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Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles

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† Professor of Law at George Washington University Law School. The authors are the co-directors of legal research for the Roundtable on Religion and Social Welfare Policy, www.religionandsocialpolicy.org, a project sponsored by the Pew Charitable Trusts. The opinions in the Article are those of the authors, and are not necessarily shared by the Pew Charitable Trusts. The authors are drafters and signatories to a Joint Statement of Church-State Scholars on School Vouchers and the Constitution; What the United States Supreme Court Has Settled, What Remains Disputed, Pew Forum on Religion and Public Life, available at http://www.pewforum.org (last visited Feb. 5, 2003). Conversations with the other drafters of this document (which addresses in brief a number of issues discussed in this Article) enriched our thinking, and we thank them all: Tom Berg, Alan Brownstein, Erwin Chemerinsky, John Garvey, Doug Laycock, and Bill Marshall. We also want to thank Melissa Rogers, the Director of the Pew Forum, for organizing and directing the project that led to the Joint Statement. All of the opinions and conclusions here are ours alone. Jason Jones, Brian Miklos, Mike Patrick, Karen Weiss, and Mara Zonderman contributed valuable research in the preparation of this piece. We especially thank Dean Michael Young for his generous support for our research.

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INTRODUCTION

On the eve of the Supreme Court's fateful decision in the Cleveland voucher case, only the most ostrich-like Separationist could have denied the flux in the law of the Establishment Clause. In the context of access of private parties to public fora for purposes of religious expression, and direct government transfer of material resources to religious institutions, 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.

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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,”5 “genuine,”6 and “independent”7 private 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 five to four, 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.8

The certainty of the resolution 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 rests are unexplained, or are attributed

5 Zelman, 122 S. Ct. at 2466–67, 2473.
6 Id. at 2465–67, 2469–70, 2473.
7 Id. at 2465–68.
8 Professor Fried characterized the Zelman dissents, especially that of Justice Souter, as “oppositional,” and he worried that the four dissenters in Zelman are committed to turning back the clock of the Establishment Clause. Charles Fried, Comment, Five to Four: Reflections on the School Voucher Case, 116 HARV. L. REV. 163 (2002). We think that the trend is too pronounced, and its crystallization in actual practice too advanced, to make Professor Fried’s concern a realistic one.
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 much can be said for the first premises in Zelman, but the decision's underpinnings require explication 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,\(^9\) 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 II.A 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 violated the church-state provisions of the Florida Constitution,\(^10\) and a panel of the U.S. Court of Appeals for the Ninth Circuit held in Davey v. Locke\(^11\) that a church-state provision in the Washington Constitution, as applied in a particular case, violated the federal Free Exercise Clause. Part II.B 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 accommodation. Here, we explore conditions related to school performance, student admissions, faculty hiring, and controversial expression by providers. Finally, Part II.C analyzes the importance of Zelman outside the field of education, by probing the decision's implications for President Bush's Faith-Based Initiative—that is, for efforts by government to en-

\(^9\) 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 J.L. & Pol. 537 (2002). That piece went to press too late to include anything more than a brief postscript about Zelman. This Article begins where that one left off.


\(^11\) 299 F.3d 748 (9th Cir. 2002).
list and finance faith-based organizations in providing social services. In this context, too, *Zelman* has had immediate impact, as revealed by the recent decision of a federal district court in Wisconsin to uphold a voucher-type arrangement for state financing of a faith-intensive drug rehabilitation program.\(^{12}\)

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.\(^{13}\) In 1996, responding to this crisis, Ohio enacted the Pilot Project Scholarship Program, which offers several options to parents of Cleveland schoolchildren. Under the Scholarship Program, Cleveland parents can receive a tuition voucher redeemable either at participating private schools in Cleveland, or at participating public schools in districts adjacent to Cleveland.\(^{14}\) Alternatively, parents whose children remain in Cleveland's public schools can choose to receive a voucher for after-school tutoring.\(^{15}\) Both the tuition and tutoring vouchers give priority to low-income families.\(^{16}\)

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


\(^{13}\) *Zelman* v. Simmons-Harris, 122 S. Ct. 2460, 2463 (2002).

