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*Zelman's Future: Vouchers, Sectarian Providers, and the Next Round
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ABSTRACT

This piece focuses on the Supreme Court's recent decision in *Zelman v. Simmons-Harris*, the Cleveland school voucher case, and the constitutional questions that have already begun to appear in its aftermath. After describing the constitutional crossroads at which the *Zelman* Court found itself, we offer a close reading of the *Zelman* opinions, paying special attention to the normative vision of church-state relations that each presupposes, the values that the Court failed to explore, and practical questions about the range of school settings to which *Zelman* might ultimately be applied. The piece then explores the legal and constitutional future of the voucher movement, with respect to education as well as other social services. This section first focuses on knotty questions of state constitutional law, and the interplay of those questions with federal constitutional norms, that have arisen in *Zelman's* wake. The piece then turns to the debate about regulatory conditions that might be imposed upon providers in voucher programs. Viewing the problem in light of the Supreme Court's tangled jurisprudence of unconstitutional conditions and religious accommodation, we explore conditions related to school performance, student admissions, faculty hiring, and controversial expression by providers. Finally, we analyze the importance of *Zelman* outside the field of education, by probing the decision's implications for the President's Faith-Based Initiative – that is, for efforts by government to enlist faith-based organizations in providing a variety of social services.

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On the eve of the Supreme Court’s fateful decision in the Cleveland voucher case,² only the most ostrich-like Separationist could have denied the flux in the law of the Establishment Clause. Whether the context be access of private parties to public fora for purposes of religious expression,³ or direct government transfer of material resources to religious institutions,⁴ norms of non-Establishment have been tending sharply toward the paradigm of Neutrality and away from the metaphorical wall of church-state separation. Only in the area of government speech on religious matters, such as school-sponsored prayer or religious holiday displays, has the law moved toward increased separation between religion and government.⁵

Zelman represents the most recent and dramatic move away from Separationism. By holding in no uncertain terms that the Cleveland school voucher program satisfies constitutional requirements, the Supreme Court has opened the door for a wide range of relationships, once thought impermissible, between government and religious institutions. The key to these new relationships, the Court held, is the concept of “true,” “genuine,” and “independent” private

² *Zelman v. Simmons-Harris*, 536 U.S. ___, 122 S. Ct. 2460 (2002).

³ See *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

⁴ *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997).

⁵ See *Santa Fe Ind. Sch. Dist v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Allegheny Cty. v. ACLU*, 492 U.S. 573 (1989); but see *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983). For analysis and defense of the evolution of different norms for cases involving government financial support of religion and government messages promoting worship, see Ira C. Lupu, *Government Money and Government Messages: Mitchell v. Helms, Santa Fe, and the Arc of the Establishment Clause*, 42 *William & Mary L. Rev.* 771 (2001).

choice to partake of services offered by religious entities. For the first time, the law explicitly permits government to spend money for the payment of tuition at religious elementary and secondary schools, even if those schools offer faith-intensive academic programs. The Court's decision places absolutely no restriction on the use of the tuition funds received by participating schools.

The outcome in *Zelman*, decided by a vote of 5-4, may have been close, but the question it answers has now been firmly resolved. Unlike other hotly disputed areas of constitutional law, such as state sovereign immunity or the death penalty, in which a fractured Court promises only future litigation, uncertainty, and a fair probability of a pendulum swing, the voucher decision both captures the trajectory of contemporary Establishment Clause jurisprudence and resolves a particular question in a way highly unlikely to be revisited.

The certainty of the resolution of the question in *Zelman* is not matched, however, by the adequacy of its justifications and its reasoning. Even the most ardent fans of vouchers should recognize the costs of a radically untheorized invocation of "private choice" as a response to deeply felt, long-held constitutional concerns. When the grounds upon which such an important decision rest are unexplained, or are attributed disingenuously and entirely to unelaborated principles laid down in prior cases, its future is left to twist in the winds created by its critics.

We think there is much to be said for the first premises in *Zelman*, but the decision's underpinnings require elaboration if they are to be sufficiently grounded in constitutional values. Moreover, *Zelman* is only the beginning, not the termination point, of constitutional litigation over voucher arrangements. In what follows, we explore the *Zelman* opinions, the questions those opinions suggest but fail to answer, and the implications of the decision for the future of

relations between the state and religious entities. In Part I, we first describe the constitutional crossroads at which the *Zelman* Court found itself,⁶ and then offer a close reading of the *Zelman* opinions, paying special attention to the normative vision of church-state relations that each presupposes, the values that the Court failed to explore, and practical questions about the range of school settings to which *Zelman* might ultimately be applied.

Part II explores the legal and constitutional future of the voucher movement, with respect to education as well as other social services. Part IIA. focuses on knotty questions of state constitutional law, and its interplay with federal constitutional norms, that have already begun to arise in *Zelman*'s wake. Indeed, the ink in *Zelman* was barely dry when a Florida Circuit Court ruled that the Florida Opportunity Scholarship Program violates the church-state provisions of the Florida Constitution,⁷ and a panel of the U.S. Court of Appeals for the Ninth Circuit held in *Davey v. Locke*⁸ that a church-state provision in the Washington Constitution, as applied in a particular case, violates the federal Free Exercise Clause. Part IIB explores the debate about regulatory conditions that might be imposed upon providers in voucher programs in light of the Supreme Court's tangled jurisprudence of unconstitutional conditions and religious

⁶ We began this task in an earlier piece, in which we analyzed the constitutional problem of voucher financing of government-supported services of all kinds, as that problem stood on the eve of *Zelman*. Ira C. Lupu & Robert W. Tuttle, Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers, 18 Journal of Law & Politics xx (forthcoming, 2002) (hereafter "Sites of Redemption"). That piece went to press too late to include anything more than a brief post-script about *Zelman*. This article begins where that one left off.

⁷ *Holmes v. Bush*, Second Judicial Circuit, Leon Cty, Florida, No. CV 99-3370, Aug. 5, 2002.

⁸ 2002 U.S. App. LEXIS 14461 (9th Cir., 2002).

accommodation. Here, we explore conditions related to school performance, student admissions, faculty hiring, and controversial expression by providers. Finally, Part IIC analyzes the importance of *Zelman* outside the field of education, by probing the decision’s implications for the President’s Faith-Based Initiative – that is, for efforts by government to enlist faith-based organizations in providing a variety of social services. In this context, too, *Zelman* has had immediate impact, as revealed by the very recent decision by a federal district court in Wisconsin to uphold a voucher-type arrangement for state financing of a faith-intensive drug rehabilitation program.⁹

I. *Zelman*

A. Background

The voucher controversy arose from a crisis in Cleveland’s public school system, which was generally regarded as one of the worst in the nation. Dismal and worsening rates of educational achievement prompted a federal district court judge to transfer control of the Cleveland schools to the state.¹⁰ In 1996, responding to this crisis, Ohio enacted the Pilot Project Scholarship Program, which offers parents of Cleveland school children several options. Under the Scholarship Program, Cleveland parents can receive a tuition voucher redeemable either at

⁹ *Freedom From Religion Foundation v. McCallum*, 2002 U.S. Dist. LEXIS 14177 (W.D. Wisc. 2002). Six months earlier, in the same litigation, the court ruled that direct financing by the state of the same faith-intensive provider violated the Establishment Clause. 179 F. Supp. 2d 950 (W.D. Wisc. 2002).

¹⁰ *Zelman*, 122 Sup. Ct. at ____, slip op. at 1-2.

participating private schools in Cleveland, or at participating public schools in districts adjacent to Cleveland.¹¹ Alternatively, parents whose children remain in Cleveland's public schools can choose to receive a voucher for after school tutoring.¹² Both the tuition and tutoring vouchers give priority to low-income families.¹³

Voucher opponents, led by teachers' unions and People for the American Way, challenged the Scholarship Program the moment it was enacted. The challengers claimed that the program violated the federal and Ohio state constitutions because the tuition vouchers could be redeemed at religious schools – indeed the majority of participating private schools were religious. The Ohio Supreme Court found that the voucher program legislation violated a technical requirement of the Ohio Constitution, and thus held the program invalid.¹⁴ The Ohio legislature quickly remedied the technical defect and the voucher program was re-enacted; again the opponents filed suit to block the program, though this time in federal district court. The federal district court ruled that the voucher program violated the Establishment Clause of the U.S. Constitution, the U.S. Court of Appeals for the Sixth Circuit upheld that ruling, and the

¹¹ Id. at 3-4. The plan paid a maximum of \$2250 per child per year for tuition; participating private schools had to agree to charge no more than \$2500 per year, leaving a \$250 co-payment to be made by the family. No adjacent public school districts have ever agreed to participate in the program. Id. at 5.

¹² Id. at 4-5. The tutoring grants paid 90% of annual tutoring costs per child, up to an annual maximum of \$360.

¹³ The program gave priority for scholarships to families with incomes below 200% of the poverty line. Id. at 4.

¹⁴ *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999) (holding Scholarship Program a violation of state constitution's prohibition on multiple subject matters within a single bill).

Supreme Court granted certiorari. At each judicial level, courts stayed injunctive relief in order to avoid educational disruption for those families who were already participating in the program, pending final resolution of the case; by the time the Supreme Court announced its decision in *Zelman*, the voucher program had been operating for six years.

In *Zelman*, the Court faced the intersection – one might say collision – of two distinct lines of establishment clause jurisprudence. The first, exemplified by *Committee for Public Education and Religious Liberty v. Nyquist*,¹⁵ prohibited substantial, unrestricted government support for religious primary and secondary schools. *Nyquist*, decided in 1973, invalidated New York State’s program of tuition grants and tax credits for low and middle income parents whose children attended private elementary and secondary schools. The overwhelming majority of beneficiaries of the program were parents with children in Catholic schools. Despite the fact that the aid ran to the parents and not directly to the schools, the *Nyquist* Court held that the program was a nonneutral attempt to ensure the financial survival of religious schools. As such, it violated then-controlling Separationist principles¹⁶ by having a “primary effect” of advancing religion and promoting “political divisiveness” along sectarian lines.¹⁷

To voucher opponents, the Ohio Scholarship Program ran directly against the principles of *Nyquist*’s “no aid separationism.” In Cleveland, religious schools offered nearly all of the

¹⁵ 413 U.S. 756 (1973).

¹⁶ The Court decided *Nyquist* within a few years of its germinal decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which set the template for decisions involving aid to sectarian schools. Although the framework of *Lemon* has been modified somewhat, its approach still controls programs of direct aid from government to sectarian schools. See *Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁷ 413 U.S. at xxx, xxx.

available seats for voucher students; the program placed no restrictions on the use of voucher funds; and the program did not require participating religious schools to allow voucher students to “opt out” of religious education or worship. The Program thus appeared to advance religion in apparent violation of Separationist principles.¹⁸

To voucher supporters, however, the case for the Ohio Program tracked a second and more recent line of establishment clause decisions, running from *Mueller v. Allen*¹⁹ through *Witters v. Washington Department of Services for the Blind*²⁰ to *Zobrest v. Catalina Foothills School District*.²¹ In *Mueller*, *Witters*, and *Zobrest*, the Court rejected establishment clause challenges to programs in which government funds reached religious institutions only “as a result of the genuinely independent choices of aid recipients.”²² These intervening independent choices, the Court reasoned, disconnected the government from any religious experience that a given voucher beneficiary might receive along with – or as part of – the services “purchased” with the voucher. In arguing that the Ohio program offered such independent choices, voucher supporters pointed to the wide range of educational options available to Cleveland parents, which included publicly supported magnet schools, independent but public community (charter) schools, tuition scholarships to private schools, and tutoring scholarships for those who remained

¹⁸ This argument persuaded a majority of the Sixth Circuit panel in *Zelman* to strike down the program. 234 F.3d 945 (6th Cir. 2000), *rev’d*, 122 S. Ct. 2460 (2002).

¹⁹ 463 U.S. 388 (1983).

²⁰ 474 U.S. 481 (1986).

²¹ 509 U.S. 1 (1993).

²² *Witters*, 474 U.S. at 487.

in any public school.²³

The Court's resolution of the conflict in the decisional law between *Nyquist* and strenuous no-aid Separationism, on the one hand, and the theory of intervening private choice, on the other, cannot be understood without an appraisal of its very recent, paradigm-confronting decision in *Mitchell v. Helms*.²⁴ *Mitchell* involved an as-applied challenge to a joint federal-state program which loaned educational equipment and materials – for example, books, computers, software, video players, and video tapes – to schools, public and private, in low-income areas. The governing statute limited these materials to “secular, nonideological” uses.²⁵ Several precedents from the *Nyquist* era had held similar programs to constitute substantial aid to religious education and therefore unconstitutional.²⁶ *Mitchell* overruled those precedents, and dramatically recast the Supreme Court line-up in cases involving direct aid to religious institutions.

Four Justices – Chief Justice Rehnquist, Justice Kennedy, Justice Scalia, and Justice Thomas, all of whom are part of the *Zelman* majority – joined a plurality opinion in *Mitchell* that made formal neutrality and secular purpose the sole Establishment Clause requirements for a direct aid program. So long as the program had been designed to advance secular ends – in

²³ The Court in *Zelman* elaborates on magnet schools and community (charter) schools at slip op. 5-6.

²⁴ 530 U.S. 793 (2000).

²⁵ *Id.* at xxx.

²⁶ *Meek v. Pittenger*, 421 U.S. 349 (1975), overruled, *Mitchell v. Helms*, 530 U.S. 793 (2000); *Wolman v. Walter*, 433 U.S. 229 (1977), overruled, *Mitchell v. Helms*, 530 U.S. 793 (2000).

Mitchell, the secular educational purpose appeared quite obvious – and encompassed a broad class of schools, both religious and secular, the plurality declared its willingness to uphold it.²⁷

The *Mitchell* plurality also explicitly and vehemently repudiated a central tenet of the Separationist ethos. From the time of *Lemon v. Kurtzman*²⁸ until the decision in *Mitchell*, the Court had repeatedly insisted that the state could not aid “pervasively sectarian” institutions.²⁹ Such aid, the reasoning went, would either advance religion or excessively entangle the state with religion in the effort to be sure that the aid went exclusively to secular uses. Reciting persuasive evidence of the anti-Catholic provenance of this doctrine, the plurality concluded that the doctrine had been the product of religious bigotry and should be abandoned.³⁰

Three Justices – Justice Ginsburg, Justice Souter, and Justice Stevens, all of whom dissented in *Zelman* as well – dissented in *Mitchell*.³¹ Hewing to all of the premises of no-aid Separationism, they insisted that the program violated the Establishment Clause because it advanced religion in at least two ways – by freeing up private resources for religious teaching,³²

²⁷ 530 U.S. at xxx.

²⁸ 403 U.S. 602 (1971). As recently as 1988, Chief Justice Rehnquist had authored an opinion which had appeared to reaffirm this doctrine, *Bowen v. Kendrick*, 487 U.S. 589 (1988), despite Justice Kennedy and Scalia’s attempt in that case to repudiate it. *Id.* at xxx (Scalia & Kennedy, JJ, concurring).

²⁹ *Id.* at 6xx.

³⁰ 530 U.S. at 827-30. See also *Columbia Union College v. Clark*, 527 U.S. 1013 (1999) (Thomas, J., dissenting from denial of certiorari, and urging the Court to abandon the doctrine that bars aid to “pervasively sectarian” institutions).

³¹ 530 U.S. at xxx.

³² *Id.* at xxx.

and by creating a substantial risk of diversion of government assistance to religious uses.³³

Justices Breyer and O'Connor – whose votes split in *Zelman* – cast the deciding votes in *Mitchell* in a concurring opinion that currently represents the governing law on direct government aid to religious entities.³⁴ The O'Connor-Breyer opinion rejected the premises of both the plurality and the dissents. For the concurring Justices, the plurality went too far in the direction of Establishment Clause Neutralism;³⁵ secular purpose and neutral coverage criteria are indeed constitutionally necessary, but not sufficient to satisfy the Establishment Clause. What is also required, in direct aid cases, is assurance that the government's assistance is not in fact being used for specifically religious activities, such as worship. But the concurring Justices similarly rejected the dissent's broad, prophylactic approach to assuring that state aid was not so used; courts, the concurring opinion concluded, must look at the precise ways in which government aid is being used, not simply at the identity of the recipient institution. Given this approach, the program challenged in *Mitchell* had sufficient safeguards against diversion to religious use, and therefore satisfied the Establishment Clause.

In light of the very recent backdrop provided by *Mitchell*, it was hardly a surprise that defenders of the Ohio Scholarship program targeted Justice O'Connor as the key vote. They

³³ Id. at xxx.

³⁴ 530 U.S. at 836-67. This concurrence represents the narrowest ground supporting the result, and thus operates as the Court's holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

³⁵ We elaborate on the general paradigms of Religion Clause Separationism and Neutralism in Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 *Vill. L. Rev.* 37 (2002) (hereafter "Distinctive Place") and *Sites of Redemption*, note xx *supra*.

needed but one to add to the four in the *Mitchell* plurality, for whom the secular purpose and formal neutrality of the voucher plan would suffice. Justice Breyer’s vote was hard to predict; his joining in the *Mitchell* concurrence had come as a bit of a surprise. By contrast, Justice O’Connor had evidenced strong prior interest in this field,³⁶ and her jurisprudential style frequently revealed tendencies to be fact-specific and flexible in her approach. Moreover, she had joined in *Mueller*, *Witters*, and *Zobrest*, the three lynchpins of the theory supporting “independent choice” as the crucial variable. If the voucher proponents lost Justice Breyer’s vote, they could still win with Justice O’Connor’s; but if they lost Justice O’Connor’s vote, they were highly likely to lose the case.

That Justice O’Connor’s vote was crucial to the outcome created tactical questions for both sides. Arguments that the Cleveland program was formally neutral between religion and nonreligion were necessary but not sufficient to win her support. She had to be persuaded by arguments about “private choice.” Voucher proponents concentrated their arguments precisely and strenuously on that point.³⁷ Voucher opponents, by contrast, did not want to concede that some voucher programs – those with sufficient choice – were constitutional. They concentrated their arguments on *Nyquist* and its place in the theory of no-aid Separationism.³⁸ *Zelman* was

³⁶ Justice O’Connor is the author of the “endorsement” theory of Establishment Clause adjudication, see *Lynch v. Donnelly*, 465 U.S. 668, xxx-xxx (1984) (O’Connor, J, concurring), a theory which has become the law in cases involving religious speech by government. *Allegheny County v. ACLU*, 492 U.S. 573 (1989). She is also the author of the most immediate, pre-*Mitchell* case involving aid to religious schools, *Agostini v. Felton*, 521 U.S. 203 (1997), which overruled prior law and began to blaze a new, more fact-dependent trail in direct aid cases.

³⁷ Petitioner’s Brief; Brief for United States

³⁸ Respondent’s Brief

won and lost on these tactical decisions, and the opinions it produced can only be appreciated in light of what divided as well what united their authors on the eve of decision.

B. The *Zelman* Opinions: Explication and Critique

Those looking beyond the result to the possibility of nuance, constitutional innovation, or normative depth in resolving the momentous conflict presented in *Zelman* cannot have been satisfied by the opinions. By a 5-4 vote, the Court upheld the constitutionality of the Ohio Scholarship Program; “independent choice” trumped “no aid separationism.” The Court opinion treats the matter, however, as if it were solely a question of choosing the applicable precedents, rather than resolving a fundamental conflict in the prior law. The primary virtue of the majority opinion, written by Chief Justice Rehnquist, resides in the fact that it *is* a majority opinion, in contrast to the fragmented decision in *Mitchell v. Helms*. Justices O’Connor and Thomas wrote concurring opinions, while Justices Souter, Breyer, and Stevens authored dissents.³⁹

1. The Court Opinion (Chief Justice Rehnquist)

An opinion of the Supreme Court, or indeed of any appellate court, should fulfill a number of functions, but at least two of these are central. First, the opinion should provide guidance that is sufficiently clear to enable lawyers and lower court judges to make decisions in future, relevantly similar cases. Second, the opinion should make a reasonable attempt to justify the court’s decision as something more principled than judicial fiat.⁴⁰ The *Zelman* majority opinion succeeds in the first task, but falls far short in the second.

