Vouchers and Beyond: The Individual As Causative Agent in Establishment Clause Jurisprudence

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I. INTRODUCTION

In recent years, many proposals have been made for the enactment of educational voucher plans for elementary and secondary school students. The core characteristic that unites these proposals is their attempt to give state money (which would otherwise be given to public schools) to students and their parents, who can then use this money to pay for attendance at the schools of their choice. Some voucher plans restrict eligible schools to those of a public and/or nonreligious character; although such plans might raise important public policy issues, there is little question about their constitutionality. It is those plans that allow the participation of religious or "sectarian" schools that raise legal issues of the most difficulty, and that are the subject of this Article.

A typical program of the latter type was recently implemented in Cleveland, Ohio. Under the Cleveland plan, more than 3700 of the City's students now use vouchers to attend private schools.[1] Of the voucher-supported schools, more than eighty percent are religious in nature.[2] At many of these schools, which enroll large numbers of voucher students, religious teachings are an integral part of the school atmosphere and formal curriculum.[3] Voucher plans that include the participation of religious schools have also been enacted in Wisconsin and Florida.[4]

Previous attempts by government to channel state-aid to religious elementary and secondary schools have encountered a large stumbling block in the Establishment Clause of the First Amendment. Indeed, the Supreme Court's refusal to approve unrestricted grants of public money to "pervasively sectarian" elementary and secondary schools has been one of the few bright lines in what has otherwise been a mosaic of confusing and contradictory Establishment Clause case law. Even in its most recent opinions, which have generally signaled a more permissive attitude toward the provision of state-aid to religious schools, the Court has stressed that under approved state-aid programs, "[n]o . . . [public] funds ever reach the coffers of religious schools . . . ."[5]

In recognition of this problem, the advocates of vouchers for religious schools make a very simple argument. They argue that existing Supreme Court doctrine, which prohibits unrestricted cash grants of public money to sectarian elementary and secondary schools, is simply inapplicable to educational voucher programs. They argue that these are not school-aid programs in the traditional sense, but rather *general welfare* programs; that the beneficiaries of these programs are students and their parents, not schools; and that the ways in which the vouchers will be used are

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1. *See* Adam Cohen, *A First Report Card on Vouchers*, TIME, Apr. 26, 1999, at 36.

2. *See id.* at 38.

3. *See id.*

4. *See* Rick Bragg, *Florida to Allow Student Vouchers*, N.Y. TIMES, Apr. 28, 1999, at A1.

5. Agostini v. Felton, 521 U.S. 203, 228 (1997). *See generally infra* Part III.A.

the products of genuinely independent and private choices by individuals, not government decisionmaking. Advocates argue that such programs are no different from state programs that provide transportation to all students, which the Court has upheld,[6] or that provide welfare checks to recipients who can, of their own volition, put the money to religious uses. To put the issue in currently fashionable terms, advocates argue that it is *the market* that determines these decisions, not the state. Accordingly, these are programs to which the Establishment Clause has no application.[7]

The theory upon which this argument is based—a theory which I shall call the "theory of the individual as causative agent"—has long been one of the strains of the Supreme Court's Establishment Clause jurisprudence. In cases involving school-aid, public fora, or other government programs, the fact that the particular religious uses or activities involved were the result of private choice has been cited by the Court as one of the factors supporting a finding of constitutionality. However, the promotion of this theory in the voucher debate has pushed it to the forefront of Establishment Clause jurisprudence. It is now championed by many as *the critical* theoretical key to properly and easily disposing of what would otherwise be very difficult Establishment Clause challenges to state-aid programs.

What are the merits of this theory? Under what circumstances, if any, can the involvement of private, individual decisionmaking eliminate Establishment Clause concerns, by breaking any constitutionally cognizable connection between state actions and religious results? It is these questions that I shall address in this Article.

II. THE INDIVIDUAL AS CAUSATIVE AGENT IN ESTABLISHMENT CLAUSE JURISPRUDENCE: SOME PRELIMINARY CONSIDERATIONS

Before we begin an examination of the theory of the individual as causative agent in Establishment Clause jurisprudence, a few preliminary matters need to be clarified. First, this theory comes into play only if one believes that the direct payment of public money to religious institutions for religious activities raises Establishment Clause concerns. This is the position that I shall argue the Supreme Court has taken,[8] and it is the position that I shall assume in this Article. Although

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6. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947).

7. This argument was the voucher advocates' central contention in *Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999), and *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998), two cases in which the question of the constitutionality of such voucher plans reached state supreme courts. In *Jackson*, the Wisconsin Supreme Court found it to be dispositive, observing that "not one cent flows from the State to a sectarian private school under the amended [choice plan] . . . except as a result of the necessary and intervening choices of individual parents." *Jackson*, 578 N.W.2d at 618. In *Bagley*, the Maine Supreme Judicial Court reached the opposite conclusion. *Bagley*, 728 A.2d at 144-45. "[C]hoice alone," the Court wrote, "cannot overcome the fact that the tuition program would directly pay religious schools for programs that include and advance religion." *Id.* at 144. "None of the [United States] Supreme Court's decisions to date have ever intimated that such direct subsidies of religious schools could survive an Establishment Clause challenge." *Id.*

8. *See infra* Part III.A.

some scholars have argued that the payment of tax dollars to religious institutions for religious activities should not, in itself, present an Establishment Clause violation,[9] this is not the position that the Court has taken, nor (I believe) what most Americans currently believe that the separation of church and state requires. If, however, one rejects my premise—if one believes, for instance, that tax dollars can constitutionally be given to churches, synagogues, and mosques for their unrestricted support—then one need not be concerned about the theory of the individual as causative agent. This theory becomes important only if the connection between the state's action and the religious result would, in the absence of this theory, be a constitutionally violative one.

In addition, the theory of the individual as causative agent arises in the particular context of voucher cases only if it is assumed that the religiously affiliated schools in question are "religious institutions" within the meaning of the Establishment Clause. In its state-aid cases, the Supreme Court has often assumed that the religious and secular aspects of activities sponsored by religious organizations can be practically and analytically separated, rendering state-aid to the secular side of those activities constitutionally permissible.[10] The Court has refused, however, to assume that such separation can be made in the case of religiously affiliated elementary and secondary schools. These schools have been assumed by the Court to be "pervasively sectarian," in the sense that the secular education that the schools offer is "subsumed in the religious mission."[11] In the Court's view, "[t]he very purpose of [these schools] . . . is to provide an integrated secular and religious education,"[12] and to "assure future adherents to [the sponsoring religious organization's] . . . particular faith."[13] If one rejects this premise—if one argues that the schools in question are not "pervasively sectarian" or otherwise "religious institutions" in a constitutional sense—then there is no constitutional issue that the theory of the individual as causative agent would address.

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9. *See, e.g.*, Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999).

10. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 608-13 (1988) (teenage counseling services offered by religious organizations); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 755-61 (1976) (opinion of Blackmun, J.); Tilton v. Richardson, 403 U.S. 672, 679-82 (1971) (plurality opinion) (religious sponsorship of institutions of higher education); Bradfield v. Roberts, 175 U.S. 291, 298-99 (1899) (religiously affiliated hospital).

11. Hunt v. McNair, 413 U.S. 734, 743 (1973). *See also* Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring) (in such schools, the school's secular educational functions and religious missions are "inextricably intertwined.").