\(^{14}\) *Id.* 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 2464.

\(^{15}\) *Id.* at 2463. The tutoring grants paid 90% of annual tutoring costs per child, up to an annual maximum of $360. *Id.* at 2464.

\(^{16}\) The program gave priority for scholarships to families with incomes below 200% of the poverty line. *Id.* If more children seek scholarships than the Program can offer, the scholarships are distributed by lottery. *Id.*
found that the voucher program legislation violated a technical requirement of the Ohio Constitution, and thus held the program invalid. The Ohio legislature quickly remedied the technical defect and re-enacted the voucher program. 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 Supreme Court granted certiorari. At each judicial level, courts stayed injunctive relief pending final resolution of the case in order to avoid educational disruption for those families who were already participating in the program. 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, prohibited substantial, unrestricted government support for religious primary and secondary schools. Nyquist, decided in 1973, invalidated New York'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 principles by having a "primary effect" of advancing religion and by promoting "political divisiveness" along sectarian lines.

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 available seats for voucher students; the program placed no restrictions on the use of

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


19 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, 218–19 (1997).

20 Nyquist, 413 U.S. at 774.

21 Id. at 796 (citing Lemon, 403 U.S. at 623).
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 violation of Separationist principles.22

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. Allen23 through Witters v. Washington Department of Services for the Blind24 to Zobrest v. Catalina Foothills School District.25 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 and private choices of aid recipients."26 These intervening independent choices, the Court reasoned, disconnected the government from any religious experience that a given beneficiary might receive along with—or as part of—the services "purchased" with the government's assistance. 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 in any public school.27

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 paradigm-confronting decision in Mitchell v. Helms.28 Mitchell involved an as-applied challenge to a joint federal-state program that 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, neutral, and

22 This argument persuaded a majority of the Sixth Circuit panel in Zelman to strike down the program. Zelman v. Simmons-Harris, 234 F.3d 945 (6th Cir. 2000), rev'd, 536 U.S. 639, 122 S. Ct. 2460 (2002).
26 Witters, 474 U.S. at 488; see also Zobrest, 509 U.S. at 9 (quoting Witters, 474 U.S. at 488). Mueller used similar language, holding aid as permissible as it was "controlled by the private choices of individual parents." Mueller, 463 U.S. at 400.
27 For the Zelman Court's discussion of magnet schools and community (charter) schools, see Zelman, 122 S. Ct. at 2464.
non-ideological" uses.\(^{29}\) Several precedents from the Nyquist era had held similar programs unconstitutional, because they transferred substantial aid to religious education.\(^{30}\) *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 only Establishment Clause requirements for a direct aid program. So long as the program had been designed to advance secular ends—in *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.\(^{31}\)

The *Mitchell* plurality also explicitly and vehemently repudiated a central tenet of the Separationist ethos. From the time of *Lemon v. Kurtzman*\(^{32}\) until the decision in *Mitchell*, the Court had repeatedly insisted that the state could not aid "pervasively sectarian" institutions.\(^{33}\) 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.\(^{34}\)

Three Justices—Justice Ginsburg, Justice Souter, and Justice Stevens, all of whom dissented in *Zelman* as well—dissented in *Mitchell*.\(^{35}\) 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

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29  *Id.* at 802 (citing 20 U.S.C. § 7372(a)(1) (2000)).
31  *Mitchell*, 530 U.S. at 808.
33  *See, e.g.*, *Bowen*, 487 U.S. at 610. *But see id.* at 624 (Scalia & Kennedy, JJ., concurring) (challenging validity of classifying institutions as "pervasively sectarian").
34  *Mitchell*, 530 U.S. at 828-29; *see also* Columbia Union Coll. v. Clark, 527 U.S. 1013 (1999) (Thomas, J., dissenting from denial of certiorari) (urging the Court to abandon the doctrine that bars aid to "pervasively sectarian" institutions).
35  *Mitchell*, 530 U.S. at 867-913 (Souter, J., dissenting).
for religious teaching,\textsuperscript{36} and by creating a substantial risk of diversion of government assistance to religious uses.\textsuperscript{37}

