

were sectarian in nature.<sup>75</sup> Whether the parents had a genuine choice among religious and secular options in using the vouchers, the Court said, had to be evaluated on the basis not only of the private schools where the vouchers could be redeemed but also by examining the full range of educational options open to them, including various public school options.

In applying the primary effect and excessive entanglement tests, the Court has also, until recently, drawn a distinction between religious institutions that are pervasively sectarian and those that are not. Organizations that are permeated by a religious purpose and character in all that they do have often been held by the Court to be constitutionally ineligible for direct public aid. Direct aid to religion-dominated institutions inevitably violates the primary effect test, the Court has said, because such aid generally cannot be limited to secular use in such entities and, as a consequence, it has a primary effect of advancing religion.<sup>76</sup> Moreover, any effort to limit the use of public aid by such entities to secular use inevitably falls afoul of the excessive entanglement test, according to the Court, because the risk of diversion of the aid to religious use is so great that it necessitates an intrusive government monitoring.<sup>77</sup> But, direct aid to religious entities that are not pervasively sectarian, the Court held, is constitutionally permissible, because the secular functions of such entities can be distinguished from their religious ones for purposes of public aid and because the risk of diversion of the aid to religious use is attenuated and does not require an intrusive government monitoring. As a practical matter, this distinction has had its most serious consequences for programs providing aid directly to sectarian elementary and secondary schools, because the Court has, until recently, presumed such schools to be pervasively sectarian and direct aid, as a consequence, to be severely limited.<sup>78</sup> The Court has presumed to the contrary with respect to religiously af-

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<sup>75</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>76</sup> *See, e.g.*, *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (grants for the maintenance and repair of sectarian school facilities); *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of secular instructional materials and equipment); *Grand Rapids School Dist. v. Bal*, 473 U.S. 373 (1985) (hiring of parochial school teachers to provide after-school instruction to the students attending such schools).

<sup>77</sup> *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (subsidies for teachers of secular subjects) and *Aguilar v. Felton*, 473 U.S. 402 (1985) (provision of remedial and enrichment services by public school teachers to eligible children attending sectarian elementary and secondary schools on the premises of those schools).

<sup>78</sup> *See* cases cited in the preceding two footnotes.