12. Meek v. Pittenger, 421 U.S. 349, 366 (1975).

13. Walz v. Tax Comm'n of New York, 397 U.S. 664, 671 (1970). In one case, for instance, the Court cited the following facts in support of its conclusion regarding "pervasively sectarian character": that the schools "include[d] prayer and attendance at religious services as a part of their curricul[a], [were] . . . run by churches or other organizations whose members must subscribe to particular religious tenets, [had] . . . faculties and student bodies composed largely of adherents of the particular denomination, and [gave] . . . preference in attendance to children belonging to the denomination." School Dist. v. Ball, 473 U.S. 373, 384 n.6 (1985), *overruled on other grounds by* Agostini v. Felton, 521 U.S. 203 (1997).

Finally, the relationship between the theory of the individual as causative agent and the "state action" doctrine must be clarified. Because both of these ideas deal with whether there is a close enough connection between the actions of government and the actions of a private person or entity to present a constitutionally cognizable case, there is sometimes a tendency to assume that these ideas deal with the same issues. In fact, they deal with very different questions and considerations—with one important caveat, as described below.

Under the state action doctrine, one is concerned with whether actions by a private entity, which are alleged to be unconstitutional in nature, can be fairly attributed to government.[14] This question arises because the Fourteenth Amendment and other constitutional provisions protecting individual liberties only apply to the deprivation of such liberties by federal and state governments. "[P]rivate conduct, 'however discriminatory or wrongful,' [is something] against which the Fourteenth Amendment offers no shield."[15] There are several reasons for the limitation of these guarantees to government conduct. First, it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."[16] Second, it avoids imposing on government "responsibility for conduct for which [it] . . . cannot fairly be blamed."[17] Finally, when state-federal relations are at issue, it preserves federalism by enforcing a zone of state sovereignty.[18]

The context in which the question of the theory of the individual as causative agent arises is very different. This theory arises in Establishment Clause cases in which government funding or other government authorization or encouragement[19] of private religious conduct is challenged. In these cases, there is no question about the existence of state action, since it is the government's funding action (or other action) which is, *itself*, the potentially unconstitutional act. Rather, the issue in these cases is whether this state action, on its merits, is a violation of the Establishment Clause—with the theory of the individual as causative agent asserted as a defense to that claim. The substantive principles that govern this issue—such as one's vision of the purposes, intent, and meaning of the Establishment Clause—are very different from those that govern state action questions.

Indeed, the very different natures of these inquiries is reflected in the Supreme Court's treatment of them in the educational funding context. The Court has held that the receipt of public funding by a private religious school, without more—even the *nearly complete* funding of such a school—does not make that school's actions (such as those involved in a teacher's discharge) "state action" within the constitutional meaning of that term.[20] On the other hand, even incidental state

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14. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

15. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

16. *Lugar*, 457 U.S. at 936.

17. *Id.*

18. *See id.* at 936-37.

19. *See infra* Part III.B.

20. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982) (holding that a teacher's discharge by private school was not state action despite the fact that public funds accounted for 90% of the school's operating budget).

funding of a private religious school may violate the Establishment Clause.[21] This is because, in the latter case, there is no question but that state action is involved. It is the state's funding action itself which raises the constitutional issue. The question, rather, is whether that state action is a substantive violation of Establishment Clause guarantees.

Thus, although the state action doctrine and the theory of the individual as causative agent both deal (at the most abstract level) with whether there is a close enough connection between the actions of government and the actions of a private person or entity to create a constitutionally cognizable case, they do so from very different perspectives and through the implementation of very different policies. To this conclusion I must, however, add one caveat. To the extent that government attempts to deliberately rid itself of public functions and public liabilities through the insertion of private entities and private decisionmaking between its actions and the anticipated results of those actions—to the extent that government clearly contemplates that private actors will both implement and insulate its policies and conduct—the use of the state action doctrine or the theory of the individual as causative agent to accomplish those ends raises very similar, and troubling, concerns. However, that observation jumps us ahead a bit too far. Before we explore those questions, we must establish the meaning and operation of the theory of the individual as causative agent in Establishment Clause jurisprudence.

III. THE INDIVIDUAL AS CAUSATIVE AGENT IN ESTABLISHMENT CLAUSE JURISPRUDENCE: DOCTRINAL BACKGROUND

Although the theory of the individual as causative agent can be found in several areas of the Supreme Court's Establishment Clause jurisprudence, it has been developed most fully in the school-aid cases that have reached the Court. I will therefore begin with an examination of the Court's school-aid decisions, and then consider other contexts in which it has appeared.

A. "Direct" Aid to Religious Schools: Traditional Rules

In examining the constitutionality of state-aid to private religious elementary and secondary schools, the Court's adherence to the traditional *Lemon*[22] tests has generally been more faithful than in other areas of its Establishment Clause jurisprudence. For instance, in its most recent opinion in this area, the Court stated that its doctrinal tests—as a formal matter, at least—"have not changed" in recent years.[23] Rather, the Court "continue[s] to ask whether the government acted with the purpose of advancing or inhibiting religion" and "whether the aid has the 'effect' of advancing or inhibiting religion."[24] In addition, whether the program "results in . . . an [excessive] entanglement [between church and state] has consistently been

21. *See infra* Part III.
22. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
23. Agostini v. Felton, 521 U.S. 203, 222 (1997).
24. *Id.* at 222-23.

an aspect" of the Court's Establishment Clause analysis.[25] It has also considered the "endorsement test"[26] in these cases, asking, for example, whether the state program "creates an impermissible 'symbolic link' between government and religion."[27]

Under these tests, the giving of unrestricted cash grants of state funds to religious elementary and secondary schools has consistently been held to be the unconstitutional advancement of religion by government. In *Everson v. Board of Education*,[28] the Court set forth what has become the doctrinal baseline in this area. No state can, "consistently with the 'establishment of religion' clause of the First Amendment[,] contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[29] Since religiously affiliated elementary and secondary schools are "pervasively sectarian" institutions,[30] and since pervasively sectarian institutions are presumed to use resources under their control for religious purposes, the giving of taxpayer funds to religiously affiliated elementary and secondary schools for their unrestricted use is a clear violation of the Establishment Clause.[31] Although scholars have mused about the possible constitutionality of such grants if given to all schools, regardless of sectarian character, the Court's shifting majorities have never seriously considered this idea.[32] Even in the Court's most recent cases, which have indicated more openness toward the idea of public aid to religious schools, the Court has been careful to distinguish the restricted, in-kind aid programs that it has approved from the idea of unrestricted grants of taxpayers' money to religious schools. In *Agostini v. Felton*,[33] for instance, the Court carefully noted that under the federal program that it upheld, "[n]o Title I funds ever reach the coffers of religious schools . . . ."[34]

Beyond the case of unrestricted cash grants, the constitutionality of direct public aid to religious schools will depend upon whether a case can plausibly be made that the aid is, itself, secular in nature, and cannot be "diverted" by the recipient institution to religious purposes or functions. This is admittedly a tricky proposition, since the Court has assumed (at the outset) that the institution, its purposes, and functions are pervasively religious in character. In addition, it is obvious that any public aid that is given to a religious school will (at the very least) save the

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25. *Id.* at 232.

26. *E.g.*, Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

27. *Agostini*, 521 U.S. at 224.

28. 330 U.S. 1 (1947).

29. *Id.* at 16.

30. *See supra* text accompanying notes 11-13.

31. *See Everson*, 330 U.S. at 15-16; *see also* School Dist. v. Ball, 473 U.S. 373, 395 (1985) ("[T]he provision of a direct cash subsidy to the religious school . . . is most clearly prohibited under the Establishment Clause."), *overruled on other grounds by Agostini*, 521 U.S. at 203; Lemon v. Kurtzman, 403 U.S. 602, 621 (1971) (warning of the dangers of direct payments to religious educational institutions).

32. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (opinion of Blackmun, J.) ("The State may not . . . pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.").