Justices Breyer and O’Connor—whose votes split in \textit{Zelman}—cast the deciding votes in \textit{Mitchell} in a concurring opinion that currently represents the governing law on direct government aid to religious entities.\textsuperscript{38} 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;\textsuperscript{39} 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 \textit{Mitchell} had sufficient safeguards against diversion to religious use, and therefore satisfied the Establishment Clause.

In light of the backdrop provided by \textit{Mitchell}, it was hardly a surprise that defenders of the Ohio Scholarship Program targeted Justice O’Connor as the key vote. They needed but one to add to the four in the \textit{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 \textit{Mitchell} concurrence had come as a bit of a surprise. By contrast, Justice O’Connor had evidenced strong prior interest in this field,\textsuperscript{40} and her jurisprudential style frequently

\textsuperscript{36} Id. at 896 (Souter, J., dissenting).  
\textsuperscript{37} Id. at 908–9 (Souter, J., dissenting).  
\textsuperscript{38} Id. at 836–67 (O’Connor, J., concurring). 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). We believe that the \textit{Mitchell} concurrence supports cash grants as well as in-kind assistance to faith-based organizations, so long as the grants are accompanied by safeguards against diversion to religious use. For a narrower view of \textit{Mitchell}, see David Saperstein, \textit{Public Accountability and Faith-Based Organizations: A Problem Best Avoided}, 116 Harv. L. Rev. 1353, 1378–80 (2003).  
\textsuperscript{39} We elaborate on the general paradigms of Religion Clause Separationism and Neutralism in Ira C. Lupu & Robert W. Tuttle, \textit{The Distinctive Place of Religious Entities In Our Constitutional Order}, 47 Vill. L. Rev. 37 (2002); and Lupu & Tuttle, supra note 9.  
\textsuperscript{40} Justice O’Connor is the author of the “endorsement” theory of Establishment Clause adjudication, see \textit{Lynch v. Donnelly}, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring), a theory that has become the law in cases involving religious speech by
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.\(^4\) Voucher opponents, by contrast, did not want to concede that any voucher program—no matter how ample the choice—was constitutional. They concentrated their arguments on *Nyquist* and its place in the theory of no-aid Separationism.\(^2\) *Zelman* was 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 five-to-four 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 opinion, written by Chief Justice Rehnquist, resides in the fact that it commanded a majority, in contrast to the fragmentation of the majority in *Mitchell v. Helms.* Justices O'Connor

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and Thomas wrote concurring opinions, while Justices Souter, Breyer, and Stevens authored dissents.43

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.44 The Zelman majority opinion succeeds in the first task, but falls far short in the second.

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.45 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.”46 The second inquiry—whether the challenged program has the “primary effect” of “advancing or inhibiting” religion47—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 individu-

43 All four dissenters, including Justice Ginsburg, joined Justice Souter’s dissent. Zelman, 122 S. Ct. at 2485 (Souter, J., dissenting). Justices Stevens and Souter, but not Justice Ginsburg, joined Justice Breyer’s dissent. Id. at 2502 (Breyer, J., dissenting). And Justice Stevens—who had joined the other two dissents—wrote a dissent for himself only. Id. at 2484 (Stevens, J., dissenting).
44 STEVEN BURTON, JUDGING IN GOOD FAITH 35–68 (1992) (arguing that an adjudication is legitimate or not based on the types of reasons the adjudicator invokes).
45 521 U.S. at 203. Agostini collapsed what had been separate inquiries of advancement of religion and “excessive entanglement” into a single inquiry into forbidden religious effects.
46 Zelman, 122 S. Ct. at 2465.
47 Id.
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.49

