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Section 1: Mitchell v. Helms

Institute of Bill of Rights Law, William & Mary Law School

MITCHELL v. HELMS

Unequal Treatment or Separation of Church and State: Is the Establishment Clause Offended by Government Aid to Parochial Schools?

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Does the First Amendment bar President Clinton from fulfilling his promise of connecting every classroom in America to the Internet? The Supreme Court in *Mitchell v. Helms* will decide what type of aid, if any, the government may provide to parochial schools without infringing the First Amendment's Establishment Clause – "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Fourteen years ago, taxpayers in Louisiana's Jefferson Parish filed suit challenging the constitutionality of federal Chapter 2 programs that provide secular aid to parochial schools through block grants to individual states. The United States Court of Appeals for the Fifth Circuit heard the case last year and ruled that the Chapter 2 programs were unconstitutional as implemented by Jefferson Parish. The Fifth Circuit relied on three previous Supreme Court decisions: *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980). The Fifth Circuit concluded that those cases permitted some aid, such as the provision of secular textbooks or funding for federally required achievement tests, but did not permit government loans of instructional materials such as library books, overhead projectors, computers, and printers.

In its decision, the Court of Appeals rejected the lower court's reliance on an apparent trend within the Supreme Court of permitting more types of government aid to parochial schools. The Supreme Court could choose *Mitchell* as the vehicle to provide additional guidance on its interpretation of the Establishment Clause. A decision in *Mitchell* may also suggest how the Court would rule in an upcoming school voucher issue. Will the Court depart from past precedent and establish a more coherent guideline, or will it add further confusion to an already chaotic area of law?

The Supreme Court could choose to uphold the Chapter 2 program, strike down all or a portion of it, or find only that it is unconstitutional as applied in Jefferson Parish. The Court, to avoid further muddying the establishment clause waters, could reject the distinction between textbooks and "instructional materials" made by past Supreme Court decisions and the Fifth Circuit. Such a distinction is largely meaningless. The government provision of secular textbooks frees resources parochial schools would have otherwise spent on textbooks, enabling them to purchase "instructional materials" or hire additional teachers to advance their religious purpose. Thus, the aid is still provided, it simply takes a more circuitous route.

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The Court could also tackle the question of whether government aid can be provided to non-parochial private schools while denying such aid to religious schools. Private schools, whether parochial or non-parochial, generally exist to further some ideology, even if it is simply that public schools are insufficient or undesirable for educating some students. *Mitchell* then, could serve as a companion case to *Board of Regents v. Southworth* because the Court could choose to decide whether religious speech is to be treated differently than other speech. (In *Southworth*, to be decided this term, the Court will decide whether mandatory student fee funding of political speech violates the First Amendment) If the Court chooses to distinguish between religious speech and other speech, such a distinction would seem to be inconsistent with the demands of the Fourteenth Amendment's Equal Protection clause.

And, lurking at the fringes of the *Mitchell* case, is the question of school vouchers. Generally, vouchers provide a fixed sum – usually less than what is spent per-student by the local public school system – to be used by parents electing to send their children to private schools. Many see vouchers as a way to cure what they regard as a failing public education system by injecting market forces such as competition into education thereby encouraging public schools to improve. Vouchers also have the appeal of granting relief to those parents who are paying taxes to support a public school system they do not utilize at the same time they are paying tuition to send their children to private schools. Proponents of vouchers have also sought support from low-income parents and social activists by arguing that vouchers will permit more lower income children to attend private schools superior to many of the aging inner-city public schools they now attend. However, such a voucher system is plagued by the same constitutional concerns implicated by *Mitchell* – taxpayer aid to religion and compelled funding of speech.

Mitchell gives the Supreme Court the opportunity to place religious speech on an equal standing with other speech and simultaneously reject *any* compelled funding of speech, whether that speech is religious or secular.

98-1648 Mitchell v. Helms

Ruling below (*Helms v. Picard*, 5th Cir., 151 F.3d 347):

Chapter 2 of Title I of 1965 Elementary and Secondary Education Act and its Louisiana counterpart, as applied in Jefferson Parish to fund loan of state-owned instructional equipment and library books to sectarian schools, violate First Amendment's establishment clause; state loan of free textbooks to parochial schools, however, is permitted by *Board of Education v. Allen*, 392 U.S. 236 (1968).

Question presented: Does program under Chapter 2 of Title I of 1965 Elementary and Secondary Education Act, which provides federal funds to state and local education agencies to purchase and lend neutral, secular, and non-religious materials such as computers, software, and library books to public and non-public schools for use by students attending those schools, and which allocates funds on equal per-student basis regardless of religious or secular character of schools students choose to attend, violate establishment clause of First Amendment?

Mary L. HELMS, et al., Appellants

v.

Guy MITCHELL, et al., Appellees

United States Court of Appeals
for the Fifth Circuit

Decided August 17, 1998

DUHE, Circuit Judge:

I.

This case requires us to find our way in the vast, perplexing desert of Establishment Clause jurisprudence. Plaintiffs, as taxpayers, sued Defendant Jefferson Parish School Board et al., claiming that three state and one federal school aid programs were unconstitutional as applied in Jefferson Parish, Louisiana. (footnote omitted) The District Court initially granted Plaintiffs' motion for summary judgment on some issues. The court then conducted a bench trial on the remaining issues and rendered judgment. When the case was reassigned due to the district judge's retirement, the new judge reversed some of the court's earlier rulings. All told, the parties spent some thirteen years in district court before reaching this Court. During that time the sand dunes have shifted.