33. 521 U.S. 203 (1997).

34. *Id.* at 228.

institution from making the same expenditures itself. The Court has refused, however, to bar state-aid on that basis,[35] and has affirmatively permitted aid that is—itself—secular in nature, and that is capable—under some circumstances, at least—of strictly secular use. On this basis, the Court upheld the giving of publicly funded standardized tests and scoring services in religious schools, with the plurality stating that since the schools did not control the content of the tests, the tests could not be used as a part of religious teaching.[36] It also upheld the provision of publicly funded speech and hearing diagnostic services to religious school students, stating that since diagnostic services have little or no educational content, they do not involve an "opportunity for the transmission of sectarian views."[37]

In many other cases, however, the Court has held that state-aid programs failed to meet the secular nature and secular use requirements and were unconstitutional as a result. In all of these cases, the religious schools were significantly involved in the ways in which the aid was used, creating (in the Court's view) state involvement in and subsidization of religious activity. For instance, the Court struck down a state program that awarded salary supplements to private school teachers who taught subjects offered in public schools, on the ground that separation of the religious and secular aspects of such a person's teaching would be extraordinarily difficult and would lead to excessive entanglement of church and state if its enforcement were attempted.[38] The Court also struck down, on similar grounds, direct grants of state money to nonpublic schools for the maintenance and repair of school facilities and equipment;[39] direct grants of state money to nonpublic schools for "reimbursement" of the costs of performing state mandated testing, grading, and record-keeping tasks;[40] direct loans of state instructional materials and equipment to nonpublic

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35. *See, e.g., id.* at 230 (possibility that public services provided to sectarian schools might give those schools an incentive to make cutbacks in spending on the same areas is an insufficient reason to hold such aid unconstitutional); *Ball*, 473 U.S. at 394 ("[T]he Court has never accepted the mere possibility of subsidization . . . as sufficient to invalidate an aid program.").

36. *See* Wolman v. Walter, 433 U.S. 229, 239-40 (1977) (plurality opinion).

37. *Id.* at 244.

38. *See* Lemon v. Kurtzman, 403 U.S. 602, 615-20 (1971); *see also id.* at 620-22 (invalidating a state program which directly reimbursed nonpublic schools for their expenditures for teachers' salaries, textbooks, and instructional materials in "secular" subjects).

39. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774-80 (1973). This program had few strings attached; as the Court noted, "Nothing in the statute . . . bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities." *Id.* at 774. The Court held that this program violated the Establishment Clause because "[its] effect, inevitably, is to subsidize and advance the religious mission of sectarian schools." *Id.* at 779-80.

40. Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 479-82 (1973). Of particular concern to the Court were the facts that the tests involved were prepared by private school teachers and could involve religious content, and that the law contained no requirement that the school's actual costs equaled or exceeded the lump sum payment. *See id.* at 477, 480.

schools;[41] and state expenditures for field trips by nonpublic school students, where the trips were chosen and conducted by nonpublic school teachers.[42] In all of these cases, the Court was concerned that public tax money would be used to subsidize and advance religious activities, because religious and secular uses were impossible to separate or—if separation were possible (in theory, at least)—efforts to enforce such separation would lead to excessive entanglement of the state with religious institutions.[43]

B. "Indirect" Aid to Religious Schools and Other Cases: Toward the Individual As Causative Agent

The question of the constitutionality of "indirect" public aid to religious schools—that is, aid given not to the schools themselves, but to the religious-school children or their parents—was first addressed by the Court in *Everson v. Board of Education.*[44] In *Everson*, the Court approved the spending of tax-raised funds to pay the bus fares of parochial school students as part of a general program that paid the fares of students attending public and nonpublic schools. The Court held that although the Establishment Clause prohibits the payment of tax-raised funds to religious institutions, it does not demand that individuals, "*because of their faith*, . . . [be deprived of] receiving the benefits of public welfare legislation."[45] The Establishment Clause "requires the state to be . . . neutral in its relations with . . . religious believers and non-believers"; "[s]tate power is no more to be used so as to handicap religions, than it is to favor them."[46] In addition, conditioning eligibility for state benefits on the students' religious (or nonreligious) destinations might

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41. *See* Meek v. Pittenger, 421 U.S. 349, 363-66 (1975). The Court emphasized that although these materials—such as maps, charts, and laboratory equipment—were capable of secular use, "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of [the recipient schools] . . . and to then characterize [the Act] . . . as channeling aid to the secular without providing direct aid to the sectarian." *Id.* at 365.

42. *See* Wolman v. Walter, 433 U.S. 229, 252-54 (1977). The Court noted that the state-funded field trips were "an integral part of the educational experience," and since the teacher who conducted the trips "work[ed] within and for a sectarian institution, an unacceptable risk of fostering . . . religion is an inevitable byproduct." *Id.* at 254.

43. *See, e.g., Lemon*, 403 U.S. at 618-20 (noting that a requirement that sectarian school teachers remain religiously neutral when teaching state-subsidized secular courses could be achieved only with "great difficulty"; the "comprehensive, discriminating, and continuing state surveillance" that enforcement would require would "involve excessive and enduring entanglement between state and church"). As Justice Douglas wrote:

> If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would . . . intermeddle in parochial affairs in a way that would breed only rancor and dissension.

Id. at 640 (Douglas, J., concurring).

44. 330 U.S. 1 (1947).

45. *Id.* at 16 (emphasis in original).

46. *Id.* at 18.

violate the Free Exercise Clause, since that Clause requires that state benefits be conferred "without regard to . . . religious belief."[47]

The principles of state neutrality and protection of free exercise that underlie *Everson* are—in this context—obviously not without limits. Indeed, if a disinclination to handicap religions and a desire to facilitate individuals' free exercise were the only concerns of the Establishment Clause, there would be no reason to restrain "evenhanded," unrestricted cash grants of state funds to secular and religious institutions—something which the Court has consistently refused to endorse.

Harmonizing *Everson* with the Court's bedrock prohibition of the payment of unrestricted cash grants to religious institutions clearly required a more elaborated theoretical basis. That basis emerged in subsequent indirect-aid cases. In *Board of Education v. Allen*,[48] for instance, the Court stressed that the Establishment Clause problem, "'like many problems in constitutional law, is one of degree.'"[49] Textbook loan programs (such as that in issue in *Allen*) do not have "'a primary effect that . . . advances . . . religion'" because they confer only incidental benefit on religious schools.[50] "As with public provision of police and fire protection, sewage facilities, and streets and sidewalks, [such programs are] . . . of some value to the religious school, but . . . not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment."[51] Under the challenged programs, "financial benefit is to parents and children, not to schools."[52]

In addition, the Court observed, "only secular books [could] . . . receive approval" under the challenged program.[53] Religious schools perform, "in addition to their sectarian function, the task of secular education."[54] The books provided through the challenged program were intended for, and could be limited to use in, the secular educational task. The Court was unwilling, on the basis of the existing record, to assume "that all teaching in a sectarian school is religious or 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."[55]

Allen's twin bases for sustaining textbook loan programs—that they provide only "incidental benefit" to religious schools, and that they buy (directly) only secular educational materials—are not without problems. The idea that the *amount* of support derived by religious schools from state-sponsored programs should be an important factor in Establishment Clause analysis may be an acknowledgement of the practical realities involved in the accommodation of religious institutions as a part of our society; it would be impossible—indeed, undesirable—to exclude religious institutions from public goods and services (such as police and fire protection) that are provided to all others. The provision of basic services necessary