³⁹ All four dissenters, including Justice Ginsburg, joined Justice Souter’s dissent. Justices Stevens and Souter, but not Justice Ginsburg, joined Justice Breyer’s dissent, and Justice Stevens – who had joined the other two dissents – wrote his dissent for himself only.

⁴⁰ Steven Burton, *Judging in Good Faith; add others (Llewellyn?)*

a) The bright line of private choice

From the beginning of his analysis, the Chief Justice moved to ground familiar even to those only casually acquainted with the Byzantine turns of Establishment Clause jurisprudence – the *Lemon* test, or at least the two parts remaining after *Agostini v. Felton*.⁴¹ *Lemon*'s first prong, the requirement that the challenged program must have a secular purpose, took the Court but a single sentence to dispatch: "There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."⁴² The second inquiry – whether the challenged program has the "primary effect" of "advancing or inhibiting" religion – proved the more challenging. With respect to the "effects" test, the Court identified a sharp distinction in Establishment Clause law between programs of direct aid to religious schools and indirect aid, defined as "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."⁴³ Although direct aid cases have blazed the erratic trail of Establishment Clause jurisprudence, the Court declared that indirect aid cases stand in a "consistent and unbroken" line, in which the Court has considered three "true private choice programs" and upheld them all.⁴⁴

Thus, for the majority, the main question to be answered was whether or not the Ohio Pilot Scholarship Program constituted indirect aid. To answer that question, the Court identified

⁴¹*Agostini v. Felton*, 521 U.S. 203 (1997).

⁴² *Zelman*, slip op. at 7.

⁴³*Id.*

⁴⁴*Id.*

three criteria present in the earlier indirect aid cases. As a threshold requirement, the aid program must be “neutral in all respects toward religion.”⁴⁵ By this, the Court simply means formal neutrality – the classes of both the participating schools and the eligible students must be defined in non-religious terms. Because the Cleveland program was open to any private school in the district and any public school in the adjacent districts, and the only preferred students are those who come from lower income families, the Court found this criteria satisfied in *Zelman*.⁴⁶

Next, the program must provide aid “directly to a broad class of individuals, defined without reference to religion.”⁴⁷ This criterion, which originated in *Mueller v. Allen*,⁴⁸ ensures that the formal neutrality required by the first criterion does not in fact represent a gerrymander in favor of a particular religious group; the more dispersed the benefits, the less likely any one religious group would be considered the intended beneficiary of government largesse. The Cleveland voucher scheme was open to “any parent of a school-age child who resides in the Cleveland City School District,”⁴⁹ which represented a beneficiary class sufficiently broad to meet this standard.

Although criteria concerning program neutrality were enough to satisfy four of the Justices in the majority, these standards do not in and of themselves make the aid indirect, so the Court’s final inquiry turns out to be the dispositive one in maintaining a majority. The aid

⁴⁵Id. at 11.

⁴⁶Id.

⁴⁷Id.

⁴⁸*Mueller* at 397.

⁴⁹*Zelman*, slip op. at 11.

recipients must be “empowered to direct the aid to schools or institutions of their own choosing.”⁵⁰ The Court found that the Cleveland program offered parents a wide array of options: “They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious school, enroll in a community school, or enroll in a magnet school.”⁵¹

Taken together, these criteria comprise the court’s image of legitimate indirect aid programs as “circuit breakers” between the government and religious institutions. If government has acted neutrally in establishing the program – by defining the providers and beneficiaries without respect to religious – and if the beneficiaries determine the provider they will use, then government is constitutionally disconnected from any religious provider that a given beneficiary might choose.

Through its articulation of this “circuit breaker” image, the Court has provided stark and well-defined answers to three of the fundamental constitutional questions concerning voucher plans for primary and secondary education:

i. Does the voucher form of financing have constitutional significance? Whether or not Chief Justice Rehnquist simply used the sharp distinction between direct and indirect financing to ensure that Justice O’Connor joined in the majority opinion, a bright line now has been enshrined in the law of the Establishment Clause. The majority recites the mantra of “true private choice” no less than fifteen times in a relatively short opinion;⁵² in the heart of its

⁵⁰Id.

⁵¹Id. at 14.

⁵² Slip op. at [list places].

analysis, the majority uses this refrain to close nearly every paragraph. “Private choice” serves as the majority’s answer to two critiques advanced by the dissenters, who claimed that the percentage of available voucher seats located in religious schools, and the overall amount of government money flowing to religious schools, should determine the constitutionality of a given program.

To both challenges, the majority provides the same answer: because of the intervening private choice exercised by beneficiaries (within a neutral program), the government is not responsible for the amount of money that ends up with religious institutions, nor is the government responsible for the percentage of students who choose seats in religious schools, or even the percentage of seats open to voucher students that are found in religious schools. Each of those statistics is created by demographic forces or choices, either personal or institutional, outside the government’s control and responsibility.⁵³

ii. How should the relevant universe of choices be defined? This question turned out to be absolutely central to the disposition of the case. The Court’s decisions in *Mueller*, *Witters*, and *Zobrest* signaled the importance of private choice for Establishment Clause jurisprudence, but the cases left wide open the question of how to measure the range of available choices. Presumably, a “choice” program that leaves beneficiaries with only one choice, and a religious one at that, would not qualify as a “genuine choice” between secular and religious options. *Mueller*, however, involved a tax deduction rather than a transfer to the a religious institution, and *Witters* and *Zobrest* involved programs that offered virtually unlimited choices. In *Witters*, the voucher program allowed recipients to choose any school or program offering vocational

⁵³ Id. at 14.

training in virtually any field.⁵⁴ The program at issue in *Zobrest* entitled hearing-impaired students to the assistance of government-financed sign-language interpreters at any school they attended, public or private, secular or religious.⁵⁵ In neither of these cases did religious schools make up a significant portion of the available choices.

In contrast, the Ohio Scholarship program offered parents a considerably narrower range of choices. On its face, the program offered three options: vouchers for use at public schools in adjacent districts; vouchers to pay for private tutoring services for students remaining in Cleveland public schools; and vouchers for use at private schools in Cleveland.⁵⁶ The first option was illusory – no public school district in the Cleveland metropolitan area agreed to take Cleveland voucher students.⁵⁷ The second option could hardly count as an equal alternative to private school tuition; the tutoring voucher offered a maximum of \$360, or approximately \$10 a week for the school year. Religious schools dominated the third option; they offered nearly 97% of the voucher seats in the 1999-2000 academic year.

The Court rejected such a narrow construction of the choices available to Cleveland

⁵⁴Witters, 474 U.S. at 487-89. Washington State excluded only religious training programs from its funding, and asserted that the Establishment Clause required such an exclusion; the Court held that it does not – although the Washington Supreme Court later held that the state constitution’s religion clause did bar state payments for religious training. The Washington Supreme Court’s ruling has lately come under federal constitutional attack in *Davey v. Locke*. See supra notes xx-xx and accompanying text.

⁵⁵Zobrest, 509 U.S. at 10-12. Like Witters, *Zobrest* involved a claim by program administrators that the Establishment Clause barred the use of program funds to support religious education, and again the Court held that it does not.

⁵⁶ Slip op. at 3-5.

⁵⁷Id.

parents. In a voucher program, the Court held, the relevant range of options should not be restricted to the options created by the challenged program. Instead, the Court said that the range should be measured

....from the perspective of Cleveland parents looking to choose the best educational option for their school-age children. Parents who choose a [voucher] program school in fact receive from the State precisely what parents who choose a community or magnet school receive – the opportunity to send their children largely at state expense to schools they prefer to their local public school.⁵⁸

Seen in that context, voucher seats in religious schools account for a much smaller portion of the state-financed educational alternatives.⁵⁹ The majority’s analysis of this point, unlike Justice O’Connor’s, does not focus on the subjective experience of parents choosing schools.⁶⁰ Although it refers to the “perspective of Cleveland parents,” the Court adopts an objective determinant for the range of choices, measured by the extent of Ohio’s overall public support for education. “All options Ohio provides schoolchildren”⁶¹ count as relevant choices from which parents may select.

iii. Who holds the burden of persuasion as to the “genuine and independent” nature of the voucher recipient’s choice? The Court’s answers to the first two questions clarify most

⁵⁸ Id. at 19, n.6. The Court expressed deep frustration at oral arguments that those who challenged the program – and the 6th Circuit – would not explain why community and magnet schools should not be included in the relevant universe of choices. Id at 18-19. Note that the Court provides an even broader description of the range of choices earlier in its analysis, which includes even the existing neighborhood public schools. Id. at 14 (quoted in the text at note xx supra).

⁵⁹ By the Court’s math, the percentage drops from 97% to less than 20% of the available alternatives. Id. at 17.

⁶⁰See discussion in the section analyzing Justice O’Connor’s opinion, TAN xx-xx infra.

⁶¹ Zelman, slip op. at 14.

Establishment Clause questions about the importance and relevant scope of beneficiary choice, but they do not directly address the significance of the various adjectives modifying “private choice,” which include “genuine,” “independent,” and “true.” The Court provides a subtle, but telling, response to this issue: “There ... is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children.”⁶² At first glance, it appears that the Court has simply indicated that those who challenge a voucher program on Establishment Clause grounds have the burden of showing that the state has failed to make available “genuine” choices to the parents making the selection.

While that conclusion is no doubt correct – and represents an important part of *Zelman*’s legacy – the quote reinforces a deeper insight about the Court’s understanding of “genuine choice.” “Genuine” modifies not the parents’ act of choosing, but rather the choices made available to them by the state. Although public schools in the surrounding district do not contribute to genuine choice – no seats were ever available in such schools – community and magnet schools did have seats available, and those schools, whatever their academic merits, count as “genuine choices” under the Court’s analysis. As in its understanding of the range of available choices, the Court declines to inquire into parents’ subjective experiences in selecting schools for their children. Parents might prefer School A over School B on grounds of academic quality, value emphasis, and/or physical safety, but prefer B over A because of the religious teaching at A. Parents in such circumstances are squeezed by the set of trade-offs presented to them. The comparative quality or safety of the various schools may generate pressure on parents to send their children to religious schools, calling into question the “genuineness” of their choice

⁶²Id. at 13.

of a particular religious element to their child’s education. The Court’s opinion, however, evinces no concern for their plight.⁶³

The majority’s opinion thus provides clear direction for lawyers and judges in future controversies over school vouchers, and a simple roadmap for legislators contemplating the design of voucher programs. If a program is enacted for a secular purpose, defines the classes of schools and students in religion-neutral terms, offers benefits to a broad set of students, and offers those students a variety of publicly-financed options – potentially including the neighborhood public school – the program will survive any challenge under the Establishment Clause.

Analyzing voucher plans in circumstances other than Cleveland’s reinforces our sense of *Zelman*’s clarity and scope. Consider, for a real example, the Florida Opportunity Scholarship Program.⁶⁴ The Program authorizes the payment of scholarships to the families of children whose public schools fail for two years in any four-year period to pass state-wide tests of minimum adequacy.⁶⁵ Recipients of these scholarships may use them at any nonfailing public

⁶³Indeed, the only indication that the Court has considered the state’s actual influence on parental choice reveals the majority’s attitude toward any subjective inquiry. “The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools....” *Id.* at 14. Defined this narrowly – in terms of coercion, rather than influence – the answer is obviously no.

⁶⁴ Florida Statutes, sec. 229.0537(3). A county-level court has recently ruled the program to be a violation of the state constitution. *Holmes v. Bush*, Second Judicial Circuit, Leon Cty, Florida, No. CV 99-3370, Aug. 5, 2002. We discuss *Holmes* and the issues it raises in Part IIA, *infra*.

⁶⁵ Many details of the Florida program are available at the website www.schoolchoiceinfo.org. The particulars of the state-wide testing system, which focuses on reading, writing, and mathematics, and is administered by the state Department of Education, can be located at www.floridachild.org/aaschoolgrading.html. To fail, a school must fall below pre-

school in their own district; at a nonfailing public school, if seats are open, in an adjacent school district,⁶⁶ or at any participating private school. Thus far, the Florida Department of Education has certified a very small number of schools to have failed for two years.⁶⁷

Given this program design and testing results, the Florida program sails over *Zelman*'s Establishment Clause hurdle. The premise of the program is that schools must be tested for adequacy, and that Florida parents whose children attend schools that have twice failed to meet state standards must be given exit options. But the number of twice-failing schools is tiny, and parents of children in them may choose from a broad array of not-failing public schools, perhaps including those in districts other their own, and participating private schools, not all of which are religious. The schools must accept voucher students on a random and religion-neutral basis, giving no weight to the applicant's academic history. On these facts, there can be little doubt that *Zelman*'s requirements that parental choices of school be "genuine" and "independent," and that parents not be coerced into sending their children to religious schools, are satisfied. The premise of the Cleveland program is that the entire system of neighborhood public schools is flawed, and that parents should be empowered to escape it. Florida's premise is far narrower; some particular schools are "failing," and if they cannot improve sufficiently, parents should be able to move

set criteria in all three academic areas. Only 78 schools failed the first set of Florida tests, <http://edworkforce.house.gov/hearings/106th/oi/tampa32700/gallagher.html> (testimony of Florida Education Commissioner before a subcommittee of the U.S. House of Representatives), and of these, only two failed a second consecutive year.

⁶⁶ Fla. Stat. Sec. 229.0537(3), section 3(e).

⁶⁷ James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *Yale Law Journal* 2043, 20xx (2002).

their children – and the state’s support associated with those children⁶⁸ – to a school that is not “failing.”

What if a community with very good public schools decides to create a voucher program, in which religious schools may participate? First, we note that this presents a situation in which the political likelihood of a voucher plan being enacted is probably close to zero. Most excellent public school systems in the United States are in affluent suburbs, which tend to have the will and the resources to support high quality public schools. The political motivation that ordinarily fuels voucher talk is completely missing from such a jurisdiction; indeed, one would expect opposition from supporters of the public system to be extremely high. Unless challengers can demonstrate that a voucher program is motivated by a governmental intent to help sectarian schools or religious families, rather than promote competition among all schools and facilitate religion-neutral parental choice, the constitutionality of a voucher plan in such a jurisdiction is completely assured; parents in this hypothetical jurisdiction have ample and rich secular, public choices. The overriding lesson of *Zelman* is that every school option, public and private, is part of the relevant choice menu. Thus, even if every private option was religious in character, a voucher plan in such a setting would pass Establishment Clause muster.

Paradoxically, given the policy impetus for school vouchers, the most difficult context in which to defend the constitutionality of a voucher plan involves a jurisdiction with dismal public schools, and no innovation in place either to improve them, or offer new, public alternatives, as Cleveland had done. In such a community, a plan that involved an overwhelming majority of

⁶⁸ If a child exits a failing school with an opportunity scholarship, the school he or she leaves behind loses an amount of state budget support equivalent to the amount of the scholarship. Fla. Stat. Sec. 229.0537(3), section 6.

religious private schools among the participating private schools would create the maximum incentive – approaching coercion as the public schools deteriorated further – for parents to select religious schools for their children.

It is not clear from *Zelman* whether such a program would be constitutionally acceptable. The Court opinion does mention the neighborhood public schools as being among the relevant options,⁶⁹ but it's only one of several, and the facts are sufficiently different from our hypothetical that one cannot be sure of the outcome.⁷⁰ We very much doubt, however, whether a voucher program in such an educationally dismal place will ever come to be. First of all, a system that bad would be under tremendous political pressure, from within and without, to improve its public offerings. Second, recent federal legislation – the “No Child Left Behind Act”⁷¹ – creates financial incentives for states and localities to make precisely the sort of innovations that Cleveland had employed. In *Zelman*, those innovations played a central part in the Court’s rationale, and some version of them is likely to appear everywhere prior to the enactment of a voucher program.

b) The failure to justify the principle of choice

Clarity and simplicity should be counted among the virtues of the majority’s opinion, but normative justification is hard to find. The Court identifies *Mueller*, *Witters*, and *Zobrest* as

⁶⁹ Slip op. at 14 (“Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, . . .”).

⁷⁰ The ultimate conclusion on this question may reside in the short run in whether Justice O’Connor would join in an opinion to uphold such a program.. We have our doubts about that. See TAN xx *infra*.

⁷¹ Cite act; see news story at www.religionandsocialpolicy.org/news/article.cfm?id=63

controlling precedent, draws from them “the principle of private choice,” and concludes that the Ohio Scholarship scheme qualifies as a program of private choice, thus ending the constitutional inquiry. Despite repeatedly invoking the mantra of “genuine private choice,” the majority never explains why a recipient’s intervening choice dissolves the Establishment Clause concerns that typically attend unrestricted transfers of public funds to religious institutions. Why is indirect aid not just a form of “money laundering,”⁷² as the dissenters claim?

Any answer to that question depends on prior judgments about the meaning and purpose of the Establishment Clause, though the *Zelman* opinion is silent about such judgments. The majority’s lack of a theoretical foundation for the principle of private choice may be simply a reflection of the Chief Justice’s style, or a reflection of an uneasy relationship between Justice O’Connor and the four Justices who joined in the *Mitchell v. Helms* plurality. For those four, private choice is unnecessary to establish the constitutionality of the program – secular purpose and formal neutrality do all the work.

Nevertheless, a glimpse at the underlying commitments of the *Zelman* majority can be discerned from the Court’s treatment of the precedents for its “principle of private choice.” In its discussion of *Mueller*, the Court says that private choice “ensure[s] that ‘no imprimatur of state approval’ can be deemed to have been conferred on any particular religion, or on religion generally.”⁷³ Summarizing *Mueller*, *Witters*, and *Zobrest*, the Court contends that in a program of indirect aid, “The incidental advancement of a religious mission, or the perceived endorsement

⁷² Laura Underkuffler, *The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 *Indiana L.J.* 167, 187-90 (2000).

⁷³ *Zelman*, 4686 (quoting *Mueller*, 399 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981))).

of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.”⁷⁴ The “reasonable observer” sees the state provide benefits to a broad class of individuals, and then sees the beneficiaries use the state’s funds to receive services from a range of providers, both religious and nonreligious. For the reasonable observer, according to the majority’s analysis, the state’s attitude toward payments to religious providers is one of benign indifference, not endorsement.

The Court’s focus on endorsement – a concept far better suited to analysis of cases involving religious expression by the government – can be attributed at least in part to the attention the parties in *Zelman* gave to the concept. Both sides perceived that Justice O’Connor represented the swing vote, and she has long been associated with the endorsement test.⁷⁵ Chief Justice Rehnquist, however, reframed the endorsement analysis, and thus the significance of private choice, to match the plurality’s reasoning in *Mitchell v. Helms*. In *Mitchell*, the plurality collapsed *Lemon*’s effects test into the single criterion of neutrality.

If the religious, irreligious, and a religious are all alike eligible for government aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government is not itself thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all

⁷⁴Id. at 4687.

⁷⁵ See TAN xx supra. Add cites to *Zelman* briefs; see also David Cole, Faith and Funding: Toward an Expressivist Model of the Establishment Clause, 75 S. Cal. L. Rev. 559 (2002)(arguing that endorsement analysis should follow from speech cases to funding cases). In our judgment, *Zelman* represents the stillbirth of Cole’s argument; if reasonable observers will always be deemed to know that the state is supporting religious and secular organizations evenhandedly, they will never perceive state endorsement of religion.

who adequately furthered that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.⁷⁶

Thus, for the *Mitchell* plurality – four of the five Justices in the *Zelman* majority – the Establishment Clause is offended when the government acts with the intent to advance some or all religions, or would be perceived by a reasonable observer to have acted with that intent. Absent such a finding of intent to advance religion over its secular counterpart, the state should not be deemed responsible for any religious indoctrination that accompanies state-financed services provided by religious entities.