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III.

Plaintiffs also claim that Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 ("Chapter 2")[1] and its Louisiana counterpart, La.Rev.Stat.Ann. § 17:351-52, violate the Establishment Clause as applied in Jefferson Parish insofar as they provide direct aid to sectarian schools in the form of educational and instructional materials. Initially, the district court agreed and granted Plaintiffs' motion for summary judgment, finding that the loan of state-owned instructional materials (such as slide projectors, television sets, tape recorders, maps, globes, computers, etc.) to pervasively sectarian institutions had the "primary effect of providing a direct and substantial advancement to the sectarian enterprise" and therefore violated the Establishment Clause. The court relied primarily on *Wolman v. Walter*, 433 U.S. 229, 250 (1977), and *Meek v. Pittenger*, 421 U.S. 349, 363 (1975).

When the case was reassigned due to Judge Frederick Heebe's retirement, Judge

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[1] On October 20, 1994, Congress enacted the Improving America's School Act of 1994, Pub.L. 103-382, 108 Stat. 3518. Former Chapter 2 is now labeled "Subchapter VI--Innovative Education Program Strategies" and is codified at 20 U.S.C. §§ 7301-7373 (West Supp.1998). For ease of reference, we will continue to refer to new Subchapter VI as "Chapter 2." We will cite individual sections, however, by reference to citations in the current United States Code.

Marcel Livaudais granted Defendants' motion to reconsider the court's ruling. Following the reasoning of the Ninth Circuit in *Walker v. San Francisco Unified School District*, 46 F.3d 1449, 1463-70 (1995), Judge Livaudais found that the reasoning in Meek and Wolman, supra, had been undermined by subsequent Supreme Court cases. He therefore reversed Judge Heebe's finding of unconstitutionality and granted Defendants' motion for summary judgment, declaring Chapter 2 and La.Rev.Stat.Ann. § 17:351-52 constitutional, facially and as applied in Jefferson Parish.

A.

Chapter 2 provides financial assistance through "block grants" to state and local educational agencies to implement eight "innovative assistance programs." *See* 20 U.S.C. §§ 7311(b); 7312(a),(c)(1); 7351. The challenged innovative assistance program describes

> programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program.

20 U.S.C. § 7351(b)(2).

Chapter 2 services are to be provided to children enrolled in both "public and private, nonprofit schools." 20 U.S.C. § 7312. Section 7372 provides that a local educational agency shall equitably provide "secular, neutral, and nonideological services, materials, and equipment" to students who are enrolled in private nonprofit elementary and secondary schools within its boundaries. 20 U.S.C. § 7372(a)(1). Chapter 2 funds for the innovative assistance programs must supplement, and in no case supplant, "funds from non-Federal sources." 20 U.S.C. § 7371(b). The control of Chapter 2 funds, as well as title to all Chapter 2 "materials, equipment, and property," must be in a public agency, "and a public agency shall administer such funds and property." 20 U.S.C. § 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by a public agency or through a contractor who is "independent of such private school and of any religious organizations." 20 U.S.C. § 7372(c)(2).

Once Louisiana receives its Chapter 2 funds from the Federal government, the designated State Educational Agency ("SEA") allocates 80 percent of the funds to Local Educational Agencies ("LEAs"). Eighty-five percent of those funds are earmarked for LEAs based on the number of participating elementary and secondary school students in both public and private, nonprofit schools; 15% go to LEAs based on the number of children from low-income families. *See* 20 U.S.C. § 7312(a). During the fiscal year 1984-85, Jefferson Parish received $655,671 in Chapter 2 funds; about 70% of those funds were allocated to public schools and about 30% to nonpublic schools.

In 1984, the State instituted a monitoring process to ensure that Chapter 2 materials were not being used for religious purposes. Nonpublic schools were encouraged but not required to sign assurances that they would only use

loaned materials for secular purposes. Additionally, LEAs made monitoring visits to nonpublic schools, and the State made monitoring visits to the LEAs and to some nonpublic schools. After the United States Department of Education conducted an on-site visit to review the Louisiana Chapter 2 program in September, 1984, the Louisiana Department of Education made changes in monitoring LEAs. It increased, for example, the frequency of on-site visits by the Chapter 2 staff to LEAs from once every three years to once every two years.

The State also began reviewing the LEAs' monitoring process of the private schools. LEAs, however, have primary responsibility in Louisiana for monitoring their Chapter 2 programs and for compliance with all applicable State and Federal guidelines. When State Chapter 2 monitors visited the JPPSS in April, 1985, the monitors found that "the services, materials, equipment, [and] other benefits provided to nonpublic schools" in Jefferson Parish were not "neutral, secular and non-ideological."

A report of that evaluation prepared by the Bureau of Evaluation indicates that, while the LEAs "handle most of the administrative matters related to Chapter 2, the nonpublic schools make the decisions about how to spend their Chapter 2 allocations, and they do so independently of one another." The report also states that "[e]xcept that funds cannot be spent for support of religious or ideological instruction, flexibility in the use of Chapter 2 funds puts a minimum of limitations on the kinds of expenditures allowed." During the 1986-87 fiscal year, for example, of the total amount of Chapter 2 funds budgeted for nonpublic schools ($214,080), $94,758 was spent to provide library/media materials, $102,862 was spent for instructional equipment, and $16,460 was spent for "local improvement programs."