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47. *Id.* at 16.
48. 392 U.S. 236 (1968).
49. *Id.* at 242 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
50. *Id.* at 243 (quoting School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).
51. *Id.* at 242.
52. *Id.* at 244.
53. *Id.* at 245.
54. *Id.* at 248.
55. *Id.*

for religious institutions to coexist with others as good neighbors is arguably quite different, however, from legislation that uses tax money to fund special programs that directly or indirectly benefit religious institutions. The theory of "incidental benefit," advanced in support of indirect aid to religious schools, has been bitterly criticized by those who argue that taxpayers should not be compelled to pay "even 'three pence'" in support of religious institutions that those taxpayers oppose.[56] Criticizing the Court's approval of the textbook loan program in *Allen*, Justice Black argued that "tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny."[57]

The idea that secular textbooks will be used only for secular teaching in pervasively sectarian schools is also problematic in light of the Court's repeatedly stated assumption that the secular education that such schools provide is "subsumed in the religious mission."[58] Although the textbooks may (themselves) be secular in nature, it is difficult to see how their use by sectarian teachers can be distinguished from the use of other materials—such as maps, charts, and laboratory equipment—which have been held, by the Court, to be incapable of strictly secular use in such schools.[59]

Whatever their problems, *Allen*'s "incidental benefit" and "secular nature" requirements became established parts of this branch of the Court's Establishment Clause jurisprudence. The limitations that these tests impose upon indirect-aid programs became apparent in a series of cases decided in the mid-1970s. In *Committee for Public Education & Religious Liberty v. Nyquist*,[60] the Court held that a state program that reimbursed parents for tuition paid to nonpublic schools violated the Establishment Clause. The Court began by noting that such grants "could not, consistently with the Establishment Clause, be given directly to sectarian schools," since they would be of financial benefit to those schools and there would be no means to assure "that the state-aid derived from public funds [would] . . . be used exclusively for secular, neutral, and nonideological purposes."[61] The question was "whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result."[62] The Court held, summarily, that it was not.[63]

The reasoning in *Nyquist* was cited by the Court when it struck down a similar tuition reimbursement plan in a companion case.[64] It was also cited by the Court when it subsequently struck down a state program that involved the lending of

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56. Everson v. Board of Educ., 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS para. 3 (Worcester, Mass., Isaiah Thomas, 1786)).

57. *Allen*, 392 U.S. at 253-54 (Black, J., dissenting).

58. Hunt v. McNair, 413 U.S. 734, 743 (1973).

59. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 363-66 (1975) (holding the direct loan of maps, charts, and laboratory equipment to religious schools unconstitutional).

60. 413 U.S. 756 (1973).

61. *Id.* at 780.

62. *Id.* at 781.

63. *See id.* at 785-87.

64. *See* Sloan v. Lemon, 413 U.S. 825, 828-33 (1973).

instructional materials and equipment to nonpublic school students.[65] Having previously held that such materials and equipment could not constitutionally be given directly to nonpublic schools,[66] the Court held that to approve the new, "indirect" plan would "exalt form over substance."[67] "Despite the technical change in legal bailee, the program in substance is the same as before . . . . In view of the impossibility of separating the [schools'] secular education[al] function from the sectarian, the state-aid inevitably flows in part in support of the [schools'] religious role . . . ."[68]

In the mid-1980s, the Court took what might be seen as an abrupt turn in these cases. In a series of decisions, the Court shifted focus from the programs of indirect aid—their benefits to religious schools, their use in sectarian educational tasks, and so on—to the identity of the entity whose actions or decisions triggered a particular school's entitlement to aid. Under this theory, it is the nonpublic school students or their parents who are the "causative agents" for Establishment Clause purposes, and their independent decisionmaking breaks the connection between the states' actions and the religious recipients. Using this approach, the Court upheld a state program that permitted tax deductions for religious elementary and secondary school expenses,[69] upheld the use of state vocational assistance funds to pay for the costs of a college student's concededly religious training,[70] and upheld the use of federal funds to provide an interpreter for a deaf student enrolled in a religious high school.[71] Under the programs involved in these cases, the Court emphasized, "[p]ublic funds become available to sectarian schools 'only as a result of numerous private choices of individual[s] . . . ,' thus distinguishing [these programs from those] . . . involving 'the direct transmission of assistance from the State to the schools themselves.'"[72] "[T]he decision to support religious education is made by the individual, not by the State."[73] As a consequence, any advancement of religion that results from these programs "cannot be attributed [in a constitutional sense] to state decisionmaking."[74]

Cases involving indirect aid to religious schools are not the only Establishment Clause cases in which the Court has utilized the theory of the individual as causative agent. Although the theory has been most thoroughly expounded in school-aid cases, it has been woven into other important Establishment Clause opinions as well. In *Rosenberger v. Rector & Visitors of the University of Virginia*,[75] for instance, the Court held that payment of University of Virginia-collected funds to a printing contractor who was retained—by students—to print religious material did not violate the Establishment Clause. The Court stressed that the University's program was

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65. *See* Wolman v. Walter, 433 U.S. 229, 248-51 (1977).
66. *See* Meek v. Pittenger, 421 U.S. 349, 363-66 (1975).
67. *Wolman*, 433 U.S. at 250.
68. *Id.*
69. *See* Mueller v. Allen, 463 U.S. 388, 399 (1983).
70. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 486-89 (1986).
71. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9-14 (1993).
72. *Id.* at 9 (quoting *Mueller*, 463 U.S. at 399).
73. *Witters*, 474 U.S. at 488.
74. *Zobrest*, 509 U.S. at 10.
75. 515 U.S. 819 (1995).

"neutral toward religion";[76] that the University made no "direct money payments to an institution or group that is engaged in religious activity";[77] and that the decision to engage in religious speech, and to engage printers to that end, was a "private" decision by the students involved, in which the University had no part.[78] If a state program is not intended to advance religion, is "neutrally" provided to all, and the decision to use the resources of that program for religious purposes is strictly the result of private choice, then the state program does not advance religion in the sense prohibited by the Establishment Clause.[79]

A similar analysis appeared in *Capitol Square Review & Advisory Board v. Pinette*.[80] That case involved a request by the Ku Klux Klan to place a cross on a state-owned square that was used for public speeches and other activities traditionally associated with public fora. The State denied the Klan's request on the ground that granting it would result in "official endorsement of Christianity" in violation of the Establishment Clause.[81] A plurality of the Court rejected this claim, stressing that the Klan wished to engage in "private expression" which would (if permitted) simply be treated in the same manner and "on the same terms [as the expression] . . . of other private groups."[82] The plurality explained:

> Where we have tested for endorsement of religion, the subject of the test was either expression *by the government itself*, . . . or else government action alleged to *discriminate in favor* of private religious expression or activity . . . . The test petitioners propose, which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence . . . .[83]

The Establishment Clause, in short, "applies only to the words and acts of *government*. It was never meant . . . to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum."[84] In other words, the individual actor—not the State—was the causative agent for the religious activity in this case.[85]

Whether any of the substantive Establishment Clause concerns previously expressed by the Court survive this analytical turn is unclear. In its most recent

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76. *Id.* at 840.

77. *Id.* at 842.

78. *Id.* at 842-44.

79. *Id.* The case was, the Court held, no different from those in which it had previously held that a public university or school may "grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities" without Establishment Clause violation. *Id.* at 842. *See also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993); Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 252 (1990) (plurality opinion); Widmar v. Vincent, 454 U.S. 263, 269 (1981).

80. 515 U.S. 753 (1995) (plurality opinion).

81. *Id.* at 761.

82. *Id.* at 760, 763.

83. *Id.* at 764 (emphasis in original).

84. *Id.* at 767 (emphasis in original).