This emphasis on neutrality and intentionality, rather than on the foreseeable effects of the voucher program in steering some families in the direction of religious education, is most visible in the Court’s attempt to distinguish the holding of *Committee for Public Ed. & Religious Liberty v. Nyquist*. The Court referred to the “ostensibly secular purposes” offered to support the program of tuition grants and tax credits,⁷⁷ and focused on the underlying legislative motive for enacting the program, which was determined to be the “increasingly grave fiscal problems” facing private religious schools.⁷⁸ This impermissible motive was manifest in the “package of benefits” given “exclusively to private schools and the parents of private school enrollees.”⁷⁹ In contrast, the Cleveland voucher plan had emerged from a long – and religion-neutral – history of

⁷⁶*Mitchell v. Helms*, 120 S.Ct. 2530, 2541. Note Justice O’Connor’s sharp critique of this account of neutrality, *Mitchell*, 120 S.Ct. at 2556-57, O’Connor, J., concurring in the judgment).

⁷⁷ *Zelman* slip op. at 19.

⁷⁸ *Id.* (quoting *Nyquist*, 413 U.S. 756, 795 (1973)).

⁷⁹ *Id.*

public school failure and the state’s enactment of a wide array of programs designed to address that failure. The “history and context” of the Ohio Scholarship Program, of which the reasonable observer is necessarily aware, should convince anyone that the government acted with religion-neutral intent.⁸⁰

By collapsing the Establishment Clause inquiry into whether or not the government acted, or was reasonably perceived to have acted, with religion-neutral intent, the Court (or more properly, the *Mitchell* plurality) has in fact limited considerably the independent significance of “genuine choice.” The first two criteria of the *Lemon* effects test – religion-neutral classification of providers and beneficiaries, broad distribution of benefits – provide the necessary scrutiny of the government’s *bona fides*. Any program that meets those two requirements will likely be perceived as religion-neutral in its intent.⁸¹ The beneficiary’s private choice simply reconfirms what was already established, i.e., that the government should not be imputed responsibility for religious indoctrination the beneficiary receives with the voucher financing.

This theoretical foundation for the Court’s opinion faces one inescapable problem: Justice O’Connor, in her concurring opinion in *Mitchell*, specifically rejected the plurality’s attempt to reduce Establishment Clause analysis to the neutral-intent inquiry.⁸² Because the intervening private choice was decisive for Justice O’Connor, and the majority needed her to join in order to maintain a unified Court opinion, the Chief Justice needed to highlight the importance of private

⁸⁰ Id. at 4688 (citing *Good News Club v Milford Central School*, 533 U.S. 98, 119 (2001)).

⁸¹ Indeed, the plurality in *Mitchell* found that the program at issue in that case reflected “independent private choice.” *Mitchell*, 120 S.Ct. at 2544-47.

⁸² *Mitchell*, 120 S.Ct. 2530, 2556-60 (O’Connor, J., concurring).

choice. The compromise obviously left Chief Justice Rehnquist in a difficult position. To articulate an Establishment Clause theory that really turned on “genuine and independent choice,” he would need to limit significantly the neutral-intent analysis advanced in *Mitchell*, and perhaps risk losing the votes of other members of the majority. If he ignored or downplayed the criteria of private choice, the Chief Justice would risk losing Justice O’Connor from the majority. The resulting majority opinion demonstrates the Chief Justice’s balancing act: The concept of “[g]enuine and independent choice” takes center stage, but in no way limits the *Mitchell* plurality’s approach to the Establishment Clause. In cases of direct funding, just as in arrangements involving private choice, these four Justices will remain willing to uphold aid programs so long as government does not intend to prefer religious institutions to nonreligious institutions.

2. Justice O’Connor’s concurrence.

From the time the Court granted *certiorari* in *Zelman*, observers generally agreed that Justice O’Connor’s vote would be decisive in the case.⁸³ Parties and amici wrote briefs designed to attract her attention, typically focusing their arguments on the endorsement test that O’Connor first articulated, and to which she frequently returns in Establishment Clause cases.⁸⁴ Once the case was handed down, most commentators focused not on what O’Connor said, but what she didn’t say or do. Unlike in *Mitchell*, O’Connor’s concurrence in *Zelman* seems to

⁸³News accounts, pre-*Zelman*, about the crucial character of O’Connor’s vote (National Law Journal, NY Times, Wash Post).

⁸⁴ Petitioner’s Brief; see *Lynch v. Donnelly*, 465 U.S. 668, xxx (1984) (O’Connor, J., concurring, and introducing endorsement test into the law of the Establishment Clause); *Agostini v. Felton*, 521 U.S. 203 (1997).

impose no constraints on the Court’s decision.⁸⁵ A closer reading, however, reveals subtle differences between her concurrence and the majority opinion, differences that could prove significant for the future of indirect aid cases.

Justice O’Connor’s opinion starts with a curious and wide-ranging survey of government programs that provide indirect, unrestricted support for religious institutions.⁸⁶ Her ostensible purpose for this inquiry is to show that “the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs.”⁸⁷ The effect of this long catalogue is even broader; it shows that the dissenters’ account of no-aid separationism was always a chimera in practice, and is now a dinosaur in theory.

The second and third parts of her opinion prove to be the more significant. At first glance, Justice O’Connor seems to have simply restated the Court’s analysis. She emphasized *Zelman*’s continuity with earlier Establishment Clause decisions; the significance of “genuine and independent choice”;⁸⁸ the need to consider “all the choices available to potential beneficiaries”;⁸⁹ and the evidentiary burden placed on those who would challenge a voucher program to show lack of “genuine choice.”⁹⁰ In several important respects, however, Justice O’Connor’s restatement of the Court’s analysis reveals important differences between her

⁸⁵ News commentary, including our own piece in *The Legal Times*.

⁸⁶ *Zelman*, slip opinion at ** (O’Connor, J., concurring)

⁸⁷ *Id.* at xx.

⁸⁸ *Id.* at xx.

⁸⁹ *Id.* at xx.

⁹⁰ *Id.* at xx.

understanding of the Establishment Clause and that shared by the other four members of the *Zelman* majority.

The first such difference emerges in her response to Justice Souter’s claim that the Ohio Scholarship program failed to provide Cleveland parents with “reasonable secular alternatives.” Justice O’Connor replied: “For nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of parents.”⁹¹ The test seems hopelessly superficial. No one claimed that nonreligious schools “need .. to be superior to religious schools in very respect”; and the consumer choice model of reasonable alternatives appears to be no more than a truism – because parents send their children to a school, they must find it a reasonable alternative. In her discussion of the test, however, Justice O’Connor demonstrated her distance from the Court’s formality. Where the Court met the dissents’ objections by reciting case law and the structure of Ohio’s programs, Justice O’Connor shifted attention to the parents of Cleveland schoolchildren and their experience of school choice. Against Justice Souter’s claim that few of the community schools should count as “reasonable alternatives” because of low test scores, Justice O’Connor pointed to the high levels of parental satisfaction at those schools, the possibility that parents may be attracted not just by test scores but by discipline and safety for their children, and the fact that the community schools in question served among the “poorest and most educationally disadvantaged students.”⁹²

The shift in focus is also evident as Justice O’Connor turned to the majority’s placement

⁹¹Id. at xx.

⁹²Id. at xx (citing J. Greene, et. al., *Lessons from the Cleveland Scholarship Program*).

of the evidentiary burden and explained how the presumption of genuine choice can be overcome. “[T]here is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program, let alone a community or magnet school.”⁹³ Contrast this statement of the burden of persuasion with that of the Court. The Court found that the challengers provided “no evidence that the State deliberately skewed incentives toward religious schools.”⁹⁴ The *Zelman* majority would seem to find a violation only on proof that the state *intended* to steer children into religious education, but Justice O’Connor measured the effect of the program on Cleveland parents and schoolchildren, and asked whether secular options were in fact open or closed to voucher recipients.

An even more subtle distinction further demonstrates Justice O’Connor’s divergence from the other members of the *Zelman* majority. Restating the Court’s test for “genuine and independent choice,” Justice O’Connor said that the criteria “requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries.”⁹⁵ Most of the statement parallels the Court’s mantra of “true private choice,” except for the specification that the aid must flow “through the hands of beneficiaries.” Though unimportant for the decision in *Zelman* – because the tuition vouchers were made payable to parents, who then endorsed the checks over to the schools – this distinction was part of what separated Justice O’Connor from the plurality in *Mitchell*. The plurality identified the program at issue in *Mitchell* as one of ‘virtual’ private choice because schools received the

⁹³Id. at xx.

⁹⁴Id. at xx.

⁹⁵Id. at xx.

government support on a per capita basis -- the amount of government aid was determined by the number of students enrolled at each school.

Justice O'Connor, however, drew a sharp distinction between the "true private choice" programs at issue in *Witters* and *Zobrest*, and the per capita aid program considered in *Mitchell*.⁹⁶ In *Mitchell*, Justice O'Connor offered three justifications for her refusal to equate per capita aid programs with those involving "true private choice." First, she claimed that per capita aid programs are more likely to be perceived as governmental "endorsements" of the institutions receiving aid. The claim, however, proves nothing more than an assertion: "The [per capita] aid formula does not – and could not – indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school."⁹⁷ The statement reveals more about the elasticity of the endorsement test than it does about the program in question. Why would a reasonable observer not perceive that the state's aid is wholly dependent on actual student enrollment in the school, and thus is disconnected from any independent (and presumably illegitimate) intention of the state to finance the school?

Second, Justice O'Connor argued that collapsing private choice and per capita aid programs -- especially those involving cash transfers -- leads to a slippery slope, potentially ending in "direct money payments to religious organizations (including churches) based on the number of persons belonging to each organization."⁹⁸ Although the *Mitchell* plurality's analysis

⁹⁶*Mitchell*, 120 S.Ct. at 2559 (O'Connor, J., concurring in the judgment). For a recent attempt to grapple with the distinction between per capita and beneficiary choice programs, see *Prince v. Jacoby*, 2002 U.S. App. LEXIS 18450 (9th Cir.).

⁹⁷*Id.* at 2559.

⁹⁸*Id.* at 2560.

could be construed to justify such grants to religious organizations, it is hard to see how the distinction between “true” and “virtual” private choice programs is material to this slippery slope. What difference would it make if government aid for religious organizations was distributed in the form of vouchers paid to individuals, who could then redeem the vouchers at the religious institution of their choice? Whether it used “true” or “virtual” private choice, the government would still need to establish a legitimate secular purpose for the aid, and show that the aid was distributed through religion-neutral categories. The fact that aid passed “through the hands of beneficiaries” seems hardly relevant to whether the state could finance the specifically religious activities of religious organizations.

The only plausible justification is found in Justice O’Connor’s third ground for distinguishing per capita aid from private choice programs.

[W]hen the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student’s private decision.

Control is demonstrated by the beneficiary’s freedom to attend the school and yet refuse the state’s payment for her education; per capita aid programs deprive the beneficiary of that control. Justice O’Connor’s emphasis on the beneficiary’s power to refuse the transfer of government funds to a chosen service provider can be traced back to an analogy first introduced in *Witters*. Writing for the Court, Justice Marshall said “a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to

dispose of his salary.”⁹⁹ The paradigmatic case of the donated paycheck offers several important features. The government transfers ownership of the money to the beneficiary, and retains only those controls over its use that apply to anyone’s use of money – e.g., criminal prohibitions on the purchase of illegal drugs. The transfer is made in cash, leaving the beneficiary with a virtually unlimited realm of options for spending or saving the money. In short, the government employee enjoys control over the money and its disposition, and it is this experience of control that Justice O’Connor’s analysis tries to capture.

The emphasis on the beneficiary’s experience of control relates directly to the other points at which Justice O’Connor diverged from the Court’s opinion in *Zelman*. At nearly every important point in the Court’s analysis – from the definition of the standard for “genuine choice” to the tests for “reasonable secular alternatives” and the evidentiary burden on challengers – Justice O’Connor directs attention to the actual experiences of parents in the Cleveland voucher program, while the Court maintains a detached and formalist focus on the structure of the state’s program. For Justice O’Connor, a program of “genuine and independent private choice” depends on the experienced and practical – not hypothetical – freedom of beneficiaries to select between religious and nonreligious providers. Such freedom ensures that beneficiaries have not been intentionally directed by the state into religious education, which is the primary concern in the Court’s analysis, and it guarantees as well that they have not been channeled into religious education because of administrative indifference, or because of a set of options which precludes a realistic choice of a secular provider.

⁹⁹Witters, 474 U.S. at 486-87 (cited and discussed in Mitchell, 120 S.Ct. at 2558 (O’Connor, J., concurring in the judgment)) (interestingly, the analogy comes in a portion of *Witters* that O’Connor did not join).

This interpretation of the contrast between the Court’s decision and Justice O’Connor’s concurrence leads us to conclude that Justice O’Connor is the only member of the Court who thinks that “genuine and independent choice” has determinative constitutional significance. The four dissenting Justices largely reject the concept of recipient choice, believing it to be a matter of form and not substance, and continue to assert “no-aid Separationism.” The four members of the *Mitchell* plurality subsume beneficiary choice under the general idea of religion-neutrality; for these Justices, beneficiary choice provides evidence of the government’s proper intention, but has no independent significance. Nevertheless, the *Zelman* decision has enshrined the concept of “true private choice” in the law of the Establishment Clause, though neither the Court’s opinion nor Justice O’Connor’s provides adequate justification for the concept.¹⁰⁰

We think that Justice O’Connor’s concern for the beneficiary’s experience of choice represents the correct focus for constitutional analysis of voucher programs, and provides a key to the principled justification of beneficiary choice. Her demand that aid must pass “through the hands of beneficiaries,” however, proves to be an awkward proxy for advancing that concern. A sounder approach to addressing that concern requires that we step back and examine the core vices with which the Establishment Clause is concerned.

Some ground-clearing is needed before we turn to those vices. The Establishment Clause does not protect against violations of taxpayer conscience caused by government support for religious institutions. Justice O’Connor’s long catalogue of government support for religion

¹⁰⁰With respect to the majority’s opinion, the failure to justify the centrality of beneficiary choice is easy to explain. As we discuss above, Chief Justice Rehnquist likely used the phrase to ensure a majority decision, but had no incentive to develop the concept in any way that would limit the “absolute neutrality” of the plurality opinion in *Mitchell*.

makes clear the extent to which such support is a normal part of contemporary and historical practice. In addition, there is no principled reason why the consciences of taxpayers with respect to religious matters should enjoy constitutional preference over the consciences of taxpayers with respect to nonreligious matters, such as support for weapons, sex education, or art. Nor does the Establishment Clause protect religious institutions from becoming slothful through dependence on government support. Why should the indolence or energy of religious institutions be a legitimate matter for government concern – or, at least, any more a matter of concern than the indolence of nonreligious voluntary associations? Nor does the Establishment Clause primarily act as a safeguard against religious strife. Despite the extensive pattern of support documented by Justice O’Connor, such strife has not been a significant part of our history, and certainly has been overshadowed by other sources of conflict.

The Establishment Clause, however, does guard against a core vice – the government’s assertion of control over, or competence in, matters of religion. Cases involving government-sponsored religious speech or expression provide clear examples of this vice, and the Court has continued to hold unconstitutional such acts of speech or expression.¹⁰¹ Direct financing of religious activity also represents a clear example of the vice, partly because of the government’s advancement of religious ends, and partly because of the government control that inevitably accompanies such financing.¹⁰²

¹⁰¹ See *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Ind. Sch. Dist v. Doe*, 530 U.S. 290 (2000).

¹⁰² For further discussion of this point in the context of historic preservation, see Ira C. Lupu and Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. Rev. ____ (forthcoming, 2002)..

Moreover, the Establishment Clause’s concern extends beyond the government’s direct and intentional engagement in religious activities. Since *Abington School District v. Schempp*,¹⁰³ a case involving Bible reading in public schools, the Court has asked whether a challenged program had the “primary effect”¹⁰⁴ of advancing or inhibiting religion, not just whether government intended to advance or inhibit religion. The question of forbidden effects has remained at the forefront of Establishment Clause jurisprudence ever since the *Schempp* case, and the *Zelman* Court acknowledges the centrality of this concern, even as it focuses almost exclusively on the neutrality of Ohio’s intent in structuring the voucher program.¹⁰⁵ At its most basic, the analysis of primary effects measures the “obvious and foreseeable religious consequences of state policy,” and in particular “the effects on the targets or recipients” of government programs or actions.¹⁰⁶ Seen in this light, judicial examination of effects proceeds from a rather ordinary legal principle: one can be held responsible for certain foreseeable consequences of one’s actions, whether or not the consequences were intended.¹⁰⁷ The chief difficulty lies in determining the circumstances under which one should be held responsible.

¹⁰³374 U.S. 203 (1963).

¹⁰⁴*Id.* at 222.

¹⁰⁵For a more sustained analysis of the “primary effects” test, see Ira C. Lupu and Robert W. Tuttle, *Sites of Redemption*, at **-**.

¹⁰⁶*Id.* at **.

¹⁰⁷This concern about the state’s responsibility for unintended but foreseeable consequences of its actions is already a part of Establishment Clause law. See *Agostini v. Felton*, 521 U.S. 203, 2** (1997) (asserting that, in Establishment Clause cases, courts must decide whether government is responsible for religious indoctrination). For elaboration on this theme, see Lupu & Tuttle, *Sites of Redemption*, at **-**.

Justice O'Connor's analysis in *Zelman* shows some degree of awareness of the unintended but foreseeable consequences of the Ohio Scholarship program. Her attention to the actual experiences of parents and schoolchildren under the program demonstrates a concern that children enrolled in religious schools are there because of the "genuine and independent choices" of their parents, not because of pressures for which the state should be held responsible. Justice O'Connor's focus on whether or not the money passes through the beneficiary's hands, however, offers little protection for her chief concern. It would be easy to design a program that used the same financing mechanism as Cleveland's – that is, the check goes first to the parent and is then endorsed over to the school – but offered fewer and less attractive secular alternatives. The financing mechanism alone might turn out to be nothing other than what the dissent believes it to be, pure form without substance. We believe that Justice O'Connor's concerns would have been better served if she had articulated them more directly, and adopted a test that measured whether or not the state was, in fact, exerting practical pressures on Cleveland parents to send their children to religious schools.

In an earlier article, we suggested just such a test, one that focused on the extent to which the state steered families toward religious experience, and the extent to which the state made efforts to ameliorate pressures in that direction. Rather than focus on the actual mix of religious and secular schools, which initially would be heavily influenced by the pre-existing demographics of private education, we urged that courts impose an affirmative duty on the state to take steps to improve the mix.¹⁰⁸ In particular, we suggested that the Ohio voucher program

¹⁰⁸In our analysis, the precise nature of the state's affirmative duty would vary relative to the extent to which beneficiaries were required to avail themselves of a particular service (e.g., compulsory school attendance laws for minors or court-mandated substance abuse treatment) and

could have required suburban public school systems to admit voucher students, mandated that participating religious schools permit voucher students to opt out of worship and religious education classes, and increased the voucher amount to attract additional private schools into the program – measures successfully used in other voucher jurisdictions.¹⁰⁹ We do not claim that our approach is the only one responsive to these concerns. Justice O’Connor’s opinion would have been much stronger, however, had she made such concerns explicit.

3. Justice Thomas’s concurrence.

Like Justice O’Connor, Justice Thomas joined the Court opinion but wrote separately and alone as well. His concurrence highlights two major themes. First, he began and ended by emphasizing the connection between *Brown v. Board*¹¹⁰ and *Zelman*.¹¹¹ *Brown* had promised equal educational opportunity for racial minority children in America, but the ghettoization of many of these children in large urban centers where public schools have deteriorated has undermined this promise.¹¹² Justice Thomas reminded us quite eloquently of the ways in which school voucher plans might help redeem the commitments made fifty years ago in *Brown*.

Second, Justice Thomas provocatively suggested that the Court’s decision in *Everson v.*

the extent to which the service was intended to comprehensively transform the beneficiary. See Lupu & Tuttle, *Sites of Redemption*, **.**.

¹⁰⁹The Milwaukee voucher program represents the best example of such measures. CITE

¹¹⁰ 347 U.S. 483 (1954).

¹¹¹ Thomas concurrence in *Zelman*, slip op. at 1-2, 7-9.

