmeshed in almost every aspect of religious schools and religious institutions. The government, as a condition for funding, could — and should — set curricula and educational requirements. The government would need to monitor to see if these mandates were met. This is a threat to religion and it is no less so because all religions are threatened equally.³¹⁰

This Note has shown that not a single one of the legitimate dangers identified here by Professor Chemerinsky — neither compulsory subsidization, nor endorsement, nor the intrusion of government into sectarian activities — is present when pervasively sectarian institutions participate in conduit financing. The unique qualities of a revenue bond issuance — its neutral allocation of government aid, minimal contact between church and state, and absolute exclusion of public funds from aid to religious universities — obviate any genuine Establishment Clause concerns. Conduit financing, therefore, presents a special case of government aid to religious institutions that remains faithful to the "wall of separation"³¹¹ between church and state.

309. See *Allegheny*, 492 U.S. at 593-94 (Blackmun, J.) ("Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring))).

310. Chemerinsky, *supra* note 154, at 232.

311. See *Lynch*, 465 U.S. at 673 n.1 (attributing the "wall of separation" metaphor to Thomas Jefferson).