85. *See id.* at 767-68 (citing prior indirect-aid cases: Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986), and Mueller v. Allen, 463 U.S. 388 (1983)).

school-aid case, *Agostini v. Felton*,[86] the Court upheld the sending of public school teachers into religious schools to provide remedial education to disadvantaged children under Title I of the federal Elementary and Secondary Education Act. In the course of overruling two of its prior holdings—one of which invalidated a virtually identical program[87] and the other of which invalidated a very similar one[88]—the Court emphasized its prior failure to consider that the federally funded services were "provided to the student rather than to the school."[89] Although it discussed the general outlines of the theory of the individual as causative agent approvingly,[90] the Court did not treat this theory as dispositive of traditional Establishment Clause concerns. Rather, the Court proceeded to emphasize that there was no evidence in the record that the program provided services that "supplant[ed]" those offered in the religious schools;[91] that the program created no "financial incentive to undertake religious indoctrination";[92] that services provided were of a secular character;[93] and that the secular character of those services could be ensured without excessive entanglement of church and state.[94]

It is clear that the theory of the individual as causative agent has gained momentum in Establishment Clause jurisprudence. The question is whether this theory—and the mechanism of private choice which it represents—are sufficient, in themselves, to eliminate traditional Establishment Clause concerns. It is to that question that we now turn.

IV. THE ESTABLISHMENT CLAUSE TRANSFORMED?: THE INDIVIDUAL AS CAUSATIVE AGENT IN VOUCHER AND OTHER CASES

A. The Constitutionality of Voucher Plans Under Existing Doctrinal Tests

In a very recent case, the question of the compatibility of an educational voucher plan with the First Amendment's Establishment Clause reached Wisconsin's highest court.[95] Because the plan involved in that case is typical of the voucher plans that have been proposed and implemented, it provides a useful factual backdrop against which to examine the constitutional issues involved in these cases.

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86. 521 U.S. 203 (1997).

87. *See* Aguilar v. Felton, 473 U.S. 402, 408-14 (1985), *overruled by Agostini*, 521 U.S. at 203.

88. *See* School Dist. v. Ball, 473 U.S. 373, 397 (1985), *overruled by Agostini*, 521 U.S. at 203.

89. *Agostini*, 521 U.S. at 221.

90. *See id.* at 225-27.

91. *Id.* at 229.

92. *Id.* at 231.

93. *See id.* at 223-28.

94. *See id.* at 232-35.

95. *See* Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

The Wisconsin case involved a voucher plan that was instituted in the City of Milwaukee. Under the plan, up to fifteen percent of lower-income students enrolled in the Milwaukee Public Schools were permitted to attend any private school located in the City of Milwaukee at no cost to the student.[96] The State paid to each participating student's parent or guardian an amount equal to the lesser of the state-aid per student to which the public schools would have been entitled under state-aid distribution formulas (had the student attended public school), or the private school's "'operating and debt service cost per pupil that is related to educational programming.'"[97] Checks issued under the plan were sent to the private schools, and the parents or guardians were required to restrictively endorse them for the use of the private schools.[98] Voucher moneys could be used by the private schools in any way that they saw fit.[99]

By the time that the constitutional challenge to the voucher plan reached the courts, more than 3400 students were attending private schools under the plan.[100] Of the 122 private schools eligible to participate in the program, 89 were religious in nature.[101] Participating private schools were prohibited from engaging in discrimination on the basis of race, color, or national origin.[102] Participating schools were also required to permit students to "opt out" of participation in religious activities in the schools if the students' parents or guardians so chose.[103] There was no limit on the percentage of a private school's enrollment which could consist of program participants.[104] State oversight of participating schools consisted of the enforcement of the same minimal educational standards as are required of all schools, public and private, as a part of general state licensing and accreditation requirements; "[t]he program [did] . . . not involve the State in the participating schools' governance, curriculum, or day-to-day affairs."[105] Participating schools could be "pervasively sectarian," as the Supreme Court has understood that phrase, and the voucher moneys received could be used for religious as well as secular activities. Schools could also (presumably) discriminate on the basis of religious affiliation, religious belief, or gender in admissions, the hiring of staff, curricula, and any other aspect of educational programming or function.

If a state plan involved the payment of unrestricted funds *directly* to schools of this type, there would be little doubt about the plan's unconstitutionality under existing Supreme Court doctrine. The Court has repeatedly held that it must be assumed that a pervasively sectarian elementary or secondary school integrates secular and religious functions, such that it is impossible—from a constitutional standpoint—to separate one from the other.[106] As a result, unrestricted grants of taxpayers' money

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96. *See id.* at 607-08.
97. *Id.* at 608-09 (quoting WIS. STAT. ANN. § 119.23(4) (West 1995-96)).
98. *See id.* at 609.
99. *See id.*
100. *See id.* at 609 n.3.
101. *See id.* at 619 n.17.
102. *See id.* at 608 n.2 (citing 42 U.S.C. § 2000(d) (1994)).
103. *Id.* at 609.
104. *See id.*
105. *Id.* at 619-20.
106. *See supra* text accompanying notes 11-13.

to such schools are presumed to fund religious institutions and religious activities in violation of the baseline mandate of the Establishment Clause.[107]

Under the Wisconsin plan and other voucher plans, however, state-aid is provided *indirectly* to religious schools through benefits given to the students of those schools and their parents; and it is on this basis that their constitutionality must be evaluated. Under the Court's traditional tests for such aid—that it provide only "incidental benefit" to religious schools and that it be of a purely "secular character,"[108] and so on—voucher plans would clearly fail. Since all or substantially all of the religious schools' funding may be provided by voucher students, there is little doubt but that these plans will cross any conceivable threshold for "significant" levels of government funding. And since these plans make no attempt to ensure that only secular educational materials or services are purchased with voucher money, voucher plans would be unconstitutional on this ground as well.

In recognition of these problems, advocates for voucher plans argue that it is the theory of the individual as causative agent that must govern these cases. This theory, they argue, is not something to be used in conjunction with traditional Establishment Clause tests, as *Agostini* might seem to indicate;[109] rather, it is—*of itself*—completely dispositive of Establishment Clause issues. Citing the Supreme Court cases that have utilized this theory,[110] they argue that the intervening private actions of students and parents in the spending of voucher money effectively break any constitutionally cognizable connection between the state's funding action and the religious result. Just as individuals' elections to use state employment checks or state welfare grants for religious purposes raise no constitutionally cognizable issues, individuals' elections to use voucher moneys for religious education do not either. To the extent that traditional Establishment Clause issues are discussed in the Court's indirect-aid opinions—including those that otherwise stress the constitutional importance of intervening, private decisionmaking—those discussions are best seen as vestigial ideas left over from a doctrinal approach that should succumb to the powerful and dispositive insight that it is the individuals involved (not the state) who are the causative agents for constitutional purposes in these cases.

Granting the theory of the individual as causative agent such broad, dispositive power in Establishment Clause cases is, in many ways, a very attractive idea. It is clean, simple, and eliminates the need for much of the line drawing that has rendered the Court's Establishment Clause jurisprudence both complicated and contradictory. Under this approach, one simply looks to see if there is a private individual or entity whose actions or choices are responsible—in a causal sense—for the religious use, expression, or activity. If there is, any constitutionally cognizable connection between the state's action and the religious result is broken, and any Establishment Clause concerns—which would otherwise exist—are eliminated.

If one accepts the premise upon which this vision of the "causative-agent" theory rests—if one accepts the shift in focus from the nature and effect of the program of indirect aid (its benefit to religious schools, its subsidization of religious activities,

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107. *See supra* text accompanying notes 28-34.