¹¹² Ryan & Heise; others

Board of Education,¹¹³ which declared the Establishment Clause applicable to the states, should be reconsidered. Justice Black’s opinion in for the Court in *Everson* had announced this proposition without any careful inquiry,¹¹⁴ and none of the other Justices writing in *Everson* had challenged him. Ever since, the Supreme Court has treated the question as entirely settled.¹¹⁵ Several commentators have strenuously questioned this conclusion as a historical and textual matter,¹¹⁶ however, and Justice Thomas – consistent with his willingness to re-examine first principles¹¹⁷ – urged that the Court limit its intervention into religious liberty issues arising under state law to those properly cognizable under the Free Exercise Clause.¹¹⁸

This is not the place for us to confront head-on this challenge to a half-century’s

¹¹³ 330 U.S. 1 (1947).

¹¹⁴ To be fair to Justice Black, we note here that the defendants in *Everson* did not question the proposition that the states and localities were bound by principles of church-state separation. Philip Hamburger, *The Separation of Church and State* 459 (Harvard 2002). Professor Hamburger argues, however, that Justice Black would have been deeply unreceptive to such arguments, see *id.* at 454-63. And, of course, Justice Black had always maintained that the entire Bill of Rights applied to the states by virtue of incorporation into the 14th Amendment. See *Adamson v. California*, 332 U.S. 46, xx (1947) (Black, J., dissenting).

¹¹⁵ See Stevens opinion (*Wallace v. Jaffree?*) slamming Judge Brevard Hand for ruling that EC doesn’t bind states.

¹¹⁶ In his concurrence, Justice Thomas cited Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 *DePaul L. Rev.* 1191 (1990), and Akhil Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131 (1991). See also Snee

¹¹⁷ See, e.g., *Saenz v. Roe*, 526 U.S. 489, xxx (1999) (Thomas, J., concurring, and urging a reevaluation of “what the Framers of the Fourteenth Amendment thought that it meant.”); *United States v. Lopez*, 514 U.S. 549, xxx (1995) (Thomas, J., concurring, and urging construction of a Commerce Clause standard “that reflects the text and history of the . . . Clause . . .”).

¹¹⁸ Thomas concurrence, slip op. at 5, & n.4.

understanding of the place of the Establishment Clause in American constitutional law.¹¹⁹ We note, however, that Justice Thomas’s suggestion that states be left free to work out their own church-state policy interacts in significant ways with the role of state constitutional law in post-*Zelman* litigation. Justice Thomas hints that free exercise values, but not pure non-Establishment values, indeed limit the states, and the scope and content of that distinction may turn out to be of considerable significance. We will take up that discussion in further detail in Part IIA, below.

4. The dissents.

a) Justice Souter. Justice Souter has for years been the Court’s most active Separationist,¹²⁰ and his *Zelman* opinion is consistent with that reputation. The longest of all the *Zelman* opinions,¹²¹ it begins with a dramatic assertion that *Zelman* has effectively dismantled *Everson*,¹²² the Court’s germinal Establishment Clause decision, and then proceeds in three sections. Part I traces and attempts to synthesize all of the Court’s decisions about aid to

¹¹⁹ Whatever the text and original history reveals, equal protection and free exercise concerns all buttress the application of Establishment Clause values to the states. See Lash in Northwestern; Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. Pa. L. Rev. 555 (1991).

¹²⁰ See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 5xx (1993) (Souter, J. Concurring, and urging overruling of *Emp. Div. v. Smith*); *Mitchell v. Helms*, 530 U.S. 793, xxx (2000) (Souter, J., dissenting); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, xxx (1995) (Souter, J., dissenting); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, xxx (1993) (Souter, J. dissenting).

¹²¹ Justice Souter’s dissent is 34 pages in the slip opinions, compared to 21 for the Court, 15 for Justice O’Connor, 10 for Justice Thomas, 13 for Justice Breyer, and 3 for Justice Stevens.

¹²² *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). In a 5-4 decision, *Everson* upheld a program of subsidy for transporting children to religious and public schools, but all nine Justices proclaimed a strong Separationist position on aid to sectarian schools.

religious entities since *Everson*.¹²³ Justice Souter concludes from this review that the *Zelman* opinion marks the first time that the Court has ever 1) deemed irrelevant “the substantiality of the aid,”¹²⁴ or 2) “held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools.”¹²⁵ Part II argues that the Cleveland voucher program does not satisfy the Court’s own criteria of neutrality and private choice,¹²⁶ because, in Justice Souter’s view, the relevant baseline for measuring both neutrality and private choice is the set of participating private schools, most of which are religious, rather than the broader universe of all educational options open to Cleveland parents. Finally, Part III argues that even if the program were neutral and rested on independent private choice, it would still represent substantial aid to the religious teaching function of sectarian schools and therefore violate the Establishment Clause.¹²⁷ Here, Justice Souter emphasizes the threat that government largesse of any kind may present to the independence of a school’s religious mission,¹²⁸ and the hazards of political divisiveness on sectarian lines.¹²⁹

The most complimentary thing we can say about Justice Souter is that he is true to his longstanding convictions. Those convictions, however, stand in need of normative defense. Only

¹²³ Souter dissent, slip op. at 3-11.

¹²⁴ Id. at 11.

¹²⁵ Id.

¹²⁶ Id. at 11-24.

¹²⁷ Id. at 24-34.

¹²⁸ Id. at 28-32.

¹²⁹ Id. at 32-34. These are elaborated in more detail by Justice Breyer. See TAN xx, *infra*.

if the reasons for barring the state from aiding religious instruction are persuasive, and only if those reasons apply to a private choice program, is Justice Souter’s position fully defensible. Had the Ohio program involved direct aid to religious schools, without any requirement that public funds be spent only on secular instruction, we would find a number of Justice Souter’s arguments quite appealing. The key question presented by *Zelman*, however, is whether a regime of private choice should alter the constitutional calculus.¹³⁰ In Part III, Justice Souter rejects the idea that private choice, however structured or facilitated, can save the Cleveland program; indeed, at the end of Part II, he concedes that a program of more substantial tuition grants, which would have widened choice, would only exacerbate the problem with which he is concerned – substantial state aid for the religious teaching function of sectarian schools.¹³¹

With respect to a direct aid program, the case for excluding state subsidy of religious instruction must be rethought. As we argue above in our discussion of Justice O’Connor’s opinion, the case does *not* rest on protecting the conscience of taxpayers, who may be frequently compelled to support views from which they dissent. Nor does the case rest on the need to ensure that religious institutions not become dependent on the state. In a complex and advanced society, such entities will inevitably be deeply dependent on government – for police and fire protection, for roads that will permit worshipers to attend prayer services, and for direct financial

¹³⁰ In *Sites of Redemption*, note xx *supra*, we argued that private choice indeed should rechannel constitutional thinking, but we analyzed the state’s role in structuring that choice far more demandingly than did the *Zelman* Court, *id.* at xx, and we concluded that the Cleveland program impermissibly steered Cleveland students into religious experience. *Id.* at xx. Among scholars, we are the only ones of which we are aware who defended a choice-focused paradigm but did not defend the constitutionality of the Cleveland voucher arrangements.

¹³¹ *Id.* at 23, n.16.

support of their charities that perform secularly valuable work,¹³² among other things.

The best argument for excluding the state from direct support of religious activity is the importance of keeping the government out of the realm of the ultimate. The state may of course adopt secular positions, and promote them, but it may not adopt an official view of religious truth.. Moreover, if the state pays directly for the transmission of religious ideals for instrumental reasons of shaping them – say, to encourage a certain view of public morality – it will have incentives to be selective in the faiths it supports and to exercise control over such teaching. This will put the state in the constitutionally impermissible position of choosing and authoring religious faith. Our constitutional exclusion of the state from religious establishment, and free exercise prohibition, is designed to limit the state to a secular jurisdiction, and to keep the experience of faith in wholly private hands. At bottom, this arrangement is profoundly anti-totalitarian; it reminds state officials as well as the citizenry that the state is temporal and limited, and should not use faith “as an instrument of civil policy.”¹³³

Whether this particular justification – to us, the only persuasive one – can be extended to “private choice” arrangements is the very question put to the Court by the problem in *Zelman*. Justice Souter, and the dissenters who join him, seem to us mired in now-antiquated and unpersuasive theories of church-state separation.¹³⁴ As a result, they were simply unwilling to

¹³² O’Connor concurrence at xxx.

¹³³ James Madison, Memorial and Remonstrance Against Religious Assessments, in James Madison, Writings 29 (Jack N. Rakove ed., 1999). For elaboration of this point, see Vincent Blasi, School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance, 87 *Corn. L. Rev.* 783 (2002).

¹³⁴ Arguments that seemed sufficient to a generation of Justices determined to keep Catholic schools from attracting a share of public largesse will not seem persuasive to the next

confront the premises that led Justice O'Connor – alone among the Justices, thus far, and unable to articulate fully a normative explanation of her view – to distinguish sharply in her jurisprudence of nonestablishment between direct and indirect aid.

Unable to answer Justice O'Connor and the remainder of the majority on its terms, the dissenters were content to parrot the arguments of voucher challengers on the nonneutrality of the Cleveland program. Had the dissenters been willing to take the Court's own premises at face value – in particular, the argument that the public schooling options had to count in any appraisal of whether the state was responsible for religious indoctrination of voucher students – they might have had a chance of persuading Justice O'Connor, the crucial fifth vote, to their side. Instead, their approach, like that of the challengers, doomed their project to failure – and, we expect, ultimate disappearance from the constitutional canon – from the start.

b) Justice Breyer.¹³⁵ Justice Souter's dissent mentioned one additional major argument from Separationism's heyday – that substantial state assistance to religious schools would lead to social and political strife. It remained, however, to Justice Breyer to elaborate on this argument in ways that have not been seen in thirty years.

The argument that state aid to religious schools would foment political strife along sectarian lines had very brief prominence in the decisional law dealing with state aid to religious

generation of American citizens. See generally Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 *Notre Dame J. of Law, Ethics, & Public Policy* 375 (1999).

¹³⁵ We do not give offer any separate discussion of Justice Stevens' dissent, which he wrote for himself only. Suffice it to say that Justice Stevens continued his long and unbroken record of opposing the cause of religion no matter what the issues presented. For further discussion of Stevens' record in this regard, see Lupu & Tuttle, *Distinctive Place*, note xx *supra*, at 48, n. 48.

entities. In *Lemon v. Kurtzman*¹³⁶ and, again, two years later in *Committee for Public Education v. Nyquist*,¹³⁷ Supreme Court majorities relied on this as one of the arguments against the constitutionality of programs that tended heavily to aid Catholic schools. With an eye on contemporary Northern Ireland, and on European and American history of Protestant-Catholic conflict, the Court in both cases cited the potential for such conflict as a reason to disfavor programs calling for annual appropriations to a large group of private schools, most of which were Catholic.

Except for cases involving government religious speech, however, this theme has been heavily criticized and submerged for the past thirty years of constitutional adjudication. The reasons for this submergence are not difficult to discern. *Roe v. Wade*¹³⁸ – decided in the same Term as *Nyquist* – quickly prompted the Justices to realize that a great many political issues, not limited to aid to sectarian schools, might foment division on sectarian lines. This sort of division also appears with respect to government policy on sexuality, reproduction, welfare, capital punishment, and war, to mention but a few. A doctrine that impeded the enactment of policy because of sectarian disagreement had no logical stopping place, and would effectively disable government from responding to matters of great public importance.

The one context in which the concern for divisiveness has kept a small toehold is that of government speech on religious issues. If, for example, public schools sponsor worship services of any kind, there will have to be some political process to determine their content. Inevitably,

¹³⁶ 403 U.S. 602 (1971).

¹³⁷ 413 U.S. 756 (1973).

¹³⁸ 410 U.S. 113 (1973).

such processes, whether they be matters of administration for elected school boards,¹³⁹ or discretionary decisions by school administrators,¹⁴⁰ or policy determinations officially delegated to students,¹⁴¹ will result in worship choices made by some and imposed coercively on others. In these circumstances, the prospect of political fights over the content of prayer echoes historical concerns over state selection of articles of worship,¹⁴² although here, as was true in the 18th century, the process concern is parasitic on the substantive worry about coercing religious expression.

Whatever the contemporary persuasiveness of these arguments in the context of government speech, however, they do not carry over well to the context of government transfers to religious entities. The concept of neutrality, as *Zelman* advances it, is the key to this distinction. Government cannot possibly be evenhanded among prayers or religious observances; there is never time enough to worship in all possible ways, and it is impossible to imagine public schools in today's United States sponsoring daily prayers to Allah, or arranging cafeteria protocols to fit the laws of Kashrut. By contrast, school voucher plans must be neutral among faiths; Jewish, Buddhist, Muslim, Christian, and Secular Humanist schools – to name only a few – must be offered equal opportunity to participate in voucher programs.

Justice Breyer's dissent shows deep insensitivity to the history, limits, and failings of the concern for "political divisiveness." He recites a history of Protestant-Catholic tension in the

¹³⁹ See *Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁴⁰ See *Santa Fe Ind. Sch. Dist v. Doe*, 530 U.S. 290 (2000).

¹⁴¹ *Id.*

¹⁴² Curry, Buckley, Levy, and other church-state historians of colonial period

U.S. that, if anything, should embarrass a Court that spawned the regime of no-aid Separationism out of deeply anti-Catholic premises.¹⁴³ He worries about attempts to suppress Islamic teaching or other unpopular views in voucher schools, apparently without realizing the extent to which this echoes 19th and 20th century concerns about public subsidy for Catholic schools teaching their students that Protestants were damned. He asserts paternalistic concerns about faiths unable or unwilling to mount schools of their own, and faiths likely to be the object of interference of public authorities.

This horrible and speculative parade, once the staple of church-state opinions, now seems hopelessly overbroad and rather out of touch with American political and cultural realities. If state interference with religious teaching in fact accompanies voucher programs, we think the Constitution is adequate to the task of blocking that interference.¹⁴⁴ Despite the three votes it got in *Zelman*, we think the prophylactic exclusion of religious entities from government support that Justice Breyer's dissent would require is a relic of a happily lost constitutional world. Indeed, we think Justice Breyer's view is cause, not cure, of social strife. The religious wars in the United States in the early 21st century are not Protestant vs. Catholic, or Christian vs. Jew, or even the more plausible Islam vs. all others. They are instead the wars of the deeply religious against the forces of a relentlessly secular commercial culture.¹⁴⁵ A doctrine that would permit the state to support secular schools only, public or private, is likely to aggravate precisely the sort of conflict with which Justice Breyer, and those who joined him, purport to be concerned.

¹⁴³ Hamburger, which Breyer cites, perhaps unfamiliar with its focus

¹⁴⁴ See Part IIB, *infra*.

¹⁴⁵ See James D. Hunter, *Culture Wars*

II. The Legal Horizon for Voucher Financing of Religious Providers

Unlike those landmark court decisions which terminate a government practice – *de jure* racial segregation, or the criminalization of abortion, for example – *Zelman* is merely permissive. It removes rather than creates a constitutional impediment to state policy. As such, its significance in American life will turn very heavily on the political energies and legal phenomena which emerge in its wake.

Others have analyzed in considerable detail the strong and determined forces that contend over the future of American education, on issues of vouchers and otherwise.¹⁴⁶ These forces include, on the anti-voucher side, suburbanites determined to insulate their public school systems from poorer urbanites;¹⁴⁷ public school teacher unions;¹⁴⁸ secular liberals committed to preserving the identity-shaping mission of the common school;¹⁴⁹ and others who fear that voucher programs will drain resources from public schools. These groups are opposed by a

¹⁴⁶ In a very important recent commentary, Jim Ryan and Michael Heise have analyzed these forces across the range of issues concerning school choice. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *Yale Law Journal* 2043 (2002). See also Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* (Beacon Press 2002).

¹⁴⁷ *Id.* at xx-xx.

¹⁴⁸ *Id.* at xx. These unions financed the anti-voucher litigation in *Zelman*, and shaped the way in which the litigation proceeded. They were central actors in the litigation over the Milwaukee voucher program, upheld in *Jackson v. Benson*, 578 N.W. 2d 602 (Wis. 1998), cert. denied, 525 U.S. 997 (1998), and are also involved in the current court challenge to the Florida voucher program. See text at notes xx-xx *infra*.

¹⁴⁹ See, e.g., literature from People for the American Way. Some opponents of voucher plans that include private school are strenuous advocates of choice among public schools. See, e.g., Richard Kahlenberg, *All Together Now: Creating Middle Class Schools Through Public School Choice* (2001).

coalition of urban parents, primarily African-American,¹⁵⁰ who seek better options for their children; ideological compatriots of Milton Friedman, the economist who originated the idea of education vouchers as a way of stimulating competition among schools;¹⁵¹ and those who see parental choice movements as the best way of promoting both fairness and educational opportunity to less affluent families.¹⁵²

¹⁵⁰ The most prominent supporter of school choice in the African-American community is the Black Alliance for Educational Options, whose website is at www.baeo.org.

¹⁵¹ See Milton Friedman, *Capitalism and Freedom* (University of Chicago, 1962). For other economic perspectives on vouchers, see David Bradford & Daniel N. Shaviro, *The Economics of Vouchers*, in C. Eugene Steurle, Van Doorn Ooms, George E. Peterson, & Robert D. Reischauer (eds), *Vouchers and the Provision of Public Services*, (Brookings, 2000) (hereafter, “Vouchers and the Provision of Public Services”).

¹⁵² John E. Coons & Stephen Sugarman, *Scholarships for Children* (1992); Joseph P. Vitteritti, *Choosing Equality* (1999). Others commentators focus on vouchers as a way of combatting the tendencies of entrenched government bureaucracies in the provision of service, see, e.g., John E. Chubb & Terry M. Moe, *Politics, Markets, and America’s Schools* (Brookings 1990). James Dwyer appears to have the most novel set of reasons for preferring a school voucher program; he would use such a program as a way of limiting the influence of traditional religious beliefs in the education of children. James Dwyer, *Vouchers Within Reason* (2002). Other useful legal sources on school vouchers include: Bolick, Clint, *Symposium: Solving the Education Crisis Through Parental Choice*, 11 *Stan. L. & Pol’y Rev.* 245 (2000); Brownstein, Alan, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 *Conn. L. Rev.* 871 (1999); Davidson, Brad J, *Comment: Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States’ School-Choice Legislation*, 33 *Tex. Tech. L. Rev.* 435 (2002); Neal Devins, *Social Meaning and School Vouchers*, 42 *Will. & Mary L. Rev.* 919 (2001); Foley, Edward B, *Symposium Essay: Judging Voucher Programs One at a Time*, 27 *U. Dayton L. Rev.* 1 (2001); Garnett, Nicole Stelle and Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 *Tex. Rev. Law & Pol.* 301 (2000); Garnett, Richard, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 *Cardozo L. Rev.* 1281 (March, 2002); Garvey, John H. *What Does the Constitution Say About Vouchers?* 44 *B.B.J.* 14 (2000); Green, Steven K. *Panel Three: The Constitutionality of Vouchers After Mitchell v. Helms*, 57 *N.Y.U. Ann. Surv. Am. L.* 57 (2000); Green, Steven K. *Private School Vouchers and the Confusion Over “Direct” Aid*, 10 *Geo. Mason U. Civ. Rts. L.J.* 47 (1999/2000); Greene, Abner S. *Why Vouchers are Unconstitutional and Why They’re Not*, 13 *N.D. J.L. Ethics & Pub. Pol’y* 397 (1999); Hamilton, Marci, *TITLE*, 31 *Conn. L. Rev.* *** (1999); Johnson, Steffen N. *A Civil Libertarian*

We cannot predict with any assurance the outcome of the political struggles that have already begun to develop in *Zelman*'s aftermath.¹⁵³ What we can say with confidence, however, is that *Zelman* has removed only one of the legal impediments to voucher programs, and that other barriers, including novel questions of state and federal law, remain. In this part, we undertake the project of identifying and analyzing the legal questions most likely to appear in *Zelman*'s wake. These include issues of state constitutional law, and its interaction with federal constitutional law; the scope and permissibility of conditions that states may impose on service providers in voucher programs, and the validity of exempting religious entities from such conditions; and the questions likely to be spawned when voucher financing is utilized by government to transfer resources to faith-intensive providers of services other than education.