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 three criteria present in the earlier indirect aid cases. As a threshold requirement, the aid program must be "neutral in all respects toward religion."50 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 were those who come from lower income families, the Court found this criteria satisfied in Zelman.51

Next, the program must provide aid "directly to a broad class of individuals, defined without reference to religion."52 This criterion, which originated in Mueller v. Allen,53 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 parents "of a school-age child who resides in the Cleveland City School District,"54 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 turned out to be the dispositive one in maintaining a majority. The aid recipients must be "empowered to direct the aid to schools or institutions of their own choosing."55 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 pub-

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48 Id.
49 Id. at 2466.
50 Id. at 2467.
51 Id. at 2468.
52 Id.
54 Zelman, 122 S. Ct. at 2468.
55 Id. at 2466–67.
licly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a private nonreligious school, enroll in a community school, or enroll in a magnet school."\textsuperscript{56} Each of these choices had consequences for the allocation of public resources.

Taken together, these criteria comprise the Court's image of legitimate indirect aid programs as "circuit breakers" between the government and religious institutions.\textsuperscript{57} If government has acted neutrally in establishing the program—by defining the providers and beneficiaries without respect to religion—and if the beneficiaries select 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:

\begin{enumerate}
\item \textit{Does the voucher form of financing have constitutional significance?}
\end{enumerate}

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;\textsuperscript{58} in the heart of its 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 in the hands of 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

\textsuperscript{56} Id. at 2469.
\textsuperscript{57} Id. at 2467.
\textsuperscript{58} See, e.g., id. at 2465–67, 2473.
statistics is created by demographic forces or choices, either personal or institutional, outside the government's control and responsibility.\textsuperscript{59}

\textbf{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 \textit{Mueller},\textsuperscript{60} \textit{Witters},\textsuperscript{61} and \textit{Zobrest}\textsuperscript{62} signaled the importance of private choice for Establishment Clause jurisprudence, but 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. \textit{Witters} and \textit{Zobrest} involved programs that offered virtually unlimited choices.\textsuperscript{63} In \textit{Witters}, the voucher program allowed recipients to choose any school or program offering vocational training in virtually any field.\textsuperscript{64} The program at issue in \textit{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.\textsuperscript{65} 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.\textsuperscript{66} The first option was illusory—no public school district in the Cleveland metropolitan area was willing to take Cleveland voucher

\begin{itemize}
  \item \textsuperscript{59} \textit{Id.} at 2469-70.
  \item \textsuperscript{60} \textit{Mueller v. Allen}, 463 U.S. 388 (1983).
  \item \textsuperscript{61} \textit{Witters v. Wash. Dept. of Servs. for the Blind}, 474 U.S. 481 (1986).
  \item \textsuperscript{62} \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 509 U.S. 1 (1993).
  \item \textsuperscript{63} \textit{Mueller} involved a tax deduction for, among other things, tuition at private elementary and secondary schools, rather than a direct government transfer to religious institutions. A large percentage of the private schools were religious, but the Court rejected the idea that the constitutionality of the scheme should turn in any way on the demography of the relevant schools. \textit{Mueller}, 463 U.S. at 400-01.
  \item \textsuperscript{64} \textit{Witters}, 474 U.S. at 487-89. Washington 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 \textit{Davey v. Locke}, 299 F.3d 748 (9th Cir. 2002). \textit{See infra} notes 202-04 and accompanying text.
  \item \textsuperscript{65} \textit{Zobrest}, 509 U.S. at 10-12. Like \textit{Witters}, \textit{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.
  \item \textsuperscript{66} \textit{Zelman v. Simmons-Harris}, 122 S. Ct. 2460, 2469-64 (2002).
\end{itemize}
students. 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 per 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 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.68