108. *See supra* text accompanying notes 50-68.

109. Agostini v. Felton, 521 U.S. 203, 225-26 (1997).

110. *See supra* text accompanying notes 69-85.

and so on) to the identity of the entity whose actions or decisions trigger the payment of particular funds to particular religious recipients—then the conclusions that voucher advocates urge must mechanically flow from that premise are undoubtedly correct. If one sees the issues involved in these cases in strictly *causal* terms—if one sees the issues involved as no different from the spending of state salaries by state employees, or the spending of state welfare checks by AFDC mothers, or other situations in which the state's involvement is seen to end, and the individual's to begin, upon the individual's receipt of state money—then it is certainly correct that all constitutional inquiry should end at the point that state money is distributed, and that any further inquiry into the ultimate uses or recipients of that money is inappropriate. The fundamental question, however, remains: is this all that these cases involve? Is this all—in this particular context—that the Establishment Clause requires?

B. Freedom from Establishment of Religion by Government: Basic Principles

Historically, the Supreme Court has been concerned with three forms of the establishment of religion by government: state favoritism toward particular religious (or nonreligious) groups, the granting of state financial support to religious institutions, and the assumption by religious institutions of essentially public functions. The first form of establishment—that of government favoritism toward particular religious (or nonreligious) groups—has been a part of the struggle for religious liberty since the earliest days of our national government. During the Founding Era, reformers opposed any government action that threatened the legal equality of religious sects, a principle that came to be strongly associated with the national government and the Bill of Rights.[111] This principle has been strongly and consistently affirmed by the Court through five decades of Establishment Clause jurisprudence.[112]

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111. *See* Laura S. Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 928-29, 947-49 (1995) (discussing this and other reformist strains of religious and political discourse during the American Founding Era). As James Madison wrote, "no man or class of men, ought, on account of religion to be invested with peculiar emoluments or privileges, nor be subjected to any penalties or disabilities." JAMES MADISON, VIRGINIA JOURNAL (1776), *reprinted in part in* "IN GOD WE TRUST": THE RELIGIOUS BELIEFS AND IDEAS OF THE FOUNDING FATHERS 301 (Norman Cousins ed., 1958). To the extent that government made any distinctions among citizens on the basis of religious affiliation or identity, "the perfect equality of rights which [must be] . . . secure[d] to every religious sect" was violated. Letter from James Madison to Dr. de la Motta (Aug. 1820), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 178, 179 (Philadelphia, J.B. Lippincoff & Co. 1867).

112. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-66 (1995); Everson v. Board of Educ., 330 U.S. 1, 15 (1947). In the Court's words: "Government promotes religion . . . when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations . . . . If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated." School Dist. v. Ball, 473 U.S. 373, 389 (1985), *overruled*

The second form of establishment—that of state financial aid for religious activities or religious institutions—has been viewed cautiously by the Court, and seriously limited in most contexts.[113] The concern with this form of establishment is rooted in the historical and contempory belief that state financial aid for religious activities violates the prerogatives of individual conscience of taxpayers and encourages the corrupting integration of governmental and religious institutional power.[114] As Justice Black wrote in *Everson*:

> [During the American Founding Era,] [t]he imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused . . . [the] indignation [of reformers]. It was these feelings which found expression in the First Amendment. No one locality and no one group . . . can rightly be given entire credit for having aroused the sentiment that culminated in the adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs . . ., provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions . . . .[115]

The final form of establishment—that of the "fusion of governmental and religious functions"[116] through the "unit[ing of] civic and religious authority"[117]—has been held by the Court to violate "'the core rationale underlying the Establishment Clause.'"[118] The Court has held that "the mere appearance of a joint exercise of . . . authority by Church and State" violates the principle of equality by providing "a significant symbolic benefit to religion in the minds of some by reason of the power conferred."[119] The perceived need to separate civic and religious functions is also

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on other grounds by Agostini, 521 U.S. at 235-36. The state must favor "neither one religion over others nor religious adherents collectively over nonadherents." Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994) (plurality opinion).

113. *See supra* text accompanying notes 28-74.

114. Taxation for the support of religious institutions was a galvanizing issue for Founding Era reformers, and was rooted in the belief that financial enmeshment of church and state had a "corrupting influence on both the parties." Letter from James Madison to Edward Livingston (July 10, 1822), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 111, at 273, 275. *See also* Underkuffler-Freund, *supra* note 111, at 930-56 (discussing opposition to taxation for religious purposes during the American Founding Era). The fact that individual taxpayers could often designate the religious or charitable recipients of the taxes that they paid did not save these plans in the eyes of reformers. By the time of the Revolution, schemes involving taxpayer choice had succeeded single payee plans in New England and elsewhere, and those programs were clearly understood to be among the "establishments" that were targeted and condemned. *See id.* at 930-33.

115. *Everson*, 330 U.S. at 11 (footnotes omitted).

116. School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

117. *Kiryas Joel*, 512 U.S. at 697 (plurality opinion).

118. *Id.* (quoting Larkin v. Grendel's Den, 459 U.S. 116, 126 (1982)).

119. *Larkin*, 459 U.S. at 125-26; *see also Schempp*, 374 U.S. at 222 (noting that fusion of governmental and religious functions inevitably results in "official support of . . . the tenets of one or of all orthodoxies").

rooted deeply in our history; for instance, President James Madison vetoed an attempt by Congress to incorporate the Episcopal Church in the District of Columbia, in part because the bill—which granted the Church authority to minister to the poor—"would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty."[120]

Those who argue that the theory of the individual as causative agent has dispositive power in state-aid cases assume that the existence of intervening decisions by private individuals eliminates these Establishment Clause concerns. We will now consider this claim.

C. The Individual As Causative Agent: Three Test Cases

To test the viability of the theory of the individual as causative agent as a response to Establishment Clause challenges, we will consider three typical settings in which this theory has been advanced. These are:

(1) Under a state welfare program, a state issues a check to a welfare recipient. This recipient, in turn, donates that check to a religious institution. State officials are aware, when this program is established, that such religious donations may occur.[121]

(2) A state university establishes a public forum, open to all speakers. Religious speakers, including religious institutions, make use of this forum. State officials are aware, when this forum is established, that religious use of this type may occur.[122]

(3) A state establishes a voucher program, under which elementary and secondary public school students can attend any private school and the state-aid that would otherwise be paid to the public school attended by the student will, instead, be given to the student, who will transfer it to the private school of choice. State officials are aware when this program is established that religious schools may be among those chosen.

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120. James Madison, Veto Message (Feb. 21, 1811), *in* THE COMPLETE MADISON: HIS BASIC WRITINGS 307 (Saul K. Padover ed., 1973). A petition by the Episcopal Church to the Virginia Assembly to allow the Church's incorporation in Virginia was similarly condemned as "an express attempt [by the church] to draw the State into an illicit connexion & commerce with them." Letter from John B. Smith to James Madison (June 21, 1784), *in* 2 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE 212, 214 n.1 (Gaillard Hunt ed., 1906). *See generally* Underkuffler-Freund, *supra* note 111, at 946-56 (discussing reformers' concerns that the essential distinction between civil and religious functions be maintained).

121. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 225-26 (1997); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986).

122. *See, e.g.*, Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

Advocates of the theory of the individual as causative agent assume that these cases are functional equivalents for constitutional purposes, and that the individual actions involved in each break any constitutionally cognizable connection between the state funding action and the religious action or use. Is this true?