Ruth Woodward, the Coordinator of the Chapter 2 program in Jefferson Parish, stated that library books are ordered for nonpublic schools, but not for public schools. Such library books are stamped "ECIA Chapter 2." Woodward reviews the titles of books and other Chapter 2 materials and deletes titles she finds inappropriate. After reviewing library book orders from 1982, Woodward discovered approximately 191 titles in violation of Chapter 2 guidelines and had the books recalled and donated to the public library.

Woodward also stated that she generally makes a single visit to a given nonpublic school during the year. During her monitoring visits, she stated that she has "normally" found that the Chapter 2 materials and equipment are used in accordance with Chapter 2 guidelines. A review of the instructional materials purchased with Chapter 2 funds during 1986-87 and loaned to nonpublic, parochial schools reveals the following kinds of items: filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc. Woodward stated that no direct payments of Chapter 2 funds are ever made to nonpublic schools; the funds are retained and administered by her office.

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B.

We will focus on the Ninth Circuit's decision in *Walker*, supra, because Judge Livaudais relied heavily on its reasoning and also because it is the only other Circuit decision to have addressed the constitutionality of Chapter 2.

In *Walker*, a panel of the Ninth Circuit confronted a Chapter 2 program that was, in all relevant respects, identical to the one we confront in Jefferson Parish. (footnote omitted) The most significant aspect of the *Walker* panel's reasoning is devoted to assessing whether Chapter 2 has a "primary or principal effect of advancing religion." (footnote omitted) *Walker*, 46 F.3d at 1464- 69. The panel began by observing that, with the cases of *Meek*, *Wolman* and *Board of Education v. Allen*, 392 U.S. 236 (1968), the Supreme Court "drew a [constitutional] distinction between providing textbooks and providing other instructional materials--such as maps, overhead projectors, and lab equipment--to parochial schools or their students." *Walker*, at 1464-65; *see Allen*, at 248; *Meek*, 421 U.S. at 362-63; *Wolman*, 433 U.S. at 237. The panel, however, was not convinced that such a distinction was still the law. In its view, subsequent Supreme Court cases-- particularly, *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980), *Ball*, *supra*, and *Zobrest*, *supra*--had "clarified the holdings of *Meek* and *Wolman*, and rendered untenable the thin distinction between textbooks and other instructional materials." *Walker*, at 1465. The Ninth Circuit thus held that "under Chapter 2, the loaning of neutral, secular equipment and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." *Id.*

The panel read *Meek* as an illogical departure from *Allen*, which had upheld a law requiring public school authorities to lend textbooks, free of charge, to both public and private school students. *Allen*, at 248. The panel pointed out that "*Allen* ... rests on the robust principle that 'the Establishment Clause does not prohibit a State from extending the benefits of state laws to all citizens without regard for their religious affiliation.' " *Walker*, at 1465, *quoting Allen*, at 242. In the panel's view, however, the Court's subsequent decision in *Meek* departed from *Allen*'s reliance on neutrality when *Meek* "upheld the provision of textbooks to parochial school students, but struck down the program which loaned instructional materials and equipment...." *Walker*, at 1465 (citations omitted); *see Meek*, 421 U.S. at 362, 365-66.

Even though the Court's subsequent decision in *Wolman* explicitly upheld *Meek*, the *Walker* panel believed that "[i]n reaffirming *Meek*'s holding ... *Wolman* undermined *Meek*'s rationale." *Walker*, at 1465; *see Wolman*, 433 U.S. at 238 (upholding *Meek* and *Allen*). Specifically, the panel concluded that *Wolman* had "eviscerated" *Meek*'s premise that "any state aid to the educational functions of a sectarian school is forbidden." *Walker*, at 1465. *Wolman* did so, the panel reasoned, by "holding as constitutional a statute under which the State prepared and graded tests in secular subjects" for both public and private, parochial schools. *Id.* Thus, the *Walker* panel announced that the paltry sum of *Meek* and *Wolman* was the thin distinction--unmoored from any Establishment Clause principles--that state loans to parochial schools of instructional materials and equipment impermissibly advances religion, but state preparation and grading of tests and state loans of textbooks do not. *Walker*, at 1466.

In the panel's estimation, the true death-blow to *Meek*'s textbooks vs. other instructional materials dichotomy came three years later in *Regan*, which "recognized this weak distinction and clarified that the provision of instructional materials and equipment to parochial schools is not always prohibited." *Walker*, at 1466. But, as the panel recognized in the next sentence, *Regan* merely reaffirmed *Wolman* by "uph[olding] a law reimbursing parochial schools for the costs of administering tests required by the State." *Id.*; *see Regan*, at 655 ("We agree with the District Court that *Wolman* controls this case."). Although *Regan* did not deal with the provision of instructional materials to parochial schools, and although *Regan* explicitly followed *Wolman* and said nothing about overruling *Meek*, the *Walker* panel nonetheless declared with perfect candor that

> *Regan* thus instructs us that the difference between textbooks and other instructional equipment and materials, such as science kits and maps, is not of constitutional significance.

Walker, at 1466. In our view, such a statement could only mean that the panel thought *Regan* silently overruled *Meek*.