Seen in that context, voucher seats in religious schools account for a much smaller percentage of the state-financed educational alternatives.69 The majority's analysis of this point, unlike Justice O'Connor’s, did not focus on the subjective experience of parents choosing schools.70 Although it referred to the “perspective of Cleveland parents,” the Court adopted an objective determinant for the range of choices, measured by the extent of Ohio’s overall public support for education. “All options Ohio provides Cleveland schoolchildren”71 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 Establishment Clause questions about the importance and relevant scope of beneficiary choice, but they do not directly address the significance of the various adjectives modify-

67 Id. at 2464.
68 Id. at 2471 n.6. The Court expressed deep frustration at oral arguments that those who challenged the program would not explain why community and magnet schools should not be included in the relevant universe of choices. Id. at 2471. 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 2469; see also supra text accompanying note 56. For a spirited defense of including the existing public schools in the relevant appraisal of choice, see Richard T. Weicher, Note, If a Public School Is Labeled “Failing,” Could More Really Be Less?, 77 NOTRE DAME L. REV. 293 (2001).
69 According to the Court’s arithmetic, the percentage drops from 96% to less than 20% of the available alternatives. Zelman, 122 S. Ct. at 2469.
70 See infra text accompanying notes 96–135.
71 Zelman, 122 S. Ct. at 2469.
ing "private choice," which include "genuine," "independent," and "true." The Court provided a subtle, but telling, response to this issue: "[t]here . . . is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children." 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 quotation 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 declined 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 of a particular religious element to their child's education. The Court's opinion, however, evinces no concern for their plight.

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

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72 See supra notes 5-7 and accompanying text.
73 Zelman, 122 S. Ct. at 2469.
74 Indeed, 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. Defined this narrowly—in terms of coercion, rather than influence—the answer is obviously no.
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. 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. Recipients of these scholarships may use them at any non-failing public school in their own district; at a non-failing public school, if seats are open, in an adjacent school district; or at any participating private school. Thus far, the Florida Department of Education has certified a very small number of schools as failing for two years.

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 their children—and the state's support associated with those children\textsuperscript{79}—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 proposals 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.

Ironically, 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 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's opinion does mention the

\textsuperscript{79} 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. ANN. § 229.0537(6).
neighborhood public schools as being among the relevant options, but it is only one of several, and the facts are sufficiently different from our hypothetical that one cannot be sure of the outcome. 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—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, which remains in most jurisdictions a political last resort.

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 identified *Mueller*, *Witters*, and *Zobrest* as controlling precedent, drew from them “the principle of private choice,” and concluded 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 explained 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,” as the dissenters claimed?

Any answer to that question depends on prior understandings about the meaning and purpose of the Establishment Clause, though the *Zelman* opinion is silent about such matters. 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

80 *Zelman* v. Simmons-Harris, 122 S. Ct. 2460, 2469 (2002) (“Cleveland school-children enjoy a range of educational choices: They may remain in public school as before . . . .”).

81 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 infra text accompanying notes 96–135.


84 Id. at 2489–90. The money-laundering image had been invoked before by Laura Underkuffler, *The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167, 187–90 (2000).
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 said 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.” Summarizing *Mueller*, *Witters*, and *Zobrest*, the Court contended that in a program of indirect aid, “The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.” 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. 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


86 Id. at 2467.


plurality collapsed Lemon's effects test into the single criterion of neutrality:

If the religious, irreligious, and areligious 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 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.  