In the first case—that involving the payment of a state welfare check—the check is supplied to an individual under a program whose sole purpose is the providing of funds to individuals for their private and completely discretionary use. Once the check is given to the individual, the state has no knowledge of or interest in how that money will be used. Under these circumstances, none of the forms of establishment of religion by government that we have previously described is involved. No endorsement or special treatment of religious or nonreligious groups is manifest, since the program makes no distinctions on the basis of the religious identities of recipients or the ultimate uses that they choose. Neither is there a granting of state-aid for religious activities, since the religious uses of these funds occur only through the completely random—and unauthorized—actions of individual welfare recipients. Although the state is aware that welfare funds could conceivably be used for religious purposes or could conceivably reach religious institutions, it is not an anticipated or important part of the state program's rationale that this will occur. Finally, the purposes and functions of the state program—to provide individual recipients with the means to buy food, housing, and other necessities—are completely unrelated to the reasons why a welfare recipient might donate to a religious cause, or to the functions that the religious recipient of such funds might perform. Indeed, one might argue that the exercise of individual choice in this way is contrary to the uses for the money that the state program promotes.

In the second case—that involving state provision of a public forum—analysis is more complicated. In this case, the individual act in question is not the transfer (through private choice) of public moneys to religious institutions;[123] rather, the individual act consists of the individual's determination, himself or herself, to engage in religious activity.

If the state forum is truly open to all comers—and *if* the expression involved there is truly individual and personal in nature—then the forms of establishment of religion by government that we have previously described would likely be avoided. First, to the extent that the forum is truly open to all and involves no institutional approvals, agreements, or other involvements, there is no danger of actual or perceived endorsement or special treatment of religious or nonreligious groups by government. If it is known that all groups are welcome, regardless of the content of their speech, there is no threat to the principle of legal equality of all religious and nonreligious groups. The forum is, truly, a "public square."

Analysis of the second form of religious establishment—that of the granting of state financial aid to religious institutions—is a bit more complicated, but ultimately yields the same result. The aid provided by the state in this case is not cash, but "in-kind" only: the state provides the room, square, or other place where the public forum occurs. The fact that state-aid is in-kind in nature does not, of itself, eliminate

123. *Cf.* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding that payments of university-collected moneys to contractors hired by religious groups are constitutional under the public forum/individual as causative agent theory).

Establishment Clause concerns. As the Supreme Court has acknowledged, "[e]ven the provision of a meeting room . . . involve[s] governmental expenditure, if only in the form of electricity and heating or cooling costs."[124] There is no question but that financial asistance, in a real form, is provided in this case. The question is whether this aid, provided under these circumstances, involves dangers against which the Establishment Clause protects.

If, as stipulated above, the state forum is truly open to all comers, and if the expression involved there is truly individual and personal in nature, then there is no granting of state-aid for religious activities in any real sense. The religious expression that occurs in this case is completely independent of state involvement, and is completely incidental to the state plan. Although the state is aware that the forum may be used for religious speech, there is no state decision that authorizes it, and no state interest that extends to it. The incidental use of this open forum for religious speech is no different from religious speech on a public sidewalk or a public university student's personal use of "a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint."[125]

The third form of religious establishment—that of the assumption of public functions by religious institutions—is also not present in this case. The public function involved in this case is the provision of education for students in a public university and, as a part of that education, the provision of a public forum for the expression of students' views. The purposes and functions of this state enterprise are unrelated to the purposes and functions of private religious expression. The fact that the state is aware that religious speech may occur in such a forum does not change this result in the absence of state institutional involvement in promoting, selecting, approving, or otherwise incorporating the religious speech into the state's institutional, educational function.

Under the particular facts of our second case, therefore, the three forms of establishment of religion by government which we have identified are not involved. This analysis must, of course, be carefully qualified. To the extent that a case deviates from the stipulated factual pattern—if, for instance, religious organizations or institutions are *approved* for use, or if use involves other agreements or arrangements between public authorities and religious institutions—concerns about endorsement of religious or nonreligious groups, the granting of state-aid for religious activities, and the fusion or uniting of civic and religious functions may all be implicated. The fact that the content of the religious speech in question is personally chosen will not transform the arrangement into an acceptable one if the setting otherwise indicates the clear presence of Establishment Clause dangers.

We will now consider the third case: that of the state voucher program for state elementary and secondary school students. This plan, with its policy of equal aid to all students and to all schools, religious and nonreligious, does not—of itself—involve the first form of establishment of religion by government. The plan, as its advocates argue, operates "neutrally"; all receive aid equally. No distinctions are made on the basis of recipients' religious or nonreligious identities or their religious or nonreligious uses. There is no danger, under these circumstances, of actual or

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124. *Id.* at 843.
125. *Id.*

perceived endorsement or special treatment of religious or nonreligious groups by government.

The fact that this plan exhibits no favoritism does not, however, negate the possibility that other forms of establishment of religion by government—such as those involved in the granting of state-aid to religious institutions, or the assumption by religious institutions of public duties and functions—is involved. These forms of establishment may present dangers *even if* they are accomplished "even-handedly."

If the state money involved in such a voucher plan were given by the state to religious schools directly, there is no doubt but that this would involve the granting of state-aid to religious institutions in violation of the Supreme Court's understanding of the Establishment Clause. In view of the massive levels of funding that these programs contemplate, it is impossible to argue that such funding would be "incidental" or unimportant to taxpayers or to the recipient religious institutions. Direct grants of money which may approach levels of complete funding for religious institutions, be they churches or schools, would clearly violate the prerogatives of conscience of individual taxpayers and encourage the integration of governmental and religious institutional power. Nor would the "evenhandedness" of such funding eliminate these dangers. Taxpayers who oppose the payment of public funds to religious institutions would be equally offended if some of such institutions were public beneficiaries, or if all were; and the concern that government financial support of religious institutions will corrupt both religion and government would be no less presented by public funding of all religious institutions than by the funding of a few.

The critical question is whether the fact that recipient institutions are chosen by students and their parents breaks the connection between the state payment and the religious recipient or use, thus eliminating this Establishment Clause concern. In evaluating this claim, we must consider the problem of state funding *in the context of* the third form of potential establishment of religion by government, that of the assumption of public functions by religious institutions. *If* a state program simply involves the direction of state money to recipient individuals, without more—if the state has no interest or concern beyond the simple act of distribution—then the connection between the public act and the ultimate religious recipient or use might quite accurately be said to be effectively broken (or, more accurately, never to have existed in the first place). In this situation, the individual can be depicted quite accurately as the causative agent for the religious use and no relationship of substance between state grantor and religious recipient or use—in the sense of funding or functional "fusion"—will exist. This situation would be very similar to those involving welfare programs and state fora, discussed above.

The problem in the voucher case is that the interest, stake, and concern of the state in how voucher funds are used go far beyond this boundary. Individuals who receive voucher funds are *authorized* to transfer that money to religious schools—it is *anticipated* that they (or some of them) will transfer that money to religious schools because of the interest that the state retains in education, including religious education. The state retains a distinct and powerful interest in the education that is afforded to elementary and secondary school students, whether that education is afforded by public or private schools. Private schools are permitted, under state licensing and accreditation requirements, to undertake the public educational task and the state remains vitally interested in how that task is performed. Indeed, it is

precisely *because* private elementary and secondary schools perform this public function that those schools are included in voucher plans.