The *Walker* panel thus adopted an Establishment Clause analysis based on what it identified as "the underlying principle animating Establishment Clause jurisprudence: government neutrality towards religion." *Id.* at 1466, *citing*, *inter alia*, *Zobrest*, 509 U.S. at 10. The panel stated its "test" as follows:

> Government neutrality becomes suspect when, in practical effect, the governmental aid is targeted at or disproportionately benefits religious institutions, or when, in symbolic effect, the governmental aid creates a symbolic union between church and state.

Walker, at 1467. Applying its test, the panel easily found that Chapter 2 passed constitutional muster. First, it found that Chapter 2 benefits were "neutrally available without regard to religion" given that "an overwhelming percentage of beneficiaries [were] nonparochial schools and their students." *Id.* (footnote omitted) Second, the panel found that the constraints under which Chapter 2 services were provided "adequately safeguard[ed] Chapter 2 benefits from improper diversion to religious use." *Id.* at 1467-68. Finally, the panel reasoned that, if the state-paid interpreter on sectarian school premises in *Zobrest* did not create a symbolic union between government and religion, then "certainly having religiously neutral material and equipment in the same classroom does not create a symbolic union either." *Id.* at 1468, *citing Zobrest*, at 13.

Although it had already established (to its own satisfaction) that *Meek* and *Wolman* were no longer good law, the panel went on to distinguish the aid programs in those cases from Chapter 2:

> [T]he statutes struck down in *Meek* and *Wolman* are fundamentally different from the Chapter 2 statute at issue here. The statute in *Meek* was not neutral because it provided close to $12 million in aid that was targeted directly at private schools, of which more than 75% were church- related. Similarly, in *Wolman*, the statute was not neutral because it provided $88.8 million in aid that was targeted directly at private schools, of which 96% were church-related and 92% were Catholic. Here, seventy-four percent of Chapter 2 benefits went to public schools. Of the remaining

> twenty-six percent ... a substantial portion was allocated to nonreligious private schools. Indeed, over thirty percent of the private schools under the Chapter 2 program are nonreligious. Thus, unlike the statutes in *Meek* and *Wolman*, Chapter 2 is a neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools.

Walker, at 1468.[2]

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C.

When we carefully review the Supreme Court's pronouncements in *Allen*, *Meek*, *Wolman*, and *Regan*, it is tempting to complain that the high Court has instructed us confusingly. As merely one example, the Court in *Allen* registered its disagreement with the proposition "that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Allen*, at 248. Only seven years later, however, the Court was heard to say in *Meek* that "[t]he secular education [that parochial] schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Meek*, at 366, *quoting Lemon*, 403 U.S. at 657 (opinion of Brennan, J.) (emphasis added). Lest we fall into despair, however, we will view the Court's cases dealing with state aid to religious schools more in terms of what they did rather than what they said.

When we take that approach, the solution becomes compellingly clear and simple. *Meek* and *Wolman* have squarely held that what the government is attempting to accomplish through Chapter 2, it may not do. No case has struck down *Meek* or *Wolman*. * * *

Meek invalidated a Pennsylvania statute that authorized the Secretary of Education to lend to parochial schools "instructional materials" which included "periodicals, photographs, maps, charts, sound recordings, films, ... projection equipment, recording equipment, and laboratory equipment." *Meek*, at 354-55; *see also Meek*, at 354 n. 4 (complete statutory definition of "instructional materials."). *Meek* is directly on point and has not been overruled by any Supreme Court case. We thus "follow the case that directly controls." *See Agostini*, 117 S.Ct. at 2017.

In *Allen*, *Meek*, *Wolman*, and *Regan*, the Court drew a series of boundary lines between constitutional and unconstitutional state aid to parochial schools, based on the character of the aid itself. *Allen* approved textbook loans to parochial schools because the evidence did not indicate that "all textbooks ... are used by the parochial schools to teach

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[2] The panel also found that Chapter 2 did not violate the "entanglement" prong of *Lemon*, given the minimal intrusion onto the parochial schools premises by State monitors, and also given the "self-policing" nature of the neutral instructional materials and equipment. *Walker*, at 1469, *citing, inter alia*, *Meek*, at 365, and *Zobrest*, at 13-14.

religion." *Allen*, at 248. While recognizing that books, if they were religious books, could have the effect of indoctrination, the *Allen* Court likened the purely secular books at issue there to the bus transportation subsidized in *Everson v. Board of Education*, 330 U.S. 1, 17 (1947): neither bus rides nor purely secular textbooks had "inherent religious significance." *Allen*, at 244. While Justices Black and Douglas dissented in *Allen*, they did so based on a different conception of the role of textbooks in parochial schools. *See Allen*, at 252 (Black, J., *dissenting*) ("Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit."), and *Allen*, at 257 (Douglas, J., *dissenting*)("The textbook goes to the very heart of the education in a parochial school."). Both the majority and the dissenting opinions, however, consistently focused on the character of the aid given to parochial schools.

Meek and *Wolman*, while both reaffirming *Allen*, nevertheless invalidated state programs lending instructional materials other than textbooks to parochial schools and schoolchildren. *Meek* merely intimated that the character of the aid was the determinative feature in its holding. *See Meek*, at 364 ("[A] State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities-- secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school.") (emphasis added). But *Wolman* clarified that, in the Court's view, the character of the aid itself determined whether the aid was constitutional. *Wolman* did so by upholding several different types of aid (textbooks, administration of state-required standardized tests, speech/hearing diagnostic services, off-premises therapeutic/guidance/ remedial services), while at the same time striking down, based on *Meek*, the loan of instructional materials to parochial schoolchildren. *See Wolman*, at 236-52. The *Wolman* Court distinguished among these various types of aid by reference to the particular attributes of the aid itself. *See, e.g., Wolman*, at 244 ("[D]iagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school."). *Wolman* candidly recognized the "tension" existing between the holdings in *Meek* and *Allen* and sought to resolve that tension by emphasizing the unique character of the aid approved in *Allen*, *i.e.*, that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." *See Wolman*, at 251 n. 18; *see also Committee for Public Education v. Nyquist*, 413 U.S. 756, 781-82 (1973).