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 the government's 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 Education & Religious Liberty v. Nyquist. The Court referred to the “ostensibly secular purposes” offered to support the program of tuition grants and tax credits, 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. This impermissible motive was manifest in the “package of benefits” given “exclusively to private schools and the parents of private school enrollees.” In contrast, the Cleveland voucher plan had emerged from a long—and religion-neutral—history of public school failure and the state’s enactment of a wide array of programs designed to

89 Id. at 809. Note Justice O’Connor’s sharp critique of this account of neutrality. Id. at 836–37 (O’Connor, J., concurring in the judgment).
91 Zelman, 122 S. Ct. at 2472. For a listing of those ostensibly secular purposes, see Nyquist, 413 U.S. at 773–74.
92 Zelman, 122 S. Ct. at 2472 (quoting Nyquist, 413 U.S. at 795).
93 Id.
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.\textsuperscript{94}

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, those who joined the \textit{Mitchell} plurality) has in fact limited considerably the independent significance of "genuine" choice. The first two criteria of the \textit{Lemon} effects test—religion-neutral classification of providers and beneficiaries, and broad distribution of benefits—provide the necessary scrutiny of the government's \textit{bona fides}. Any program that meets those two requirements will likely be perceived as religion-neutral in its intent.\textsuperscript{95} The beneficiary's private choice simply confirms what was already established, i.e., that the government should not be deemed responsible for religious indoctrination that the beneficiary receives with the voucher-financed services.

This theoretical foundation for the Court's opinion faces one inescapable problem: Justice O'Connor, in her concurring opinion in \textit{Mitchell}, specifically rejected the plurality's attempt to reduce Establishment Clause analysis to the neutral-intent inquiry.\textsuperscript{96} 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 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 \textit{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 "genuine and independent choice" takes center stage, but in no way limits the \textit{Mitchell} plurality's approach to the Establishment Clause. In cases of direct funding, just as in arrangements involving private choice, these four Justices—Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas—will remain willing to up-

\textsuperscript{94} \textit{Id.} at 2469 (citing \textit{Good News Club v. Milford Cent. Sch.}, 533 U.S. 98, 119 (2001)).

\textsuperscript{95} Indeed, the plurality in \textit{Mitchell} found that the program at issue in that case reflected "independent and private choice." \textit{Mitchell v. Helms}, 530 U.S. 793, 814–20 (2000).

\textsuperscript{96} \textit{Id.} at 836–43 (O'Connor, J., concurring in the judgment).
hold 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.\footnote{See, e.g., Michael A. Fletcher, High Court Joins Battle Over School Vouchers: Church-State Divide at Issue in Ohio Case, Wash. Post, Feb. 20, 2002, at A6; Linda Greenhouse, Cleveland's School Vouchers Weighed by Supreme Court, N.Y. Times, Feb. 21, 2002, at A1; Linda Greenhouse, Court Takes Case Testing the Limits of Voucher Laws, N.Y. Times, Sept. 26, 2001, at A1; Charles Lane, The O'Connor Factor: Justice Plays Pivotal Role on High Court, Wash. Post, Feb. 18, 2002, at A1.} 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.\footnote{Petitioner's Brief at 15–17, 21–22, 92, 35–38, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) (No. 00-1751); Petitioner's Reply Brief at 5–7, 13, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) (No. 00-1751); see Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (introducing endorsement test into the law of the Establishment Clause); see also Agostini v. Felton, 521 U.S. 203, 235 (1997) (applying endorsement test).} Once the Court announced its decision, most commentators focused not on what O'Connor said, but what she did not say or do. Unlike in Mitchell, O'Connor's concurrence in Zelman seems to impose no constraints on the Court's decision.\footnote{We took this view in our initial reaction to the Court's decision. Ira C. Lupu & Robert W. Tuttle, In Vouchers We Trust, Legal Times, July 8, 2002, at 34.} 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 wide-ranging survey of government programs that provide indirect, unrestricted support for religious institutions.\footnote{Zelman, 122 S. Ct. at 2474–75 (O'Connor, J., concurring).} 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."\footnote{Id. at 2475 (O'Connor, J., concurring).} The effect of this long catalogue is even broader; it shows that the dissenters' account of no-aid separationism has always been 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 choice"; the need to consider "all the choices available to potential beneficiaries"; and the placement upon challengers to a voucher program of the evidentiary burden to show the lack of a "genuine choice." In several important respects, however, Justice O'Connor's restatement of the Court's analysis reveals important differences between her 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." This test seems both disingenuous and superficial. No one had ever claimed that nonreligious schools "need ... [to] be superior to religious schools in every 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 uneasiness with 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."