A. State Constitutional Law and the Anti-Voucher Cause

To hear the anti-voucher litigators tell the story, they had all but given up on federal

Case for the Constitutionality of School Choice, 10 Geo. Mason U. Civ. Rts. L.J. 1 (1999/2000); Kemerer, Frank R. Reconsidering the Constitutionality of Vouchers, 30 J.L. & Educ. 435 (July, 2001); Macedo, Stephen. Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values, 75 Chi.-Kent L. Rev. 417 (2000); McConnell, Michael W. Government, Families, and Power: A Defense of Education Choice, 31 Conn. L. Rev. 847 (1999); Mincberg, Elliot M. Symposium Essay: School Vouchers: Bad for Our Children and Dangerous for Our Liberty, 27 Dayton L. Rev. 17 (2001); Robinson, Adele. Symposium: Risky Credit: Tuition Tax Credits and Issues of Accountability and Equity, 11 Stan. L. & Pol'y Rev. 253 (2000); Salamone, Rosemary C. Symposium: Panel One: Educational Vouchers: Legal and Policy Dimensions: Legal Dimensions of Education Vouchers, 75 St. John's L. Rev. 205 (2001); Stern, Mark D. Commentary: On School Vouchers and the Establishment Clause: School Vouchers – The Church-State Debate That Really Isn't, 31 Conn. L. Rev. 977 (1999).

¹⁵³ See, e.g., Terry M. Neal, School Vouchers— Where is the Constituency?, Washington Post, July 3, 2002; Voters Protective of Public Schools, Wary of Vouchers, Washington Post, June 28, 2002; Robert E. Pierre, Detroit Still Skeptical About School Vouchers And Who Really Profits; Despite Failing Classrooms, Voters Rejected Move, Washington Post, July 28, 2002, at A3.

constitutional law as their stopper even before the Court handed down the *Zelman* opinion.¹⁵⁴

Instead, their principal line of legal attack on educational voucher plans has shifted to reliance on a variety of state constitutional restrictions on material transfers to religious institutions. Indeed, in Florida, which has the only state-wide voucher program in the United States,¹⁵⁵ the challengers filed suit against the plan in state court and raised *only* state constitutional questions.

Florida's constitution indeed provides ammunition to the anti-voucher side, but, as will be elaborated below, Florida is far from unique. Florida's constitution contains several clauses that touch on the relationship between the state and religion or religious institutions. The first sentence of Article I, section 3 of the state charter, in a near-mirroring of the First Amendment to the federal constitution, provides that "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof."¹⁵⁶ The section proceeds, however, with a section suggesting limits on religious freedom,¹⁵⁷ and then adds the following :¹⁵⁸

¹⁵⁴ See, e.g. the remarks of a leading anti-voucher litigator Elliot Mincberg, General Counsel, People for the American Way, at a Pew Forum panel held the day after *Zelman*:

First, while this is an important milestone, it is by no means the end of the legal road because despite the fact that the Court has said that it is okay under the federal Constitution, there are many, many state constitutions that have much more specific provisions in them that say that taxpayer money shouldn't go to support religious institutions directly or indirectly.

<http://pewforum.org/events/index.php?EventID=30>; see also remarks of Robert Chanin, who argued *Zelma* for the pro-voucher forces, in Wash Post/New York Times after *Zelman*

¹⁵⁵ Florida's program provides vouchers only to students in public schools which fail statewide measures of performance for two years within a period of four years. For more details, see www.schoolchoiceinfo.org.

¹⁵⁶ Florida Const. Art. I, sec. 3.

¹⁵⁷ "Religious freedom shall not justify practices inconsistent with public morals, peace or safety." *Id.*

¹⁵⁸ *Id.*

No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The Florida Constitution presents other impediments to the voucher plan as well,¹⁵⁹ but this last provision of Art. I, section 3, with its sweeping prohibition on taking revenue “from the public treasury directly or indirectly in aid of . . . any sectarian institution” has from the outset appeared to be a major impediment to a program that involves public financing of tuition at religious schools. And, predictably enough, a Florida Circuit Court in early August, 2002, ruled the Florida Opportunity Scholarship Program in violation of that provision.¹⁶⁰ With no suggestion that *Zelman* and its theory of intervening private choice might have any bearing on the state law question, the Florida Circuit Court held that the voucher program could not be squared with the blunt prohibition on using public revenue “directly or indirectly in aid of . . . any sectarian institution.” As the Court put it,¹⁶¹

“To hold that this [mechanism of intervening private choice] avoids the constitutional prohibition in Article I, [section] 3 would be the functional equivalent of redacting the word ‘indirectly’ from this phrase of the Constitution. . . . [S]uch an interpretation would amount to a colossal triumph of form over substance.”

¹⁵⁹ Art. IX, sec. 1; Art. IX, sec. 6. These provisions concern the state’s obligations to fund the public schools, rather than any prohibition on aid to private, religious schools.

¹⁶⁰ *Holmes v. Bush*, Second Judicial Circuit, Leon Cty, Florida, No. CV 99-3370, Aug. 5, 2002. Earlier claims that the program violated other provisions of the state constitution had already been resolved in *Bush v. Holmes*, 767 So. 2d 768 (FL 1st DCA 2000), or had been dismissed voluntarily. *Holmes v. Bush*, note 1. The court in *Holmes v. Bush* also announced, with no supporting analysis, that any federal Establishment Clause claims had been “resolved” in *Zelman*. *Id.*

¹⁶¹ *Id.* at 4 (citation omitted). A recent op-ed in The Tampa Tribune wondered explicitly how the state legislature and the Governor had been willing to support the program in the face of this constitutional language. Daniel Ruth, *State School Voucher Scam Flunks Basic Civics Test*, reprinted at <http://www.religionandsocialpolicy.org/news/article.cfm?id=78>.

This provision of the Florida Constitution is not unusual. As a number of scholars have pointed out in recent years, somewhere between twenty and thirty state constitutions, depending on the counting criteria, contain explicit provisions barring the use of public money at religious schools or other religious institutions.¹⁶² These provisions have a common and troubled historical provenance;¹⁶³ virtually all of them seem to have been a product of Protestant-Catholic conflict over education in the 19th and early 20th century. Catholics, many of whom were recent immigrants, objected to the Protestant character of the public schools, and sought to change that character and/or secure funding for their own schools. Protestants opposed both the change in the public schools and the funding for a rival system of Catholic schools.

In 1875, at the height of this controversy, Republican Presidential aspirant James Blaine introduced an amendment to the federal Constitution which would have explicitly forbidden any state from authorizing lands or money devoted to public schools to be “under the control of any religious sect,” or “divided between religious sects or denominations.”¹⁶⁴ Although Blaine’s

¹⁶² See Toby J. Heytens, *School Choice and State Constitutions*, 86 Va. L. Rev. 117 (2000); Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol’y 657 (1998); Eric Treene, “The Grand Finale is Just the Beginning: School Choice and the Coming Battle Over Blaine Amendments,” available at www.becketfund.org (hereafter, Treene, Grand Finale). The most comprehensive survey in the field is Frank R. Kemerer, Ph.D., *State Constitutions and School Vouchers*, 120 Ed. Law Rep. 1. The Kemerer piece includes the text of the relevant provisions, sorted into tables.

¹⁶³ The best telling of this history is in Philip Hamburger’s important new book, *The Separation of Church and State*, chaps. III-IV (Harvard, 2002).

¹⁶⁴ In addition to Professor Hamburger’s recent book, sources on the Blaine Amendment include Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Amer. J. Leg. Hist. 38 (1992); Joseph P. Vitteriti, *Choosing Equality* 153 (1999); Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 Tex. Rev. L. & Pol. 301, 337-38 (2000).

efforts at the federal level failed, the cause he championed led to constitutional change in a number of states, and influenced the drafting of constitutions for states that later entered the Union.¹⁶⁵ Because of Senator Blaine’s national influence over this movement, these state provisions are now frequently referred to generically – especially by their enemies – as the “Blaine Amendments.”

Some of the Blaine Amendments have been construed narrowly, and would now be no impediment to a Cleveland-type school voucher program.¹⁶⁶ Still others may yet be construed to “mirror” the Supreme Court’s interpretations of the federal Establishment Clause.¹⁶⁷ Moreover,

¹⁶⁵ Eric Treene argues that at least 6 states (New Mexico, Arizona, South Dakota, North Dakota, Montana, and Washington) “were forced by Congress to enact such articles as a condition of their admittance into the Union.” Treene, *Grand Finale*, note xx supra, at 8 & n.43.

¹⁶⁶ See *Kotterman v. Killian*, 972 P.2d 606, 624 (1999) (construing Blaine Amendment narrowly because of its background of religious bigotry). Wisconsin’s Blaine Amendment did not stop the Milwaukee voucher program, see *Jackson v. Benson*, 578 N.W.2d 602, 6xx, cert. denied 525 U.S. 997 (1998). The Ohio Supreme Court held that Ohio’s Blaine Amendment would not be an impediment to the Cleveland voucher plan, *Simmons-Harris v. Goff*, 711 N.E.2d at 212. Neither the Wisconsin nor the Ohio provision, however, included a sweeping, Florida-type bar on direct or indirect aid to a religious institution.

¹⁶⁷ A mirroring interpretation of a state provision on church-state relations would tie the state law to the law of the federal establishment clause, whatever that law happened to be at any given moment. A number of state courts have embraced mirroring interpretations of other sorts of provisions, including those related to religion. See Angela Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 *BYU L. Rev.* 275 (documenting the trend in state supreme courts to cut their religious liberty law loose from parallel federal law in the wake of *Emp. Div. v. Smith*). A different sort of impediment to voucher arrangements has arisen in the past. Prior to *Zelman*, some courts refused to permit voucher-type payments to religious schools because of perceived federal constitutional restrictions. See *Strout v. Albanese*, 178 F. 3d 57 (1st Cir. 1999), cert. denied, 120 S. Ct. 320 (1999); *Bagley v. Raymond Sch. Dist.*, 728 A.2d 127 (Me. 1999), cert. denied, 120 S. Ct. 364 (1999). Both *Bagley* and *Strout* hold that the Establishment Clause forbids Maine from including religious schools in a voucher plan for secondary schooling of students in rural districts. *Bagley* and *Strout* now of course must be overruled, unless state law independently supports their result.

the logic of the Supreme Court’s opinion in *Zelman*, which emphasizes the fact of parental designation rather than state transfer of scholarship funds to religious schools, may influence the interpretation of some state courts in which the scope of the Blaine Amendment is an open question. To the extent *Zelman* rests on a notion that parents rather than the state are responsible for the transfer of resources to religious schools, state courts may borrow from this reasoning to conclude that similar schemes do not involve the state in transfers of the sort forbidden by their own constitutions.

There definitely will remain, however, a number of states – including, as of this writing, the state of Florida – in which courts resist such interpretations of their Blaine Amendments, and still other states whose Blaine Amendments have been recently construed in ways that make them more hostile to educational voucher plans than is required by current federal constitutional law. The best-known and prominent example of a state with a still-robust Separationist approach to these questions is that of Washington State. After the U.S. Supreme Court in 1986 ruled unanimously that the federal Establishment Clause did not preclude the use, at a beneficiary-selected bible college, of state vocational training funds for the blind,¹⁶⁸ the Washington Supreme Court held on remand of the case that the state constitution’s Blaine Amendment nevertheless precludes such use.¹⁶⁹

¹⁶⁸ *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986).

¹⁶⁹ *Witters v. State Comm’n for the Blind*, 771 P.2d 1119 (1989). Article I, section 11 of the Washington State Constitution provides that “No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” Washington may have backtracked from that position in recent years. See *Malyon v. Pierce County*, 935 P.2d 1272 (Wash. 1997). Nevertheless, Washington appears to be a true “separationist” state, holding religious institutions to be constitutionally distinctive for purposes of both benefits, see *Witters*, and burdens, see *First Covenant Church v. Seattle*, 840

In July of 2002, however, a panel of the United States Court of Appeals for the 9th Circuit cast doubt on the continued validity of Washington’s Blaine Amendment, at least as applied to a program of indirect funding. In *Davey v. Locke*,¹⁷⁰ the panel ruled (2-1) that the state constitution could not justify the exclusion, from the state-sponsored “Promise Scholarship” program, of students majoring in theology at private, religiously affiliated schools. The Program included students majoring in other subjects at those schools, and the panel opinion suggests that it included as well those students studying theology as part of a course of study at state-run schools.¹⁷¹ Such an exclusion, the panel majority ruled, burdened the student’s rights under the Free Exercise Clause of the federal constitution, and the state constitution applied to these facts did not promote a sufficiently compelling interest to justify the exclusion. *Davey* involves a form of voucher program, and its holding casts doubt on whether Blaine Amendments can lawfully limit state voucher programs to secular options without running afoul of the federal constitution.¹⁷²

P. 2d 174 (Wash. 1992). For further discussion of *First Covenant* and its place in Separationist thinking, see Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 *Vill. L. Rev.* 37 (2002).

¹⁷⁰ 2002 U.S. App. LEXIS 14461 (No. 00-35962, July 18, 2002).

¹⁷¹ *Id.* at xxx. The opinion is oblique on this point, and some ambiguity remains concerning the state’s treatment of courses on theology taught at state universities. Slip op. At 10143-44.

¹⁷² Our own view of *Davey v. Locke* is that it is correctly decided on equal protection and/or free speech grounds, and that its suggested sweeping condemnation of Washington’s Blaine Amendment is too broad. *Davey* relied on *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), to hold that all discrimination against religion is constitutionally suspect. That decision, however, involved a coercive prohibition against a religious practice, and a gerrymander of the ordinance designed to impede the rituals of one and only one sect. As we see the problem in *Davey*, the vice of Washington’s policy is that it singled out a particular

Several scholars have analyzed the federal constitutional problem presented by Washington State and other states whose constitutions, as construed, would impede the inclusion of religious schools in any voucher program that would result in a transfer of state funds to private schools. What has begun to pass for conventional wisdom among these scholars goes something like this. Blaine Amendments, so construed, no longer have federal law for reinforcement. By excluding religious entities from aid that may go to secular organizations, state law of this character: 1) presumptively violates the equal protection clause by using religion, an arguably suspect classifying criterion, as a basis for excluding some entities from aid; 2) offends free exercise norms by singling out religious associations for disfavored treatment; and 3) independent of the first two arguments, violates the Constitution because enactment of the state provision was the product of anti-Catholic animus.¹⁷³

The first two of these theories may seem to amount to one and the same thing, but they turn out to be fetchingly different. The equal protection argument is even-handed as between religious and secular entities; if, after all, “religion” is a generically suspect classifying trait, it should be equally suspicious if the state favors or disfavors religious institutions. Under this theory of equal protection, state law that disables religious institutions only from receiving benefits is presumptively unconstitutional, but state policies that provide special

viewpoint concerning religious studies and refused to fund it, while financing other viewpoints about religious studies. Whatever legitimate interest the state has in an institutional church-state separation broader than that required by federal law, that interest cannot justify the viewpoint-based discrimination in which Washington State appears to have engaged. See *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995).

¹⁷³ Treene, *Grand Finale*, *supra*, at 12-13; Heytens, *Virginia Note*, note xx *supra*, at 140-153.

accommodations for religious causes and institutions, and treat them more favorably than their secular counterparts, are likewise presumptively invalid.¹⁷⁴

Such a doctrine is in sharp tension with the Supreme Court's invitation in *Employment Division v. Smith*¹⁷⁵ to legislatures to make precisely such generic accommodations of religion.¹⁷⁶ Moreover, the anti-Blaine forces tend to be protective of state-created accommodations for religious institutions and causes. Accordingly, their preferred approach to the problem of discrimination against religious entities rests on the Free Exercise Clause of the First Amendment.¹⁷⁷ Its premise is that the state may not generically treat religious entities worse than secular ones. To do so is, in free exercise terms, to "burden" religious institutions by disqualifying them from opportunities open to analogous secular organizations.¹⁷⁸ Those who adopt this argument, as did the 9th Circuit panel in *Davey v. Locke*, presume that all generic

¹⁷⁴ This theory would force a change in the result in decisions like *East Bay Local Dev. Corp. v. California*, 13 P.3d 1122 (Cal. 2000) (upholding power of self-designated exemption, for all noncommercial property owned by religious corporations, from state or local schemes of historic preservation. We discuss *East Bay* further in *Distinctive Place*, note xx supra.

¹⁷⁵ 494 U.S. 913 (1990).

¹⁷⁶ For debate on the constitutionality of such accommodations, compare Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. Pa. L. Rev. 555 (1991) with Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685 (1992).

¹⁷⁷ The Free Exercise Clause has applied to the states through the Fourteenth Amendment since the Supreme Court's decision in *Cantwell v Connecticut*, 310 U.S. 296 (1940).

¹⁷⁸ For fuller explication of the notion of free exercise "burdens," see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933 (1989). Although that article argues that discrimination against religion should count as such a burden, cases later decided under the Religious Freedom Restoration Act occasionally held to the contrary. See *Fordham University v. Brown*, 856 F. Supp. 684 (D.D.C. 1994).

disfavoring of religious entities is unconstitutional unless such policies can satisfy strict judicial scrutiny – i.e., unless the state can demonstrate that the policy is narrowly tailored to a compelling state interest.¹⁷⁹

The Free Exercise approach spares religious accommodations from its wrath, but it has a deep flaw of its own. American constitutional law, federal and state, has for many years done exactly what this argument condemns. The law of the federal Establishment Clause has been and continues to be that the state may not make unrestricted, direct transfers of funds to religious organizations, because the principal activity of such organizations – religious worship – is something which the state may neither regulate nor subsidize.¹⁸⁰ Nor is this the only constitutionally required exclusion of religious organizations from a state protection or benefit. The state operates under religion-specific constitutional limitations with respect to disputes, relating to property or personnel, that are internal to religious communities and organizations.¹⁸¹ The state’s obligation either to refrain from intervening in such disputes,¹⁸² or to adjudicate them under principles which can be applied without reference to religious matters,¹⁸³ is both a

¹⁷⁹ This standard of review is drawn from *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), which involved the imposition of coercive, animal protection legislation upon a particular religious sect, rather than the limitation of a government benefit to secular organizations.

¹⁸⁰ *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁸¹ For discussion of relevant principles, see, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

¹⁸² *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

¹⁸³ *Jones v. Wolf*, 443 U.S. 595 (1979).

privilege of religious communities, because it reduces government interference in religious affairs, and an imposition upon those communities, because it deprives religious factions of the opportunity for authoritative dispute resolution by the state.¹⁸⁴

The argument that Blaine Amendments are presumptively unconstitutional because they single out religious entities for special treatment thus proves far too much; if the line between religious and nonreligious organizations is a constitutionally suspect one, each and every religion-specific doctrine under the federal Religion Clauses becomes constitutionally doubtful as well.¹⁸⁵ An interpretation of the Free Exercise Clause that casts doubt on many longstanding constitutional norms seems questionable indeed.¹⁸⁶

A narrower argument against the Blaine Amendments that voucher proponents may make would focus on the change in federal Establishment Clause law represented by recent

¹⁸⁴ Frederick M. Gedicks, A Two-Track Theory of The Establishment Clause (ms. On file with the authors). Another example of religion-specific treatment required by the Constitution are the rulings of a number of lower court decisions to the effect that government may not apply anti-discrimination law to the relationship between religious entities and clergy. See, e.g., *EEOC v. Catholic University of America*, 83 F.3d 455 (DC Cir. 1996). We discuss the ministerial exception at length in *Distinctive Place*, note xx, supra. But these rulings rest on the free exercise clause as well as the establishment clause, and represent an immunity from regulation rather than an exclusion from state largesse.

¹⁸⁵ A doctrine that made suspect all distinctions between religion and nonreligion would also throw into doubt the various religious freedom restoration acts enacted by the federal government (cite RFRA and RLUIPA) and many states (cite examples) since the Supreme Court's 1990 decision in *Employment Division v. Smith*.