Contrary to the *Walker* panel's view, *Regan* did nothing to "instruct us that the difference between textbooks and other instructional equipment and materials ... is not of constitutional significance." *Walker*, at 1466. *Regan* did exactly the opposite. In seeking to harmonize the holdings of *Meek* and *Wolman*, the *Regan* Court merely observed that *Meek* did not forbid all types of aid to sectarian schools. *See Regan*, at 661. Indeed, as the *Regan* Court realized, if *Meek* stood for such a proposition, then Wolman's approval of, for example, the testing and grading services would have flown in the face of precedent. *See id. Regan* clarified that *Meek* only invalidates a particular kind of aid to parochial schools--the loan of instructional materials. *See id.* at 662.

The *Walker* panel made a flawed attempt to avoid the holdings of *Meek* and *Wolman* by "distinguishing" the statutes at issue in those cases from the Chapter 2 program. The panel opined that the *Meek* and *Wolman* statutes were "fundamentally different" from Chapter 2 because they were not "neutral." *Walker*, at 1468. By this, the panel meant that the challenged programs in *Meek* and *Wolman* directly targeted massive aid to private schools, the vast majority of which were religiously-affiliated. *See id.* By contrast, the panel distinguished Chapter 2 as a "neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools." *Id.* But *Walker* misunderstood the aid programs struck down in *Meek* and *Wolman.*

Those cases dealt with general aid programs designed to provide equitable benefits to both public and nonpublic schoolchildren. *See Meek*, at 351-52 (* * *) (citations omitted), and *Wolman*, at 234. The *Meek* and *Wolman* Courts, however, dedicated their discussion to those parts of the programs that channeled aid to nonpublic schools, because it was the character of the aid provided to those schools, and not the relative percentages of aid distributed between public and nonpublic schools, that was determinative. *See Walker*, at 302 n. 1 (Reinhardt, J., dissenting from denial of en banc rehearing). Thus, the percentages discussed in *Meek* and *Wolman* were completely irrelevant to the constitutionality of the programs at issue there, as was the fact that the general aid programs might have been implemented by two separate statutes. The Court observed in *Meek*, in a different context, that "it is of no constitutional significance whether the general program is codified in one statute or two." *Meek*, at 360 n. 8.

Since *Walker* was decided before the Supreme Court handed down *Agostini*, we should add that *Agostini* also does not overrule *Meek* or *Wolman*; nor does *Agostini* dismantle the distinction between textbooks and other educational materials. In fact, *Agostini* does not even address that issue. *Agostini* does, it is true, discard a premise on which *Meek* relied--*i.e.*, that "[s]ubstantial aid to the educational function of [sectarian] schools ... necessarily results in aid to the sectarian school enterprise as a whole." *Meek*, at 366, 95 S.Ct. 1753 (emphasis added). But *Agostini* does not replace that assumption with the opposite assumption; instead, *Agostini* only goes so far as to "depart[ ] from the rule ... that all government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 117 S.Ct. at 2011 (emphasis added). *Agostini* holds only that the aid at issue there (*i.e.*, the on-premises provision of special education services by state- paid teachers) was not the kind of governmental aid that impermissibly advanced religion. *Id.* 2016. *Agostini* says nothing about the loan of instructional materials to parochial schools and we therefore do not read it as overruling *Meek* or *Wolman*. *Agostini* only instructs us that *Meek*'s presumption regarding instructional materials should not be applied to state-paid teachers on parochial schools premises. *See Agostini*, at 2012; *see also Ball*, 473 U.S. at 395-96 (applying *Meek* and *Wolman* to state-paid teachers).

D.

Applying *Meek* and *Wolman*, we hold that Chapter 2, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351- 52, are unconstitutional as applied in Jefferson Parish, to the extent that either program permits the loaning of educational or

instructional equipment to sectarian schools. By prohibiting the loaning of such materials, our decree encompasses such items as filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc. *See, e.g., Meek*, at 354 n. 4. Our decree also necessarily prohibits the furnishing of library books by the State, even from prescreened lists. We can see no way to distinguish library books from the "periodicals ... maps, charts, sound recordings, films, or any other[ ] printed and published materials of a similar nature" prohibited by *Meek*. *See id.* at 355 (internal quotes omitted). The Supreme Court has only allowed the lending of free textbooks to parochial schools; the term "textbook" has generally been defined by the case law as "a book which a pupil is required to use as a text for a semester or more in a particular class he legally attends." *Allen*, at 239 n. 1. We do not think library books can be subsumed within that definition.

We therefore REVERSE Judge Livaudais' grant of summary judgment in favor of Defendants and RENDER judgment declaring Chapter 2, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351-52, unconstitutional as applied in Jefferson Parish.