When we have, as in the voucher case, the payment of large amounts of public funds to institutions which perform vital public functions—when we have the payment of large amounts of public funds to institutions which are intended to accomplish, and which do accomplish, important state objectives and state goals—the fact that such money is channeled through a process of individual decisionmaking has little constitutional relevance. The theory of the individual as causative agent assumes that no state interest is involved in the activities that are undertaken by the ultimate beneficiaries of state funds. Indeed, when the state program involves the payment of a welfare check or the provision of a public forum for all comers, the state has no interest in the particular activities that its funding (ultimately) facilitates. Under an educational voucher plan, the situation is quite different. In that case, the choices that are made by individuals in distributing or using state funds are not made for purposes or for ends that are unrelated to state interests: they are made in execution of a program that is infused—both before *and after* the individual distributive decision—with vital state concerns. The individual decisions under voucher plans are not unrelated and unanticipated actions that break the connection between state payment and ultimate recipient; they are completely related, anticipated, and authorized actions, which accomplish the goal—the public funding of (public and private) education—that the government has previously identified. As a result, the Establishment Clause concerns that inhere in state-aid programs to religious institutions remain a vital part of these cases.

Indeed, the failure of the individual actions involved to break the connection between the state's funding plan and the religious recipients of state funds is apparent when one considers the way in which we, as taxpayers, intuitively view voucher-funded schools. Let us take, for instance, an educational voucher plan along the lines of the Wisconsin plan described above.[126] Under this plan, and others like it, a participating school could discriminate on the basis of religious affiliation, religious belief, or gender in admissions, the hiring of staff, the content of the curriculum, or any other aspect of educational programming or function. A participating school could restrict admissions to an explicitly preferred religious group and teach intolerance or hatred of the religions (Judaism? Catholicism? Islam? . . .) of others. It could teach that, as a matter of religious command, girls are (by nature) inferior to boys; that women must submit (in all things) to the will of men; and that the education of women beyond the twelfth grade is contrary to God's will. It could teach that gay men and lesbian women are an abomination to God and that AIDS is a curse that God has wrought upon homosexual sinners. It could, in short, infuse every aspect of secular teaching with religious beliefs and practices that are deeply offensive to others.

We have decided, as a society, that such schools must be permitted to teach those who wish to attend them, under principles of religious free exercise[127] and the general right of parents to choose the education that their children receive.[128]

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126. *See supra* text accompanying notes 95-109.

127. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

128. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that the private right of

However, the fact that such schools may exist, and that individuals may wish to pay privately for them, is quite different from the proposition that such schools *can* or *must* be funded—indeed, one-hundred percent funded—with public voucher money. Should taxpayers be forced, through the anticipated and intended operation of a state funding program, to substantially or completely fund religious beliefs and practices with which those taxpayers vehemently disagree? Is the nature of such schools truly beyond the cognizance of the Establishment Clause, simply because their attendees are there through the mechanism of private choice? We seem, as taxpaying individuals, to intuitively retain a more vital interest in what occurs in schools that are massively publicly funded than the advocates of vouchers would acknowledge. The theory of the individual as causative agent simply does not capture the violation of conscience which compelled funding of the religious beliefs and activities of others involves.

The conclusion that voucher plans are not exempt from traditional Establishment Clause scrutiny—and that they are, indeed, unconstitutional when so scrutinized—might seem to be unfortunate, or harsh, when one considers that many religious schools are not of this extreme character, and do not involve religious beliefs or practices that are insensitive to the faiths of others or that otherwise engender sharp and divisive controversy. Although the theory of the individual as causative agent does not exempt voucher plans from Establishment Clause tests, perhaps our substantive constitutional conclusion—that the massive public funding of *all* religious schools is unconstitutional, under traditional Establishment Clause tests, because of the nature of *some* of those schools—is too hasty, or unjustified. The blanket denial of public funding seems particularly tragic in view of the historic role that some religious schools—particularly parochial schools—have played in providing the only viable educational alternative for inner-city students who have failed, or are in danger of failing, in public schools. Such schools often follow a completely nondiscriminatory admissions policy, and the religious mission of such schools is often expressed in ways that are not offensive to the community or to the diverse populations that they serve. Is there any way to distinguish religious schools that raise constitutional problems from those that do not, with only the former barred from receiving voucher funds?

If the voucher plan were to include only religious *but "nonsectarian"* schools— if the education provided by those schools were not, to use the Court's words, "subsumed in the religious mission"[129]—then there would be no reason, under current doctrinal tests, to invalidate that plan on Establishment Clause grounds. Such schools could presumably receive public funds, through voucher plans or otherwise, in the same way that religious hospitals and post-secondary schools now do.[130] Although the Court has never considered the constitutionality of state-aid to a school which is argued to be of this type, the creation of schools along these lines

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parents to send their children to the schools of their choice outweighs competing state interests beyond those reflected in minimum state accreditation standards).

129. Hunt v. McNair, 413 U.S. 734, 743 (1973).

130. *See supra* text accompanying note 10. For an article with interesting and provocative suggestions along these lines, see Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 392-96 (1999).

is not inconceivable. This solution would, however, carry a distinct cost for many religious schools. The eradication of religion from the schools' missions and required curricula that this solution would entail would undoubtedly destroy the reason for being of many religious schools.

Any proposal short of this, to distinguish religiously affiliated schools that are constitutionally "offensive" from those that are not, would simply compound the Establishment Clause problems that are faced in these cases. There is, in fact, no way to distinguish religious content that is offensive to others from that which is not; and any attempt by government to make such distinctions, or to enforce *its* standards for funding, would only serve to violate the neutrality toward religious sects which government must exhibit, and to promote state intermeddling with—and consequent corruption of—the religious (educational) enterprise.

* * * *

The principle that emerges from the examination of our three archtypical cases can be simply stated. The Establishment Clause connection between a state funding program and its beneficiaries is broken by private choice *only* if that private choice involves institutions or activities that are truly of no interest to the state or its funding program. If the state retains, under the funding plan, a distinct and demonstrable interest in the private choice, its character, or its (intended) uses, Establishment Clause concerns remain. The theory of the individual as causative agent does not break the connection between a state funding program and its beneficiaries when the individual's private choice simply operates, in an anticipated and authorized way, as a part of the state funding scheme.

V. CONCLUSION

The theory of the individual as causative agent has a very seductive simplicity, something that is particularly attractive in Establishment Clause cases. It also promises to enhance personal autonomy, something that we all value.

In some cases, the theory of the individual as causative agent may accurately describe the fact that there is, in fact, no connection between a state's funding action and the religious institutions or activities that are facilitated or enabled by that funding action. In such cases, the theory is a useful part of Establishment Clause analysis. However, the use of this theory in other cases fails to acknowledge that the state funding action involves state interests that extend beyond the act of private choice. State funding of private elementary and secondary education, whether accomplished through voucher plans or otherwise, is an obvious example of the latter.

The idea that government might deliberately rid itself of public functions and public liabilities through the simple insertion of private decisionmaking between its actions and the anticipated results of those actions is not a new one. It has been argued, for instance, that the giving of textbooks to students who attend racially discriminatory schools is not "state action" because the decision to attend such

schools is a matter of private choice,[131] and that actions by private prison officials (acting pursuant to state contract) are not "state action" because they are performed by private parties.[132] When the private conduct simply operates in an anticipated and authorized way as a part of the state sponsored plan, the Court has rejected these arguments on the ground that "'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'"[133] If we value the freedom of conscience that freedom from compelled funding of the religious activities of others provides, we must, in like manner, reject the notion that public money can simply be laundered through "private choice" as a way to avoid Establishment Clause guarantees. Otherwise, intimate connections between state actions and religious uses will be beyond Establishment Clause cognizance, no matter how authorized, planned, or anticipated the result.

131. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973) (involving state lending of textbooks to public and private schools, including all-white private academies).

132. *See, e.g.*, Richardson v. McKnight, 521 U.S. 399, 413 (1997).

133. *Norwood*, 413 U.S. at 465 (quoting Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).