¹⁸⁶ In reaching its conclusion that all discriminations against religious entities are constitutionally suspect, the 9th Circuit panel in *Davey v. Locke* relied heavily on *McDaniel v. Paty*, 435 U.S. 618 (1978). *McDaniel* invalidated a state law prohibition on clergy serving as elected representatives in state legislatures. Because the restriction in *McDaniel* operated to coercively exclude clergy from one aspect of the right of self-government, the decision does not necessarily extend to state law exclusions of religious entities from state largesse. But the 9th Circuit did not explore any such distinction.

cases, including *Agostini v. Felton*,¹⁸⁷ *Mitchell v. Helms*,¹⁸⁸ and *Zelman* itself. The premise of this theory is that states may indeed treat religious institutions differently from secular ones, but only to the extent that federal constitutional law so requires. If this were the law, states would be obliged to ensure that they did not directly aid the specifically religious activities of private organizations, but states with voucher programs could not rely on their Blaine Amendments to exclude religious schools because *Zelman* teaches that federal law does *not* so require.

This approach does not unravel existing federal constitutional law, but it has strange consequences in the federal system. States would be free under this theory to construe their Blaine Amendments in only one way – to mirror whatever the U.S. Supreme Court held at any given time was required by the Establishment Clause. This leaves the states absolutely no room to have a nonestablishment policy broader than whatever five Supreme Court Justices find to be the content of federal law at any given moment. The upshot would be to deny the states any room whatsoever for their own church-state policy, even if that policy had been federal constitutional law a few short years ago. It’s hard to imagine a doctrine more hostile to notions of respect for state law, and in particular to the tradition of independent state constitutional law.¹⁸⁹ Although he of course was imagining that states would be pro-religion rather than the

¹⁸⁷ 521 U.S. 203 (1997).

¹⁸⁸ 530 U.S. 793 (2000).

¹⁸⁹ The late Justice Brennan was an ardent champion of the independent development of state constitutional law. See William J. Brennan, *State Constitutions and the Protections of Individual Rights*, 90 Harv. L. Rev. 489 (1977). ADD articles by state supreme court judges who have made similar pleas. Indeed, friends of religious liberty, upset at the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), have urged state courts to develop independent free exercise policy under state law, and some states have done precisely that in the last dozen years See, e.g., *First Covenant Church v. Seattle*, 840 P. 2d 174 (Wash.

opposite, Justice Thomas urged in *Zelman* that states be given room to fashion their own church-state policies, and the campaign against the Blaine Amendments threatens state autonomy of precisely that character.

Sensitive to these considerations of federalism, we believe that states should be free to make their own constitutional policy of church-state relations, and to extend it beyond the federal policy, so long as the state approach serves reasonable purposes of the sort associated with the regime of Separationism. What is obvious, however, is that those purposes need some restatement and reinvigoration. As Separationism has come under attack in recent years, its defenders – the *Zelman* dissenters prominently among them – have tended to rely excessively on justifications now viewed by many as outmoded. A result that four of nine Justices vehemently favored in *Zelman* may be constitutionally reasonable, but not just because they so conclude. Whether states can defend a Separationist policy broader than the federal constitution requires will thus depend on the efforts of judges and academics to provide precisely this sort of rehabilitation of the Separationist ethos.¹⁹⁰

Separationism aside, there is one very stark way for a state to reconcile a strenuous Separationist policy with norms of equality, from wherever drawn. Equality can be achieved by

1992). For discussion of this trend, see Angela Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 *BYU L. Rev.* 275 (documenting the trend in state supreme courts to cut their religious liberty law loose from parallel federal law in the wake of *Emp. Div. v. Smith*).

¹⁹⁰ We have tried to do some of this work ourselves. See Ira C. Lupu & Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 *J. L. & Politics* xx (forthcoming, 2002); Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 *Vill. L. Rev.* 37 (2002).

equalizing down as well as up.¹⁹¹ States can simultaneously comply with their Blaine Amendments and norms of equality simply by treating religious and nonreligious private organizations alike, and excluding all from the aid that the state constitution precludes going to the religious entities. Such an approach would entail, for example, a school choice program limited to public schools only.¹⁹²

This strategy, however, cannot help the broader voucher movement, and its emphasis on maximizing parental choice in ways that include private schools, religious and otherwise. If courts permit the states to maintain church-state policies more Separationist than the federal constitution requires, with or without the equality kicker, is the attempt to advance the school voucher movement by ousting the Blaine Amendments doomed to failure? Perhaps it is not. We think there is one argument that may yet push the attack on the Blaines over the top, but it is the most ornery and least generic of the arguments frequently advanced against such amendments. The anti-Catholic origins of at least some of the Blaines may be a powerful source of constitutional condemnation. The argument is made yet stronger – and the Supreme Court’s receptivity to it made more obvious – by the view expressed in the plurality opinion in *Mitchell v. Helms*¹⁹³ that the judge-made doctrine which excluded “pervasively sectarian” entities from government assistance was a product of anti-Catholic bigotry. The underlying premise of the

¹⁹¹ See, e.g., *California Savings & Loan v. Guerra*, xxx U.S. xxx (19xx) (federal law outlawing sex discrimination does not pre-empt state requirement for maternity leave, because employer can comply with both by providing paternity as well as and maternity benefits).

¹⁹² This is the approach advocated in Richard Kahlenberg, *All Together Now: Creating Middle Class Schools Through Public School Choice* (2001).

¹⁹³ 530 U.S. 793 (2000).

Mitchell plurality is that the line of decisions from *Lemon* to *Aguilar*, representing the high water mark of Separationism, is itself blemished by such prejudice. If it can be proven that a particular state added a Blaine-type Amendment, blocking all forms of material transfer to religious institutions, because of anti-Catholic sentiment, federal constitutional law would strongly support the invalidation of such an amendment.

Several discrete lines of case law, under a variety of constitutional provisions, intertwine around this view. In *Church of the Lukumi Babalu Aye v. Hialeah*,¹⁹⁴ the Supreme Court unanimously held that a city's policy, ostensibly designed to protect a religion-neutral concern for animal welfare, had been gerrymandered for the purpose of impeding animal sacrifice as practiced by a particular sect, and therefore violated the Free Exercise Clause unless it could meet the requirements of strict constitutional scrutiny. In *Larson v. Valente*,¹⁹⁵ the Court applied a similar doctrine under the Establishment Clause to a Minnesota statute, regulating fund-raising practices, that the Court found had been covertly designed to burden the Unification Church and to leave untouched the practices of mainstream faiths. If courts take this approach in challenges to the Blaines, the state is not likely to prevail; as *Davey v. Locke* reveals, it will be very difficult to show that a strict separationist posture, now partly repudiated in federal law, is narrowly tailored to compelling state interests.

Away from the field of religion, the Equal Protection Clause (and the equal protection component of the due process clause of the Fifth Amendment) have been pressed into similar service, but with significant doctrinal differences from the Religion Clause cases just described.

¹⁹⁴ 508 U.S. 520 (1993).

¹⁹⁵ 456 U.S. 228 (1982).

In *Washington v. Davis*,¹⁹⁶ the Court held that covert unconstitutional purposes – in that case, alleged racial animosity – could render a race-neutral scheme unconstitutional. In the *Arlington Heights* decision,¹⁹⁷ the Court clarified that evidence of such purposes tainted a government decision, but did not trigger conventional strict scrutiny; instead, it shifted the burden to the government to demonstrate that it would have made the same decision in the absence of the impermissible motive. Perhaps the age of the Blaine Amendments would make it unlikely that states could carry such a burden, but this approach leaves open a plausible way for the state to preserve a Blaine Amendment even if its past is tainted by sectarian hostility.

The legal setting of the Blaine Amendments in state constitutions, rather than statutory law, in no way immunizes them in any way from claims of unconstitutional motivation. In *Hunter v. Underwood*,¹⁹⁸ the Supreme Court invalidated a provision of the Alabama Constitution, disfranchising a very wide group of persons who had been convicted of a felony; the Court found indisputable evidence that the backers of the provision had been motivated by a desire to disfranchise African-Americans. And, most recently, the Court rendered its most controversial invalidation of a state constitutional amendment; in *Romer v. Evans*,¹⁹⁹ it ruled that Colorado's attempt to constitutionalize a prohibition on protecting gays and lesbians from

¹⁹⁶ 426 U.S. 229 (1976).

¹⁹⁷ *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977). See also *Mt. Healthy City Sch. Dist. Bd. Of Educ. V. Doyle*, 429 U.S. 274 (1977) (proof that the dismissal of government employee is tainted by constitutionally impermissible reason shifts burden to the state to show that the dismissal would have occurred independent of that reason).

¹⁹⁸ 471 U.S. 222 (1985).

¹⁹⁹ 517 U.S. 620 (1996).

discrimination had been motivated by a constitutionally forbidden anti-homosexual animus.

If we are correct that the most persuasive constitutional argument against Blaine Amendments is that each may have been motivated by anti-Catholic animus, the path for those who are fighting for vouchers, and against the Blaines, is twisted and uphill. First, the fight must be won on state-specific historical grounds in each and every jurisdiction. Even if the case for anti-Catholic animus as a motivating force is supported by substantial historical evidence in some states,²⁰⁰ the case may not be nearly so easy to make in others. The problem of proof may be especially acute with respect to states in the West, where Congress may have required states newly entering the Union to include a Blaine-type provision in their constitutions as a condition of entry.²⁰¹ With respect to such states, challengers may have to show that the Congress(es) that imposed such conditions were moved by impermissible hostility to the Roman Catholic Church. Evidence of this may not be easy to find, and courts in any event, influenced by the decision in *United States v. O'Brien*,²⁰² may not be receptive.

²⁰⁰ Becket Fund lawsuit – details of attempted immunization of Mass provision – see Treene, Grand Finale.

²⁰¹ *Id.* at 8-9. Even with respect to those states in which the anti-Catholic case can be made, it will depend entirely on constitutional history, and statements from legislative debates. Of course, some Justices (most notably Justice Scalia, whose vote may well be necessary to form a majority in favor of invalidating a Blaine Amendment in the Supreme Court) are on record as being opposed to judicial reliance on such evidence of covert motivation. See, e.g., *Church of Lukumi Bablu Aye, Inc. V. City of Hialeah*, 508 U.S. 520, xxx (Scalia, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, xxx (1987) (Scalia, J., dissenting). By the same token, will those who normally are willing to consider such evidence, but who dissented in *Zelman*, be willing to invalidate Blaine Amendments, sect-neutral and separationist on their face, when confronted with such evidence? The ironies presented by the attack on the Blaine Amendments are rich and thick, and uncertainty about the outcome in the Supreme Court of an animus-based challenge to a Blaine Amendment affects the overall picture for the litigants.

²⁰² 391 U.S. 367 (1968) (rejecting inquiry into congressional motivation).

Moreover, an animus-based theory of why a Blaine Amendment is unconstitutional invites the possibility of successful contemporary reenactment. If Blaine Amendments are generically unconstitutional because they disfavor religious entities, current enactment or reenactment of such a restriction is constitutionally doomed. If, however, a state enacts one today in a climate that precludes an inference that it has been motivated by sectarian animus, it would stand on the same footing as a 19th century enactment in a state in which animus could not be proven. This proposition is well illustrated by the contrast between the Supreme Court’s decisions in *Hunter v. Underwood*²⁰³ and *Richardson v. Ramirez*.²⁰⁴ In the former, the Court held unconstitutional a state constitutional provision disfranchising all persons convicted of crimes involving “moral turpitude,” on the basis of evidence that it had been motivated by a desire to exclude African-Americans from the vote; in the latter, the Court upheld a California provision disfranchising all convicted felons, a restriction on voting that had not been shown to be impermissibly motivated.²⁰⁵

If the campaign against the Blaines fails in the courts, the anti-Blaine, pro-voucher forces might consider one other strategy. Perhaps Congress would have power, acting under section 5 of

²⁰³ 471 U.S. 222 (1985).

²⁰⁴ 418 U.S. 24 (1974).

²⁰⁵ *Id.* at xx. One can imagine, therefore, that invalidation of a Blaine Amendment may lead to a political campaign to reenact some new version of a comparable restriction on church-state relations. Even if contemporary reenactment will effectively reinstate a Blaine Amendment, however, invalidation of the 19th century version will place the burden of political inertia on the anti-voucher forces rather than, as is currently the case, on the pro-voucher forces who are leading the charge against the Blaines. The invalidation of the anti-gay amendment in *Romer v. Evans*, 517 U.S. 620 (1996) could not similarly be overcome by re-enactment, because the Court held that provision invalid on its face rather than corrupted by covert, impermissible motivation.

the 14th Amendment, to legislate against the Blaine Amendments. The theory would resemble that which in part underlay the Supreme Court’s willingness to uphold voting rights legislation in *Katzenbach v. Morgan*²⁰⁶ – that a state law, seemingly neutral, had in part been motivated by impermissible prejudice. As we have suggested above, the same sort of case could be mounted against the Blaines. If the anti-Catholic animus underlying the enactment of many of the Blaines is sufficiently widespread, Congress arguably should have power to legislatively preempt them all, on the theory that litigants should not be put to the difficult burden of state-by-state proof of such prejudice.

An effort to legislate under section 5, however, even if politically feasible, would no doubt face substantial constitutional obstacles. First, *City of Boerne v. Flores*,²⁰⁷ and the Supreme Court’s still more recent decisions on state sovereign immunity,²⁰⁸ suggest growing limits on congressional power to use section five to interfere with the legal autonomy of the states. The Religious Freedom Restoration Act, invalidated as applied to the states in *City of Boerne*, challenged a particular Supreme Court decision in a way that an anti-Blaine enactment would not, but the overriding concerns for federalism, and judicial control over the meaning of the Constitution, would remain. Perhaps the fact that Congress and the Court would be moving in

²⁰⁶ 384 U.S. 641 (1966). *Katzenbach* upheld a law requiring the states to permit voting in state elections by those literate in Spanish and educated in American-flag schools – i.e., persons educated in Puerto Rico. The underlying theory of power to enact this measure under section 5 of the 14th Amendment was that the state restriction itself violated the equal protection clause, although courts were unlikely to so hold, or that the state restriction contributed to a likelihood of invidious discrimination against Spanish speakers in the delivery of state services.

²⁰⁷ 521 U.S. 507 (1997).

²⁰⁸ See, e.g., *Federal Maritime Comm’n v. South Carolina State Ports Authority*, xxx U.S. xxx, 122 S. Ct. 1864 (2002).

the same direction on nonestablishment norms – as was precisely not the case with respect to the religious Freedom Restoration Act - would help buttress the constitutionality of such a federal law. The Establishment Clause, however, originally protected state religious establishments against federal interference,²⁰⁹ and one wonders if it would protect state nonestablishments with equal force.²¹⁰ To put the point differently, an anti-Blaine enactment by Congress might well be seen as a law “respecting an establishment of religion.”

This discussion of reliance on political processes to rehabilitate or eradicate the Blaine Amendments suggests, as do many other features of this story, that the resources necessary on both sides of this struggle may be very large indeed. State constitutional law, and its validity under federal constitutional norms, is likely to play a major role in the post-*Zelman* struggle over vouchers, but it is impossible at this point to identify all the ways in which the state-federal interplay may evolve. At the least, one would expect pro-voucher strategists (as distinguished from pure anti-Blaine strategists) to look for states without Blaine Amendments to push most aggressively for new voucher programs. Despite the lift provided by *Zelman*, the question of whether the politics of vouchers, and the constitutional law controlling vouchers, will interact productively for the pro-voucher forces is now only a matter of long-term speculation.

²⁰⁹ This of course is one of the central points of Justice Thomas’s concurring opinion in *Zelman*. See TAN xx supra.

²¹⁰ For development of the argument that Congress is barred by the First Amendment from legislating on the subject of religion and state law, see Jay Bybee, Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act, 48 Vand. L. Rev. 1539 (1995).

B. Conditions on Providers in Voucher-Financed Programs

The second major focus of post-*Zelman* legal controversy will emerge from the debate about the obligations of participating schools and social service providers. In particular, a coalition of opponents of vouchers, those generally skeptical about using public money to educate children in private schools, and those who simply believe that private organizations receiving public money must take on a certain public-regarding character²¹¹ are likely to press for a variety of conditions which providers must meet. Although there are refinements and qualifications that we discuss below, our basic position on such conditions is simply stated – most such conditions are entirely a matter of political discretion. The Constitution does not require them, and it rarely forbids them. Many in the voucher wars disagree with our basic position,²¹² however, and there are subtle differences among such conditions. Thus, we believe that it is worth breaking them down into categories and analyzing them separately.

Perhaps the easiest set of conditions to analyze are those limited to voucher students only. These might include requirements of nondiscrimination on many different grounds, including disability, academic performance, race, religion, and others. The Cleveland plan, for example, did not permit participating schools to select among those students who had been awarded an Ohio

²¹¹ See, e.g., Martha Minow, *Partners, Not Rivals: Privatization and the Common Good* 92-93 (Beacon Press 2002) (arguing that “school voucher plans must preserve public values in the schools found eligible for the vouchers”).

²¹² See, e.g., Michael Paulsen, *Scouts, Families, and Schools*, 85 *Minn. L. Rev.* 1917 (2001) (asserting broad theory of freedom of association and expression for religious institutions, whether or not they are accepting state benefits; others (Americans United, People for American Way, Lambda Legal Defense, etc.) who take polar opposite view, government may not subsidize discrimination

Scholarship,²¹³ and it explicitly prohibited discrimination based on race, religion, and ethnicity.²¹⁴

Another possible condition, narrowly tailored to voucher students only, may attach to religious education and experience expected of those students. Milwaukee, for example, required participating schools to offer voucher students an opt-out from religious training.²¹⁵ Cleveland did not so require, and Florida has taken a compromise position, permitting students to remain passive when confronted with obligations of religious affirmation.²¹⁶

Any condition limited to voucher students may conceivably alter the character of a school, but participating schools have obvious mechanisms of control over such transformation, because of their power to set the number of voucher students each will take. Having ten per cent voucher students, who may not share the faith tradition at the school, will have very different consequences for the school's religious ambience over time than having fifty percent of the students be both voucher-supported and unconnected to the faith. In any event, we believe that conditions limited to voucher students only will be by far the easiest to justify under the constitution. These are the students for whom the state is paying, and any condition that is

²¹³ The statutes required selection among eligible students to be random, subject to categorical priorities (low-income before others) and an exception for siblings of pre-existing students in the private schools. Ohio Rev. Code Ann. Sec. 3313.977 (A)(1).

²¹⁴ *Id.* at sec. 3313.976(A)(6). The full scope of this provision is quite unclear, but all parties in *Zelman* agreed that it covers admission of voucher students

²¹⁵ See *Jackson v. Benson*, 578 N.W.2d 602, 609 Wis. 1998), cert. denied 525 U.S. 997 (1998).

²¹⁶ The Florida plan's opt-out provision is narrower than Milwaukee's, because it forbids compulsory worship but permits compulsory religious education. See Florida Stat., chap. 229, Title XVI, sec. 229.0537(4)(j) (voucher students may not be compelled "to profess any sectarian belief, to pray, or to worship."). We discuss the constitutional significance of such opt-outs in *Sites of Redemption*, note xx *supra*.

reasonably related to the state's programmatic purpose in so paying should be easily withstand constitutional scrutiny.²¹⁷

The set of conditions much more likely to invite large-scale controversy, both political and constitutional, are those which effectively regulate the provider in its entirety rather in its relationship to voucher beneficiaries. Conditions of this sort, which use voucher money to leverage control over the school as a whole, fall into several categories. First, voucher programs may insist that participating private schools test all of their students, report their test scores, or otherwise respond to concerns for academic performance and accountability in precisely the same way that public schools must. Such conditions present distinct and obvious benefits and costs. Taxpayers reasonably want to know whether they are supporting programs of quality, and parents trying to decide among schools can certainly make use of such information. These goals can be only incompletely fulfilled by a condition requiring testing and reporting for voucher students only; the number of those may be very small, and testing and reporting about all students provides much more comprehensive information, especially for parents making choices at an early stage in the life of the voucher program. On the other hand, testing regimes may be expensive, and may tend to alter the curriculum as schools face pressure to teach to the evaluative tests.²¹⁸ In the experimental stage of voucher programs, schools may be reluctant to participate if they must substantially change their educational protocols in order to educate even a small number of

²¹⁷ Cf. *Wyman v. James*, 400 U.S. 309 (1971) (welfare assistance may be conditioned on consent to reasonable home visits, which do not have to meet the probable cause requirements of the 4th Amendment).