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WHITE HOUSE SEEKS RULING ON PRIVATE SCHOOL AID

The New York Times

Sunday, June 6, 1999

Linda Greenhouse

Raising the stakes in the debate over public aid to parochial schools, the Clinton Administration is asking the Supreme Court to review a Federal court's finding that it is unconstitutional for public schools to provide computers and other "instructional equipment" for use in religious school classrooms.

The Administration has proposed spending $800 million on an educational technology program that would, among other things, help connect every classroom and school library in the country to the Internet. But the little-noticed ruling last August by the United States Court of Appeals for the Fifth Circuit, in New Orleans, poses a formidable constitutional obstacle to that goal, as the Administration told the Supreme Court in a brief it filed last month.

The Administration's brief supports a group of parochial school parents from the New Orleans area who are appealing the decision.

The implications of the case reach far beyond classroom computers to the highly charged question of where -- and how -- to draw the line between permissible and prohibited Government assistance to religious schools. Although the question of publicly financed vouchers for religious school tuition is not directly at issue, the stakes are high for that constitutional debate as well.

The Court is likely to announce later this month whether it will hear the appeal, a prospect significantly enhanced by the Administration's intervention. The fact that another Federal appeals court, the Ninth Circuit in San Francisco, reached an opposite conclusion three years earlier also adds to the likelihood that the Justices will add the case to their docket for the next term.

The Fifth Circuit case began as a challenge to a provision of the Elementary and Secondary Education Act of 1965 under which public schools receive Federal aid for special services and equipment, including computers, and must share the material on a "secular, neutral, and nonideological" basis with students enrolled in private schools within their boundaries. Several taxpayers in Jefferson Parish, La., where 41 out of 46 private schools were religious, objected that this aspect of the program was unconstitutional and filed a lawsuit in 1985.

The case had a tangled history before finally reaching the appeals court last year. Writing for a three-judge panel, Judge John M. Duhe Jr. opened his opinion by commenting that "this case requires us to find our way in the vast, perplexing desert of Establishment Clause jurisprudence." He then went on to find that a series of Supreme Court decisions on parochial school aid, dating from the 1970's, had drawn a fairly clear line between the permissible and the prohibited, based on the "character of the aid itself."

Textbooks in secular subjects were on the permissible side of the line, Judge

Duhe said, because in the Supreme Court's view, the public school district could screen the books in advance to make sure that they would not be used as part of a parochial school's religious mission. But he said the precedents made clear that other material, with less easily confined and ascertainable content, more subject to diversion to religious purposes, was off-limits.

Whether the Fifth Circuit's view of the current state of the law is accurate is obviously open to debate, given the Ninth Circuit's conflicting opinion in a similar case. So the real question in this case, Mitchell v. Helms, No. 98-1648, is where the Justices think their precedents place the line, and whether they are prepared to adjust or jettison those precedents to make room for technology that was not even on the horizon a quarter-century ago.

Two years ago, in a case from New York that concerned another provision of the same 1965 Federal education law, the Court explicitly overturned an earlier decision and ruled that the Constitution permitted public school teachers to offer remedial courses in parochial school classrooms. Justice Sandra Day O'Connor's opinion for a 5-to-4 majority in that case, Agostini v. Felton, said the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect" had changed and that a 1985 decision barring public school teachers from parochial classrooms was accordingly no longer good law.

In his brief for the Administration in the current case, Solicitor General Seth P. Waxman cited the Agostini decision as an indication that the "broad categorical rule" the Fifth Circuit derived from the Supreme Court's precedents, with textbooks on one side of the line and everything else on the other, is no longer an accurate statement of the majority's view. The brief invites the Justices to re-examine the precedents and adopt "a more nuanced rule" that would permit public schools to provide computers and other instructional equipment to parochial schools as long as safeguards were in place to make sure the material would not be diverted to religious use and would not "supplant resources that the school itself would otherwise provide or obtain."

Although cases in the lower courts seeking or challenging tuition vouchers for parochial schools have been receiving headlines, this case has been the focus of intense interest among lawyers and others who monitor church-state developments. The parochial school parents bringing the appeal are represented by Michael W. McConnell, a law professor at the University of Utah whose articles and advocacy for the view that religious and secular institutions are constitutionally entitled to equal treatment have been highly influential over the last decade.

In his brief, Mr. McConnell maintained that the Fifth Circuit's decision "consigns those who attend religiously affiliated schools to the use of textbooks under the program, while children of other taxpayers are using graphing calculators to solve polynomial equations and reading about the latest in Mesopotamian archeological discoveries on CD-ROM's."

Lee Boothby, a Washington lawyer and well-known advocate of strict church-state separation, has represented the plaintiffs in this case since they filed their lawsuit 14 years ago. "What's really at stake," he said in an interview this week, "is whether we will abandon the concept the Court has historically followed of not providing any direct aid" to parochial schools. "The Court is being asked to reject some pretty bedrock no-direct-aid

principles," he said, adding that if the Justices accepted that invitation, "I don't know where you draw the line."

JEFF CASE SPOTLIGHTS SCHOOL AID BATTLE
High Court Weighs Church-State Issue

The Times-Picayune

Tuesday, June 15, 1999

Bill Walsh, Washington Bureau

Seizing upon a Jefferson Parish case that has meandered through the courts for 14 years, the U.S. Supreme Court signaled Monday that it is once again prepared to venture into the turbulent debate over whether public aid should be given to parochial schools.

The court decided to hear the Louisiana lawsuit, which challenges the use of taxpayer money to transport and provide equipment for parochial schools, a month after the Clinton administration complained that its goal of linking all American classrooms to the Internet would be subverted by a lower court ruling in the case blocking certain public grants to religious schools.

The Supreme Court's decision, which probably won't be handed down until 2000, is expected to clarify whether, or in which cases, the public should underwrite private and parochial education. It is an issue of keen interest around the country and especially in the New Orleans area where the Catholic Archdiocese operates 104 schools that receive millions annually in federal government assistance.

"It's a burning question, the government's effort to assist parochial schools," said Paul Baier, a constitutional expert at the Louisiana State University Law School. "The court has been backing away from any rigid interpretation of church versus state. It looks like the court wants to elaborate on it even further."

It could, legal experts said, even be used to signal whether it would be constitutional for government vouchers to be used to pay tuition at private and church-run schools.

The court's decision to review Mitchell v. Helms was not altogether unexpected. Recent lower court rulings have raised questions about exactly how high the wall between church and state should be when it comes to educational financing. And when the administration seeks a legal clarification, as Solicitor General Seth Waxman did in May, the Supreme Court is inclined to take a hard look.

For the original plaintiffs, a group of public school parents in Jefferson Parish, the Supreme Court review is just the next stop in a circuitous and frustratingly long legal odyssey.

"It's slow justice (but) we at least have been given or opportunity to be heard," said Neva Helms of Metairie, whose 26-year-old daughter, Amy, was in middle school when the suit was filed in December 1985. Helms, who was an active volunteer with the Jefferson Parish public school system, was stirred to action when she learned that parochial school students in her neighborhood were being shuttled to their classrooms on publicly subsidized buses. She soon found out that 32 percent of money Jefferson Parish received from a federal education program -- more than $655,000 in 1984-1985 -- went to private schools.

With the financial backing of Americans United for Separation of Church and State, Helms and two other parents sued local, state and federal education officials challenging a variety of taxpayer expenditures on private schools, including busing, special education training and classroom equipment. Americans United issued a statement Monday calling the case "the most important church-state lawsuit to come before the Supreme Court in over two decades."

The court will review a U.S. 5th Circuit Court of Appeals decision out of New Orleans last August that struck down the federal education program by ruling that it is unconstitutional to spend public money on religiously affiliated elementary and secondary schools, except for textbooks.

The court came to that decision after reviewing a long line of cases that sought to delineate which public expenditures for private schools were proper, and which were not. It is apparent from the introduction to Judge John Duhe Jr.'s opinion for the three-judge panel just how murky the church-state issue is.

"This case requires us to find our way in the vast, perplexing desert of jurisprudence" on the issue, Duhe wrote, noting that in the almost 14 years since the Jefferson Parish case was filed, "the sand dunes have shifted."

Indeed they have. In the 1970s, the U.S. Supreme Court seemed to draw a sharp line between church and state when it came to education financing. But in recent years, the court has identified some exceptions to its rule. In 1993, it said that public school districts can provide sign language interpreters to deaf children at parochial schools. Then, in 1997, the court said public school teachers can offer remedial aid to parochial school students as well. The solicitor general urged the court in his brief last month to expand the interpretation even more.

Attorneys representing parochial school parents argued that the 5th Circuit ruling limiting the use of education grants unfairly punishes students attending private schools.

"It consigns those who attend religiously affiliated schools to the use of textbooks under the program, while children of other taxpayers are using graphing calculators to solve polynomial equations and reading about the latest Mesopotamian archeological discoveries on CD-ROMs," attorneys wrote in their brief to the Supreme Court.

The stakes are high for religiously affiliated schools locally and around the nation.

A spokesman for the Archdiocese of New Orleans said that its schools in the eight New Orleans area parishes received $17 million in federal education-related financing in the 1997-1998 school year. Although not party to the suit, the archdiocese has kept a close eye on the litigation.

"The Archdiocese is hopeful that in light of recent Supreme Court decisions, the court will clarify that the federal law is, indeed, valid," the archdiocese said in a statement Monday.

Baier, the LSU law professor, said the Supreme Court has been itching for years to leave its mark on church-state jurisprudence, but how far the court will reach remains unclear.

He said it's possible that the decision could even have an impact on the highly contentious issue of government vouchers for students who attend religiously affiliated schools.

"It may have a spillover effect, we just have to wait and see," Baier said. "The Supreme Court can make a case as big as it wants to make it."

SUPREME COURT WILL REVIEW HIGH-TECH AID TO RELIGIOUS SCHOOLS

The Washington Post

Tuesday, June 15, 1999

Joan Biskupic, Washington Post *Staff Writer*

The Supreme Court agreed yesterday to decide whether taxpayer funds can be used to pay for computers, software and other library equipment in parochial schools. The court's ultimate ruling will likely influence the contentious nationwide debate over the use of publicly financed vouchers to help students attend religious schools.

Further fueling broad interest in the case, which will be heard by the court next fall and likely decided in 2000, is its relationship to the Clinton administration's proposal to connect all classrooms--in both public and private schools--to the Internet. Although the administration opposes the use of public vouchers to pay for religious schools, it has taken the other side in the case before the Supreme Court, supporting the New Orleans parochial school parents who have appealed a lower court's interpretation of federal education law that would bar such public high-tech assistance to religious schools.