²¹⁸ See, e.g., Jacques Steinberg, *Edgy About Exams, Schools Cut the Summer Short*, <http://www.nytimes.com/2002/08/18/education/18SCHO.html> ADD educational policy literature re: effect of testing regimes on curriculum

voucher students.

Whatever their policy merits, the only constitutional questions suggested by conditions of this sort involve issues of religious neutrality. We believe that the state has substantial discretion to impose an accountability regime on private schools generally that is either the same as or different from those in the public schools, which the state controls more totally. *Zelman*'s emphasis on neutrality suggests that the only constitutional constraint on conditions of accountability is the obligation to treat secular and religious private schools alike.²¹⁹

The more constitutionally controversial conditions likely to be imposed on voucher providers regulate their freedom of association, or freedom of expression. The Ohio voucher program, for example, included a provision forbidding participating schools from discriminating “on the basis of race, religion, or ethnic background,”²²⁰ and another forbidding such schools from teaching “hatred of any person or group on the basis of race, ethnicity, national origin, or religion.”²²¹ The scope of the anti-discrimination provision in Ohio is uncertain; no party in *Zelman* challenged it, and it may or may not apply to admission of nonvoucher students, or to hiring of teachers or other school staff. The anti-hate provision, by contrast, seems crystal clear in its exclusion of certain messages from those advanced by the school, but here too no challenge has yet been made to the provision by a school or anyone else.

If either of these conditions were imposed coercively on schools *independent* of state-created benefits, we think the case for their unconstitutionality might be quite strenuous indeed,

²¹⁹ *Infra* cite to discussion of exemption for religious schools only

²²⁰ Ohio Revised Code Ann. sec. 3313.976 (A)(4).

²²¹ *Id.* at sec. 3313.976(A)(6).

and in any event would be considerably stronger than the case for their unconstitutionality as conditions on benefits. The anti-hate provision singles out points of view and outlaws their transmission to the young. Our tradition of free speech suggests ample protections for these points of view, however obnoxious, against government attempts to generally suppress them.²²² Teaching that the Christian view of God and the world is correct, for example, implies that some other views are mistaken, and the state may not preclude such teaching, nor specify the intensity or language with which it is accomplished.²²³

If completely detached from state benefits, an anti-discrimination condition is likely to be constitutional in most of its applications, but somewhat doubtful in others that impinge on freedom of religious association and expression. Religious schools' most powerful claim to be free from anti-discrimination law arises from their interest in limiting the religious identity of students or employees, especially employees whose efforts shape the religious mission of the

²²² See, e.g., *RAV v. St. Paul*, 505 U.S. 377 (1992) (cross-burning); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (anti-Catholic phonograph record); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (denunciation of racial minorities). Justice Holmes famous dissent in *Abrams v. United States*, 250 U.S. 616, xxx (1919) urged protection for “the expression of opinions that we loathe and believe fraught with death . . .” unless they presented imminent danger of grave harm.

²²³ See *Cohen v. California*, 403 U.S. 15 (1971) (government may not specify the language with which political sentiments may be expressed). The only settled exception to this principle would be for language that incites to imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

school.²²⁴ The Supreme Court's decision in *Boy Scouts of America v. Dale*²²⁵ protects the associational freedom of private, cause-oriented organizations to select their spokespersons, and it is no great leap from *Dale* to the associational freedom of a school to select its students on the basis of communal, faith-based identity. Similar considerations would support limiting employees to members of the faith around which the school is organized, or to exclude, as in *Dale*, students or faculty whose views or behavior is deemed inconsistent with that faith. A Sunday School housed in a place of worship, for example, should be free to limit its students to those whose families share its religious commitments, and to exclude from its teaching staff those not of its faith and those it deems to be sinners.²²⁶

Once the state offers benefits in exchange for limitations on expression or association,

²²⁴ A comparable claim by religious schools to engage in racial and ethnic exclusion of students or employees would likely fare much worse. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Runyon v. McCrary*, 427 U.S.160 (1976) (racial discrimination by private academies violates 1866 Civil Rights Act).

²²⁵ 530 U.S. 640 (2000).

²²⁶ The line of lower court decisions protecting the right of religious organizations to be free of anti-discrimination law in choosing clergy supports the autonomy of religious schools in selecting spokespersons for their religious tradition. See, e.g., *McClure v. Salvation Army*, 460 F.2d 553, 560-61 (1972); *EEOC v. Catholic University of America*, 83 F.3d 455 (DC Cir. 1996). Many religious institutions offer programs of weekend or after-school instruction in their culture, customs, and worship. Would the constitution permit the state to outlaw religious discrimination in hiring teachers for such a program, or to regulate what is taught – positive or negative – about various faith traditions? We doubt it; see, e.g., *Farrington v. Tokushige*, 273 U.S. 284 (1927) (holding that territory of Hawaii may not forbid parents of Japanese descent from providing after-school instruction in programs teaching Japanese language and culture).

The federal civil rights laws, and many state laws as well, permit religious entities to discriminate in favor of co-religionists for *all* positions. This policy has been upheld against Establishment Clause attack, see *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), but there is no reason to suppose that it is required by the Constitution with respect to all positions in religious organizations.

however, appraisal of the constitutionality of these limits inevitably must change. Unlike the situation with respect to free-standing prohibitions, religious institutions may escape the force of such conditions by rejecting the accompanying benefits. Under current arrangements, however, virtually every school engaged in day-long instruction of the young receives such benefits, and they cannot be easily rejected. Often overlooked in the constitutional case against conditions on voucher schools is that all of them must be accredited by the state. Accreditation, which permits parents to satisfy the compulsory attendance laws by sending their children to an approved school, is itself a substantial state-conferred benefit, justifying a variety of autonomy-limiting regulations on curriculum, teacher credentials, and other attributes of educational institutions.²²⁷ The financial support that vouchers bring merely adds political impetus, not constitutional warrant, for the imposition of regulatory conditions.

The state has considerable – though not infinite – leeway to impose limits on state-benefitted schools that the First Amendment would not tolerate if applied coercively to all expressive organizations. We cannot in this space tackle the entire, unwieldy subject of unconstitutional conditions,²²⁸ but we can at least make a reasonable appraisal of the ways in which these issues might be framed. First, the Supreme Court’s oft-reaffirmed decision in *Pierce*

²²⁷ See *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 940 (1st Cir. 1989) (Breyer, J.) (State has broad power to impose conditions of accreditation on religious school). Justice Breyer cited this opinion in his *Zelman* dissent, slip op. at 10.

²²⁸ The leading academic works on the subject include Robert Post, *Subsidized Speech*, 106 *Yale L.J.* 151 (1996); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of neutrality in Government-Funded Speech*, 67 *N.Y.U. L. Rev.* 675 (1992); Kathleen Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413 (1989); Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *Harv. L. Rev.* 4 (1988); and Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. Pa. L. Rev.* 1293 (1984).

*v. Society of Sisters*²²⁹ creates an obligation for states to permit private schools, religious and otherwise, as alternatives to the public schools as a means of satisfying compulsory education requirements. Accordingly, a sweeping condition on accreditation that all schools be secular would without question violate the federal Constitution.²³⁰

Second, at a minimum, conditions on schools that wish to participate in a voucher program must be reasonable in light of the program's purposes and other legitimate governmental concerns.²³¹ On this score, it will be impossible to persuade judges that anti-discrimination conditions that apply to the admission of students, or to the hiring of all but the most religiously sensitive positions, are unreasonable. Ensuring equal opportunity for students to attend publicly supported schools, or for employees to work in such schools, comports with public policy that has been widely adopted in the United States for the last 30 years or more.²³² It may be that religious schools can insist that classes in theology, or other aspects of religious culture, be taught only by

²²⁹ 268 U.S. 510 (1925). The full name of the decision, rarely used, is *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*.

²³⁰ In *Vouchers Within Reason* (Cornell 2002), Professor James Dwyer argues that school vouchers should be available to all, but that voucher schools should not be free to teach religious doctrines, such as antifeminism, that conflict with certain presuppositions of liberalism. For reasons we develop below in connection with possible restrictions on expression by voucher schools, we think this proposal is in fundamental tension with *Pierce*.

²³¹ See *Wyman v. James*, 400 U.S. 309 (1971) (upholding unannounced, warrantless home visits to welfare beneficiaries as reasonably related to child-protecting purposes of the welfare program).

²³² See *Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (rejecting claim of free exercise immunity Internal Revenue Code's requirement of no racial discrimination in academic policies as condition of tax exemption for religiously affiliated college); *Runyon v. McCrary*, 427 U.S.160 (1976) (racial discrimination by private academies violates 1866 Civil Rights Act).

persons from within a particular faith tradition; the state's interest in regulating hiring for such positions, even if it supports the school through vouchers, seems especially weak. Beyond this narrow group of courses, however, schools will have a difficult time arguing that they should be free to accept voucher payments while simultaneously repudiating limits on their hiring discretion; schools that want history, or chemistry, or any other secular subject taught from a particular religious perspective will simply have to insist that members of their instructional staff, whatever their faith, communicate that religious dimension.²³³

Voucher conditions that limit the content of expression by schools and their agents arguably present tougher First Amendment questions. For example, the Cleveland voucher program included a restriction on “teach[ing] hatred of any person or group on the basis of race, ethnicity, national origin or religion.”²³⁴ Analyzing this sort of restriction requires attention to a line of decisions, most recently capped by *Legal Services Corporation v. Velazquez*,²³⁵ in which

²³³ Lest our argument be misunderstood, we want to emphasize that the conditions we are discussing are entirely a matter of political discretion. The constitution does not forbid them, but neither does it require them, and legislatures are free to omit them from all voucher schools. See Testimony of Professor Ira C. Lupu Concerning the Constitutional Role of faith-Based Organizations in Competitions for Federal Social Service Funds Before the Subcommittee on the Constitution of the Committee on the Judiciary, U.S.. House of Representatives, June 7, 2001, http://www.house.gov/judiciary/lupu_060701.

²³⁴ Ohio Rev. Code Ann. Sec. 3313.976(A)(6).

²³⁵ 531 U.S. 533 (2001). *Velazquez* produced a surprising 5-4 invalidation of an expressive restriction on a government-funded private entity. Four of the five Justices in the *Zelman* majority are also in the *Velazquez* dissent. So those on the Court most receptive to use of vouchers at religious schools are least receptive to controlling the government's ability to condition its transfers on speech restrictions, and four of the Justices most willing to invalidate such speech restrictions are constitutionally opposed to use of vouchers at religious schools. Justice Kennedy, who authored *Velazquez*, is the only Justice to join in both of these opinions of the Court. Here, as was the case in the discussion of the Blaine Amendments, the ironies are rich, and the tensions among positions by various Justices are thick.

the Supreme Court has drawn a series of lines between acceptable and unacceptable restrictions on speech by government-financed private entities. These decisions are not a model of clarity and consistency, to say the least, but certain key principles stand out, and all of them can be fruitfully applied to schools participating in voucher programs.

First, the cases suggest a crucial distinction between situations involving government promotion of particular messages – e.g., in favor of decency in art,²³⁶ or carrying pregnancies to full term²³⁷ – through the financing of private speakers, and the government contracting for some service independent of the delivery of any particular message.²³⁸ Government power to restrict speech is less in the latter situation, because the state cannot make the claim that it is simply controlling its agents’ transmission of a message that the agent has been engaged to deliver.

Are voucher schools the agents of government and its chosen messages? They cannot be in the absolute sense, because the government may not employ religious speech as part of its own. But accredited schools are always in some sense acting as agents of the state, and the state has sufficient reason to control the content of some of their messages. The regulation of curriculum, common to accreditation efforts, is a viewpoint-neutral regulation of content – it specifies the subjects which the school must address. Moreover, the regulation of messages of intolerance or

²³⁶ National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

²³⁷ Rust v. Sullivan, 500 U.S. 173 (1991).

²³⁸ See Board of Commissioners, Wabaunsee Co. v. Umbehr, 518 U.S. 668 (1996); O’Hare Truck service, Inc. V. City of Northlake, 518 U.S. 712 (1996). These decisions extend to government contractors the First Amendment protections of government employees, whose statements on matters of “public concern” are entitled to First Amendment protection unless they substantially interfere with the performance of his duties or the operations of the agency where the employee works.

hatred for religious or racial groups is bound up with education for citizenship in a liberal, inclusive democracy. Thus, for the state to insist on this particular exclusion from the school's message seems to us a reasonable regulation of curricular content. By contrast, the school's affirmative statement of its own religious commitments – for example, the Divinity of Jesus, or the Prophetic status of Moses or Mohammed – is beyond the scope of state control. The state has no legitimate interest in barring such a message, and to permit it to do so would be to effectively exclude certain faiths from operating schools, contrary to the requirements of *Pierce*.²³⁹

Second, the cases involving restrictions on government-financed speakers emphasize the breadth of the restriction's impact on a speaker's overall expressive activity, including the portion which may be privately financed.²⁴⁰ If the government exacts from the speaker a promise to refrain from the message under all circumstances, privately or publicly supported, or otherwise makes it practically impossible for the speaker to communicate the message on her own, it is using its resources impermissibly to gain leverage over wholly private speech.

This consideration, as applied to schools participating in voucher programs, is not likely to strengthen the argument against such conditions. In defense of a restriction on hate speech in

²³⁹ We recognize that our formulation leaves open the problem of a faith which describes its affirmative beliefs in negative terms about others – i.e., to be a believing X, you must adhere to the following principles, including the principle that Y's are instruments of the devil. We think that in such a case, the state could insist that the anti-Y precept be omitted from the teaching at a state-approved school, and left to be transmitted in other settings. We would distinguish such a case, however, from that presented by a faith that teaches it is the exclusive path to salvation, and that those who do not adhere to it are damned. We do not think the state could bar such a teaching, even at a school which it subsidizes, because the teaching would represent a core element of the faith's self-definition.

²⁴⁰ *Rust v. Sullivan*, 500 U.S. 173, xxx (1991); *National Endowment for the Arts v. Finley*, 524 U.S. 569, xxx (1998); *FCC v. League of Women Voters of California*, 468 U.S. 364, xxx (1984).

voucher schools, the government could responsibly argue that participating religious communities are free to operate more than one school, and preach whatever hatred they want in those schools that do not accept voucher students. More realistically and powerfully, the government can argue that faith communities are quite entirely free to preach hatred of others in their worship activities, or other communicative efforts, outside of school. These activities are constitutionally outside of regulatory control as well as government financial support. So religious communities may teach hatred of others, but they may be restricted from teaching such attitudes in state-supported schools, whether the support takes the form of vouchers or is limited to accreditation.

Third, government is under a more strenuous obligation to permit competing viewpoints when its resources are provided in a way that can be characterized as the creation of a public forum. *Rosenberger v. University of Virginia*²⁴¹ and *Widmar v. Vincent*²⁴² present such cases in the context of religious association and expression. Ordinarily, however, the provision of public services – even if they have an expressive component – is conceptually distinct from the creation of a forum for debate. Unlike the context of public fora, in which the state provides resources for the very purpose of association and expression, school choice programs have the narrower and more focused purpose of delivering educational service to the young in the community. For example, the state can and should exclude incompetent or highly inefficient providers from such a service program; policies of this sort are entirely alien to the concept of a public forum, in which speakers are presumed equal in their right to participate.

We consider one final question concerning conditions on voucher schools. If religious

²⁴¹ 515 U.S. 819 (1995).

²⁴² 454 U.S. 263 (1981).

schools are not constitutionally exempt from such regulation, may the state legislatively exempt religious schools only from such conditions? The Supreme Court has held that such exemptions are sometimes permissible and sometimes not. *Corporation of Presiding Bishop v. Amos*²⁴³ upheld a statutory exemption for religious entities from the prohibition on religious discrimination in Title VII of the 1964 Civil Rights Act.²⁴⁴ Accommodations of this sort, which protect associational freedom of religious organizations to prefer their own members, can be justified on a theory of equality – they permit religious communities, like other organizations, to prefer those who are ideologically in tune with existing members.

Other discretionary accommodations, however, which have the quality of religious preferences rather than equalizers, have fared badly in the Supreme Court,²⁴⁵ and the constitutional presumption is against them. Accommodations of religious institutions alone are justifiable only when failure to accommodate them poses some unique threat to their religious mission, and the threat to secular entities is not similar. In general, we think that the case for preferring religious schools to secular private schools with respect to conditions concerning curriculum, accountability, and teacher credentials (as distinguished from religious identity), to name a few, is quite weak.

²⁴³ 483 U.S. 327 (1987).

²⁴⁴ Civil Rights Act of 1964, section 702 (as amended), 42 U.S. C. Sec. 2000e-1.

²⁴⁵ *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). For a more complete discussion, see Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. Pa. L. Rev. 555 (1991).

As we have argued elsewhere,²⁴⁶ the Constitution should require neutrality between religious and secular entities unless a case can be made that distinctive attributes of religious communities justify different treatment. For most conditions that states will impose on schools participating in voucher programs, no such case for religious distinctiveness can be made. Nothing in *Zelman* operates to change the law in ways that would or should have impact on the scope of state power to create religion-specific accommodations.

C. *Zelman* and the Charitable Choice Movement

The context of *Zelman* is education, but in principle its approval of indirect funding of services provided by religious entities extends seamlessly to other social services.²⁴⁷ Formal neutrality and “true private choice” remain the measure of constitutionality. Moreover, state constitutions are likely to present many of the same impediments to inclusion of faith-based providers of social services as they do to the inclusion of religious schools, and the fights over conditions on voucher providers will arise in these other contexts as well.

These observations are not merely academic. The 1996 welfare reform statute expressly recognized the role that religious organizations may play in welfare-to-work programs,²⁴⁸ and the

²⁴⁶ Lupu & Tuttle, *Distinctive Place*, note xx *supra*.

²⁴⁷ The lower courts have already recognized this. See *Freedom From Religion Foundation v. McCallum*, 2002 U.S. Dist. LEXIS 14177 (W.D. Wisc. 2002), discussed at TAN xx *infra*.

²⁴⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C., including 42 U.S.C. § 604a et seq. (1996)). For discussion of constitutional questions raised by the Act, see Lupu & Tuttle, *Distinctive Places*, passim; Susanna Dokupil, *A Sunny Dome With Caves of Ice: The Illusion of Charitable Choice*, 5 *Tex. Rev. Law & Pol.* 149 (2000); Jonathan Friedman, *Charitable Choice and the Establishment Clause*, 5 *Geo. J. on Fighting Poverty* 103 (1997); add cite to Yale Policy journal piece)

Congress is currently considering reauthorization of that scheme. From the very first days of his administration, President Bush has made it a centerpiece of his agenda to promote the inclusion of faith-based organizations as partners with government in the provision of social services of many kinds.²⁴⁹ Moreover, major bills have been introduced, in both the House²⁵⁰ and Senate,²⁵¹ that would expand the regime of “Charitable Choice,” as the welfare reform arrangements are known, into a wide variety of other federally-financed social services.

These schemes typically include explicit affirmations of the right of religious organizations to maintain their religious identity while serving the public as a partner with government.²⁵² Some of them explicitly affirm the right of faith-based organizations to prefer co-religionists in their hiring,²⁵³ though such discrimination is forbidden with respect to service beneficiaries.²⁵⁴ All such proposals explicitly forbid faith-based organizations that obtain

²⁴⁹ See C Executive Order, Establishment of White House Office of Faith-Based and Community Initiatives, Jan. 29, 2001; Executive Order, Agency Responsibilities with Respect to Faith-Based and Community Initiatives, Jan. 29, 2001. The Order on Agency responsibilities creates centers for the Faith-Based Initiative in five major federal departments – HUD, Labor, Justice, Health & Human Services, and Education. These centers agencies have been busy for the past 18 months in assessing their departments performance, recommending administrative change, and initiating new actions to include faith-based organizations as partners with government in the provision of social services. See, e.g., <http://www.hhs.gov/faith/index.html> (HHS website on the faith-based initiative); Faith-based Groups Benefit from New Federal Grants, <http://www.religionandsocialpolicy.org/news/article.cfm?id=58>.

²⁵⁰ Community Solutions Act of 2001, H.R. 7 (107th Cong., 1st sess., 2001)

²⁵¹ Cite Lieberman-Santorum Senate version – CARE Act, S. 592, S. 1300

²⁵² 42 U.S.C sec. 604a(d) (1999).

²⁵³ H.R. 7 did so affirm, but this was very controversial and would not pass the Senate, although HR 7 did pass the House. Cite

²⁵⁴ See, e.g., 42 U.S.C sec. 604a(g) (1999); see also H.R. 7, sec. 1994A(g)(1)..

contracts with government from engaging in religious proselytizing, worship, or instruction with government funds.²⁵⁵

Despite statutory prohibitions of this latter sort, charitable choice arrangements are thick with constitutional questions about the financial relationship between government and faith-based providers.²⁵⁶ The President and his advisors on this subject continually emphasize the need for a “level playing field” on which secular and religious groups can compete for these contracts, but constitutional limitations, reflected in *Mitchell v. Helms*²⁵⁷ and *Agostini v. Felton*,²⁵⁸ on direct funding of religious activity by government impede that sort of leveling. Secular organizations may obtain the government’s aid in the use of secular methods of service, but faith-intensive organizations may not similarly get the government’s financial support for their religiously distinctive methods of service.²⁵⁹

²⁵⁵ Id. at sec. 604a(j); see also H.R. 7, sec. 1994A(j).

²⁵⁶ Courts have begun to confront these questions. See, e.g., *Freedom From Religion Foundation v. McCallum*, 2002 U.S. Dist. LEXIS 14177 (W.D. Wisc. 2002) (states may finance faith-intensive drug treatment in voucher program with genuine beneficiary choice). Six months earlier, in the same litigation, the court ruled that direct financing by the state of the same faith-intensive provider violated the Establishment Clause. 179 F. Supp. 2d 950 (W.D. Wisc. 2002). See also *ACLU of La. v. Foster*, UD District Court, ED La, Civil Action No. FILL IN, July 25, 2002 (enjoining aspects of Louisiana abstinence program found to violate Establishment Clause). We comment on *Foster* at http://www.religionandsocialpolicy.org/legal/legal_update.cfm?id=7.

²⁵⁷ 530 U.S. 793 (2000).

²⁵⁸ 521 U.S. 203 (1997).

²⁵⁹ See *McCallum*, note xx *supra*. A crucial constitutional question for the charitable choice movement is whether the constitutional prohibition on aid to “pervasively sectarian organizations” survives *Mitchell v. Helms*. We think the prohibition does not so survive, but at least one lower court has disagreed in the context of aid to social service efforts. *ACLU of La. v. Foster*, UD District Court, ED La, Civil Action No. FILL IN, July 25, 2002 (enjoining aspects of

Zelman, and its approval of voucher programs that transfer funds from government to private religious organizations, represents under current law the only constitutionally acceptable path for realizing the “level playing field” the President seeks. As applied to social service programs, the voucher device would permit government to finance beneficiaries who choose to obtain services at faith-based providers, so long as secular providers were among the available choices. And the fact that the programs may have varying degrees of faith content, from the mildest to the most intense, would itself have no effect on the program’s constitutional status. Indeed, for service contexts in which faith-intensive methods are most comprehensive and widely in use, voucher financing may be the only method that will permit faith-based providers to participate at all.

Outside of education, however, the application of *Zelman*’s principles presents new and less secure dimensions for voucher financing of faith-based services. To be sure, the requirement of religion-neutral classes of voucher recipients and service providers should prove no more an obstacle outside the education context than it did in *Zelman*. Moreover, the placement of the burden of persuasion on those who challenge the voucher program certainly should bolster the case for other programs that include faith-based providers.

With respect to the relevant universe of choices, however, voucher programs for services other than education stand on less certain ground. Educational vouchers typically appear in settings in which government provides the service itself, and offers a substantial number of the available choices. In most areas of social service, by contrast, government tends to finance privately provided services rather than to operate such programs directly. In some contexts, such

Louisiana abstinence program found to violate Establishment Clause).

as child care, there tends to be a healthy mix of religious and non-religious providers.²⁶⁰ For other services, such as substance abuse treatment programs, the pool of providers tends to be dominated by faith-based providers – especially if one considers, as most courts do, that 12-step programs count as “religious.”²⁶¹ In rural areas in particular, the overall number of service providers may be quite small, and may in some locales be dominated by faith-intensive organizations, highly motivated to fill social needs. In addition, particular service areas tend to attract more faith-intensive service approaches or therapies than others. Welfare-to-work readily lends itself to secular methods, but rehabilitation of prisoners,²⁶² and programs designed to teach sexual abstinence to teenagers,²⁶³ are likely to attract a high percentage of providers that use explicitly religious methods to try to transform those with whom they are engaged. In such circumstances, government may be under considerable pressure to bring secular providers into the service market, although *Zelman* liberates the government from any obligation to ensure that the secular options are as plentiful or as attractive as the religious ones.

²⁶⁰ We discuss this in detail in Lupu & Tuttle, *Sites of Redemption*, note xx supra, at xx-xx.

²⁶¹ See, e.g., *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397 (2d Cir. 2001). See also *Warner v. Orange County Dept. of Prob.*, 115 F.3d 1068 (2d Cir. 1997) (holding that county may not condition probation on participation in Alcoholics Anonymous because of AA's religious content), *reaff'd after remand*, 173 F.3d 120 (2d Cir.), *cert. denied*, 528 U.S. 1003 (1999).

²⁶² See R.G. Ratcliffe, *Christianity At Center of Texas Faith-Based Aid*, HOUSTON CHRON., Feb. 4, 2001, at 1 (discussing successes of Inner Change Freedom Initiative, a "New Testament-based prison redemption program").

²⁶³ See *ACLU of La. v. Foster*, UD District Court, ED La, Civil Action No. FILL IN, July 25, 2002 (enjoining aspects of Louisiana abstinence program found to violate Establishment Clause).

*Freedom From Religion Foundation v. McCallum*²⁶⁴ highlights the problem of government provision of non-religious alternatives, constitutionally required to validate the choice of a faith-based provider as “true” and “independent.” *McCallum* is among the first, and thus far the most important, of the decisions connecting the Supreme Court’s Establishment Clause rulings to charitable choice programs. In January, 2002, the court held unconstitutional a welfare-to-work program that transferred funds from the state’s Department of Workforce Development (“DWD”) to Faith Works, Inc, a faith-intensive treatment program for substance abuse. DWD made the grants, which transferred \$150,000 from DWD to Faithworks in 1998 and another \$450,000 in 1999, in response to a proposal from Faith Works to provide a nine-month, residential “addiction recovery program for men” that is a “faith-based, long-term residential, holistic program that emphasizes spiritual, physical, emotional and economic wellness..”²⁶⁵ The program included 1) a faith-enhanced, 12-step recovery process led by paid counselors and volunteer leaders; 2) individual and group counseling by Faith Works counselors; 3) training in skills related to job readiness and overall living; 4) housing assistance; and 5) aftercare counseling. The DWD grants did not depend on the numbers of beneficiaries who chose to participate in the program.

Synthesizing the Supreme Court’s recent decisions on direct aid to religious entities, and emphasizing the concurring opinion in *Mitchell v. Helms*, the court concluded that the central question raised by this grant was whether any religious indoctrination that occurred in the

²⁶⁴ 179 F.Supp.2d 950 (W.D. Wis. 2002). For a thorough explication of this case, see our analysis at http://www.religionandsocialpolicy.org/legal/legal_update.cfm?id=3. Much of our description, and some of our analysis, of *McCallum* is drawn from comments that we have posted on that website.

²⁶⁵ 179 F. Supp. 2d at xxx.

DWD-financed program was “attributable to the state.”²⁶⁶ It then examined closely the details of the program, including what the grant paid for and the degree of religious experience that was included in the program. With respect to the particulars of the program, the court found that state funds were supporting counselor salaries as well as other program expenses. Counselors were participating in, among other things, faith-enhanced AA meetings at which attendance by participants was mandatory, and counselors were always available “to facilitate transformation of mind and soul of participants.”²⁶⁷ Moreover, the court expressed the view that traditional AA meetings, even without the faith enhancement, are “religious as a matter of law.”²⁶⁸ Accordingly, the court found that the state bore responsibility for directly financing religious experience for program participants, and that the direct grant therefore violated the Establishment Clause.²⁶⁹

²⁶⁶ Id. at xx.

²⁶⁷ Id. at xx.

²⁶⁸ Id. at xxx (citing FILL IN, xxx F.3d xx (7th Cir. 19xx)).

²⁶⁹ The court rejected the argument by Faith Works that only 20% of counselor time was devoted to spiritual counseling, and that Faith Works raised non-governmental funds sufficient to support that 20%. Because the organization commingled its public and private funds, and expected that spiritual activities would be integrated into all of the counselors’ responsibilities, the government was effectively paying for religious experience for participants. Although the court noted that the documents governing the grant specified that “grant monies may not be used to attempt to support either religious or antireligious activities,” id. at xx, the court also observed that the DWD’s agents ignored the faith components of the program (obvious from the organization’s mission statement, employee handbook, and its proposal to DWD) and never communicated to Faith Works that state funds should not be allocated to religious activities. The court ruled that the state must show that it has an adequate system in place to safeguard against direct state financial support for religious activity, and that unenforced, boilerplate language in the contract would not be sufficient for this purpose. The court ruled that the DWD funding of Faith Works violates the Establishment Clause and ordered the state “to cease all funding of Faith Works through the [DWD] discretionary grant as it is currently implemented.” Id. at xx.

At the same time it made that ruling, however, the court took under advisement a related constitutional claim against a beneficiary choice program involving Faith Works. This program involved placement of drug offenders, by agents of the state's Department of Corrections ("DOC"), in substance abuse treatment at Faith Works, among other providers.²⁷⁰ In 1999, DOC entered into a contract with Faith Works, under which DOC would pay Faith Works on a per beneficiary basis if and when beneficiaries received services through the program.²⁷¹ Under the program, a DOC probation or parole agent would refer qualified offenders to substance abuse treatment as an alternative to incarceration (or other forms of DOC control); beginning in 1999, Faith Works was among a number of treatment programs in the Milwaukee area eligible to receive DOC referrals. Faith Works was the only program offering nine- to twelve-month treatment, compared to the two- to three-month programs offered by other providers. DOC policies permitted agents to recommend Faith Works to eligible offenders, but required the agents to inform offenders that non-religious treatment alternatives were available.

In July, 2002, the district court upheld the constitutionality of the DOC arrangement with Faith Works.²⁷² Drawing heavily from the Supreme Court's recent decision in *Zelman*, Judge Crabb wrote that the chief question to be resolved was "whether offenders under the supervision of the department who participate in the Faith Works program do so of their own independent,

²⁷⁰ The factual details in this paragraph are from *Freedom From Religion Foundation, Inc. v. McCallum*, 2002 U.S. Dist. LEXIS 14177 (ED Wisc, 7/26/02) (hereafter "McCallum II").

²⁷¹ In the 1999 contract, DOC would reimburse Faith Works up to \$50,000 for providing five spaces in the nine-month program. DOC renewed the contract in 2000 and 2001 for only two spaces.

²⁷² *McCallum II*, note xx supra.

private choice.” To resolve the issue of “independent private choice,” Judge Crabb focused on the DOC’s referral process, and based her decision on two considerations. First, she determined that the DOC’s policy required its agents to offer a secular treatment alternative to offenders, and to inform them that they were not required to attend Faith Works if they objected to its religious content.²⁷³ Second, the judge found that “there is no evidence suggesting that offenders who reject a particular program are punished in any way.”²⁷⁴

We have serious doubts about Judge Crabb’s analysis of the beneficiary choice program operated by DOC. In her assessment of that choice, the judge followed closely Chief Justice Rehnquist’s majority opinion in *Zelman*, and, unsurprisingly, her analysis shares both the clarity and the weaknesses of the *Zelman* majority. The district court’s inquiry into the offender’s choice of treatment program, like the Supreme Court’s analysis of parental choice in Cleveland, does not pay close attention to the possibility that the state is steering participants toward religious experience.

Perhaps the starkest example of this inattention to the particular context of choice comes in Judge Crabb’s comparison between the offenders under DOC control and the Cleveland schoolchildren in the *Zelman* case. She asserts that the offenders are less “susceptible to indoctrination” than schoolchildren and so their choices need no greater scrutiny than the *Zelman*

²⁷³ Id. at xxx. DOC was able to document not only its general policy, but the specific steps its agents had taken to inform the offenders referred to Faith Works of their options, and the fact that these offenders had affirmatively selected Faith Works.

²⁷⁴ Id. at 14177, *38. Following *Zelman*, Judge Crabb declined to presume that the state had limited offenders’ choices to religious providers. Instead, she placed the burden on plaintiffs to show that the offenders’ apparent freedom of choice was illusory. The plaintiffs did not meet this burden.

Court provided. But the analogy is misleading for two reasons. First, the issue of susceptibility focuses attention on the wrong point in time. It is no doubt true that children, captive in schools for many hours per day and many weeks per year, are vulnerable to indoctrination; but *Zelman* means that, in a properly designed voucher program, parents and children are free to choose their preferred source of indoctrination. The voucher model is not focused on susceptibility per se. Instead, the model is concerned with susceptibility to state influence at a particular point in time – when the participant is deciding what kind of experience to accept in the chosen school or program, not when the participant has already entered it.

This first mistake leads into the second problem with the court’s analogy. The court misleads through its contrast between the adult offender and the school child, suggesting that because the offenders are adults, they have greater capacity to give meaningful consent than the schoolchildren. Schoolchildren do not make the decision alone on which school to attend; indeed the decision must be made by their parents. These parents certainly face the legal pressure of compulsory school attendance laws and the practical pressure that arises from their desire to have their children attend safe and challenging schools, and yet the *Zelman* court did not think those pressures coerced parents into choosing religious options.

Contrast those pressures, however, with the context in which the DOC offender chooses. To begin with, the offender is by definition a substance abuser, perhaps even struggling with the symptoms of withdrawal. This physical condition itself may impair the capacity for choice; and such an impairment may be most severe in those cases in which long-term residential treatment is warranted. Moreover, the offender receives a recommendation to attend a religious facility from an agent of the state, an agent who holds the power to recommend significantly greater restrictions

on the offender, including incarceration, if the offender fails to meet the conditions set for parole or probation. Even though the agent is required to inform the offender of a secular alternative, the DOC agent's expressed preference may well impinge on the "genuinely private and independent" choice of the offender.²⁷⁵

Despite *Zelman*'s broad warrant to uphold the constitutionality of voucher programs, we think that courts in the future should examine issues of "independent choice" more carefully, especially when the choosers may be suffering cognitive incapacities. Although *Zelman* counsels strongly against close judicial evaluation of the relative merits of secular versus religious providers, it does not preclude examining participants' capacity for choice.²⁷⁶ Moreover, as we have argued elsewhere,²⁷⁷ the state should be held to a duty to take affirmative steps to ensure the presence of secular options. This duty was satisfied in *Zelman* by the wide range of public school choices in Cleveland, but voucher programs for social services, frequently lacking these publicly operated counterparts, may present entirely different circumstances.

Zelman, especially as glossed in *Freedom From Religion Foundation v. McCallum*, suggests that vouchers are indeed the path of least constitutional resistance for government partnerships with faith-intensive providers. As noted in Part IIB, however, voucher programs are

²⁷⁵ Judge Crabb's analytic lapse may be attributable in part to the plaintiff's failure to litigate the choice question more thoroughly; this plaintiff, like other advocates for the Separationist position, may not have fully internalized the legal changes produced by *Zelman* and other recent decisions. (Notably, the plaintiffs did not call any of the offenders as witnesses, and did not file a brief with the court after *Zelman* was handed down.)

²⁷⁶ Cf. *Goldberg v. Kelly*, 397 U.S. 254, xxx (1970) (capacity of class of welfare recipients to communicate orally as compared to in writing should shape the requirements of procedural due process in welfare fair hearings.)

²⁷⁷ Lupu & Tuttle, *Sites of Redemption*, note xx supra, at xx-xx.

likely to face significant political controversy when proposed for any social service, education or otherwise. Although providers in such programs have in the past tended to get less governmental scrutiny and control than those working under direct government grants,²⁷⁸ more widespread use of vouchers in the future will likely invite an increase in regulatory attention. Just as in the case of education, civil rights advocates will press for restrictions on the employment practices of service providers, targeting those providers who discriminate in favor of co-religionists and against gays and lesbians.²⁷⁹ Moreover, any expansion of social services to include voucher arrangements at faith-based organizations may well invite new demands for accountability of providers. Here too the rules of neutrality, presumptively requiring the same treatment of secular and religious providers, will control.

In addition, voucher programs are less likely than direct grants and contracts to induce faith-based organizations into the service arena. Unlike fixed-price contracts, vouchers cannot provide seed money to start new programs or provide a stable financial base on which to build a service program. From the perspective of providers, vouchers may be constitutionally secure but

²⁷⁸ For discussion of this phenomenon in the context of vouchers for child care, see Douglas Besharov & Nazanin Samari, *Child Care Vouchers and Cash Payments*, in C. Eugene Steurle, Van Doorn Ooms, George E. Peterson, & Robert D. Reischauer (eds), *Vouchers and the Provision of Public Services*, (Brookings, 2000).

²⁷⁹ For example, Lambda Legal Defense and education Fund recently filed suit against officials of the State of Georgia, alleging that the State had unconstitutionally financed a Methodist Children's Home that discriminated against gays, lesbians, and Jews. See Lambda Legal, News Release 08/01/2002, <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1108>. Moreover, battles over the scope of employment discrimination laws as applied to faith-based providers have been a central impediment to current legislative proposals to expand charitable choice. CITE PERIODICALS. We expect that proposals to use vouchers to pay for social services rendered at faith-based organizations would invite a similar debate.

economically unpromising. From the perspective of government administrators, eager to lure new groups of providers into the regime of charitable choice, vouchers may not have the quick and large payoff that agencies would like, whether for reasons of publicity, patronage, or provision of service.

Whatever the political dynamics, *Zelman* virtually guarantees that vouchers will play a central role in the ongoing debate over the role of faith-based organizations in government-financed social service. If this or any other Administration, state or federal, wants a “level playing field” for religious and non-religious organizations, vouchers have become the constitutionally appropriate route. Political resistance to efforts to go down this path will surely emerge, but constitutionally knowledgeable administrators are already preparing their voucher plans as a way to include faith-intensive organizations in a variety of social services.²⁸⁰

CONCLUSION

Zelman is thinly reasoned, but it presents a key that opens many doors. The opportunities it presents are both theoretical and practical. On the theoretical side, the decision may force a long overdue reconsideration, by judges and others, of Establishment Clause premises and principles. The pervasive anti-Catholic sentiment that drove Separationism from the 1940's to the 1980's is well behind us, but the questions of religion's distinctive place in our constitutional ethos remain. And the tangled issues of the relationship between federal and state constitutional law, now squarely framed by government's financial relations with religious entities, present a

²⁸⁰ See Jane Eisner, Making Marriage the Choice for Parents; Church Can Play a Role, Especially among Blacks, *The Philadelphia Inquirer*, July 14, 2002 (p. C1) (attributing to Wade Horn, head of HHS Office of Children and Families, a plan to promote vouchers for premarital counseling).

rich context in which to think through afresh a set of questions as old as the Republic.

On the practical side, the opportunities seem even more pressing. Lawyers and judges have the luxury of watching and waiting as new principles emerge and work themselves pure. The questions of how and where we educate our children – especially those whose family wealth puts them in a disadvantageous position – and how we care for the least fortunate among us, demand immediate attention. Folding those concerns in with proper constitutional respect for the role of religious organizations, and limits on state power in dealing with such entities, is a formidable challenge. To ignore that challenge, ostrich-like, is to leave the field to those who would remake the Constitution in their zeal for government exploitation of religious faith.