At its broadest, the dispute will offer the court an opportunity to clarify its doctrine on the constitutional separation of church and state and provide guidance on permissible aid to religious schools. Although the 5th U.S. Circuit Court of Appeals ruled last year that federal funds could not be used to provide educational materials other than textbooks to religious schools, another appeals court, the 9th Circuit based on the West Coast, ruled the opposite.

The federal program at issue in Mitchell v. Helms flows from the Elementary and Secondary Education Act of 1965, which gives public school districts money for special services and instructional equipment and requires the funds to be shared with nonpublic schools within the district.

"This case vitally affects the quality of education available to over a million schoolchildren nationwide," the New Orleans parents said in their appeal to the Supreme Court. "Congress has wisely recognized that the national interest is served when all schoolchildren have access to supplementary educational resources and equipment in keeping with this fast-moving, technological age, without regard to whether their schools are public or private, religious or secular."

The taxpayers who have urged the high court to affirm the 5th Circuit say providing computers, software and other resource equipment beyond textbooks is unconstitutional because "it provides direct aid . . . [and] the items furnished are easily divertable to religious and sectarian school administrative purposes."

The 5th Circuit's 1998 decision relied primarily on Supreme Court rulings that have generally prohibited the government from providing educational materials other than textbooks to parochial schools.

But in recent years, the Supreme Court has begun to permit more government support for and involvement in religious programs, for example, by permitting public school teachers to provide remedial help at parochial schools.

Separately, the court, over the lone dissent of Justice Clarence Thomas, refused to intervene in an ongoing case involving Columbia Union College in Takoma Park. The college, affiliated with the Seventh-Day Adventist Church, is seeking financial aid under a Maryland state program that provides financial assistance to private colleges, but the Maryland Higher Education Commission has concluded that Columbia Union is "too religious" to participate. A federal appeals court has ordered an investigation to determine whether the school is "pervasively sectarian" and thus ineligible for the state aid. (Columbia Union College v. Clark)

ESTABLISHING RELIGION OR AIDING SCHOOLS?

The News and Observer (Raleigh, NC)

Monday, June 21, 1999

James Kilpatrick, Universal Press Syndicate

WASHINGTON – The story is told of Sisyphus, king of Corinth. He angered Zeus, who banished him to the Underworld. There he was condemned for all eternity to push a heavy stone up a hill, only to have the stone roll down before he reached the top.

Something like this is happening at the Supreme Court. The Supremes keep struggling with the intractable mysteries of the Constitution's establishment clause. Every time the court thinks it has solved one mystery, the stone rolls back down again.

The Constitution says, with murky clarity, that "Congress shall make no law respecting an establishment of religion." The high court has extended that edict to the states, but the court has found unceasing difficulty in defining such obscure words as "no law," "respecting," "establishment" and "religion."

Now, here we go again. Cases involving state aid to pupils attending church-sponsored schools are rolling up like thunderclouds on a summer afternoon. The cases come from Ohio, Maine, Arizona and Louisiana, following in the train of landmark cases from Wisconsin and New York. Everyone wants a piece of the action.

On May 27, the Supreme Court of Ohio upheld a program providing tuition vouchers for the children of low-income families in Cleveland. The vouchers are in the form of tax credits covering 75 percent to 90 percent of tuition costs in a nonpublic school, up to a maximum of $ 2,500. The checks are made payable to parents, who endorse them in turn to the child's school. Most of the nonpublic schools are Catholic parochial schools. Is Ohio's law a law respecting an establishment of religion?

On the same day, May 27, the Supreme Court of Maine took off in another direction. The state had established a program of tuition grants for children residing in thinly populated areas that have no public schools. The plan specifically excludes children who wish to attend denominational schools. The U.S. Constitution says that Maine cannot deny to any person the equal protection of its laws. Does this discrimination against Catholic children deny them equal protection? The Maine court said it does not.

The U.S. Court of Appeals for the 5th Circuit ruled last August that Louisiana has violated the establishment clause in its handling of a federal program known as Title VI. Now the case is pending for review by the Supreme Court.

Using Title VI money, Louisiana buys a wide variety of instructional equipment. The equipment then is lent to individual public and nonpublic schools. Taxpayers in Jefferson Parish complained that the program unconstitutionally benefits establishments of religion.

The Clinton administration defends the Title VI program. The solicitor general emphasizes the "secular, neutral and

nonideological" nature of the grants. The idea is to supplement, not to supplant, existing state funding. The states monitor the use made of the federal money to assure that it does not go to sectarian purposes.

The government's argument did not impress the 5th Circuit. It ruled that (1) Louisiana's program advances the cause of religion, and (2) the monitoring entangles the state with the church. The 9th Circuit has upheld an almost identical program in California. The intercircuit conflict may compel the high court to grant review.

A complex arrangement from Arizona also is pending for review. Under state law, any Arizona taxpayer, with or without children in schools, may direct that up to $ 500 of income tax obligation will be used to provide scholarships and tuition grants to students attending nonpublic schools. At least 70 percent of the nonpublic schools are church-related.

Participating taxpayers send their checks not to the state treasurer, but as voluntary contributions to an STO (School Tuition Organization). The STOs then parcel out the money to the children, hence to the schools. Does the plan violate the equal protection clause? Opponents of the plan call it a sham. The Arizona Supreme Court found it OK.

As an editor and columnist, I have supported the concept of tuition grants for the past 40 years. I see no reason why the neutral, secular benefits provided by the state to children in public schools should be denied to children in private schools. That's my opinion. Next year we will get the court's opinion. Again.