The shift in focus is also evident as Justice O'Connor turned to the majority's placement of the evidentiary burden and explained how the presumption of genuine choice can be overcome: "there is

102 Id. at 2478 (O'Connor, J., concurring).
103 Id. (O'Connor, J., concurring).
104 Id. (O'Connor, J., concurring).
105 Id. at 2492 (O'Connor, J., concurring).
106 Id. at 2477 (O'Connor, J., concurring).
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.”108 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.”109 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 “require[ ] that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries.”110 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 government support on a per capita basis—the amount of government aid was determined by the number of students enrolled at each school.111

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.112 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: “[t]he [per capita] aid formula does not—and could not—indicate to

108 Id. at 2477 (O’Connor, J., concurring).
109 Id. at 2466.
110 Id. at 2476 (O’Connor, J., concurring).
112 Id. at 843 (O’Connor, J., concurring in judgment). For a recent attempt to grapple with the distinction between per capita and beneficiary choice programs, see Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002).
a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school." 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 religious aspects of 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." Although the Mitchell plurality's analysis 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:

[When 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

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113 Mitchell, 530 U.S. at 843 (O'Connor, J., concurring in judgment).
114 Id. at 843-44 (O'Connor, J., concurring in judgment).
116 Mitchell, 530 U.S. at 842 (O'Connor, J., concurring in judgment).
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." The paradigmatic case of the donated paycheck offers several analytically 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 juncture 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 that precludes a realistic choice of a secular provider.

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 signifi-

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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.\(^{118}\) 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.\(^{119}\) 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.\(^{120}\)

We think that Justice O'Connor's attention to 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,"\(^{121}\) however, proves to be an awkward proxy for advancing that concern. A sounder approach requires that we step back and examine the core vices with which the Establishment Clause is concerned.

The regime of strong Separationism offered its own account of those vices, but that account no longer carries the persuasive force that it once did.\(^{122}\) First, despite Separationist claims to the contrary, the Establishment Clause does not protect against violations of taxpayer conscience caused by government support for religious institutions.\(^{123}\) Justice O'Connor's long catalogue of government support for religion makes clear the extent to which such support is a normal

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\(^{118}\) Zelman, 122 S. Ct. at 2486–90 (Souter, J., dissenting).

\(^{119}\) Id. at 2466–70.

\(^{120}\) With 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 concept of "absolute neutrality" advanced by the plurality opinion in Mitchell. See Mitchell, 530 U.S. at 838 (O'Connor, J., concurring in the judgment) (describing the plurality's treatment of neutrality as "near-absolute").

\(^{121}\) Zelman, 122 S. Ct. at 2476 (O'Connor, J., concurring).


\(^{123}\) Of the fifty state constitutions, each of which contains some version of nonestablishment norms, only the Vermont provision is framed in terms of taxpayer conscience. See Vt. Const. art. 3. We collect the texts of the relevant nonestablishment provisions of the fifty states in Ira C. Lupu & Robert W. Tuttle, Government Partnerships with Faith-Based Service Providers: State of the Law 77–129 (Dec. 11, 2002), at http://www.religionandsocialpolicy.org.
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. Second, the Establishment Clause does not 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? Third, at least in its focus upon government expenditures, the Establishment Clause does not act primarily 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 expression provide clear examples of this vice, and the Court has continued to hold unconstitutional such acts of expression. 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.

Moreover, the ambit of the Establishment Clause extends beyond the government's direct and intentional engagement in religious activities. Since Abington School District v. Schempp, a case involving Bible reading in public schools, the Court has asked whether a chal-

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125 We discuss this theme in connection with the dissent of Justice Breyer. See infra Part I.B.4.b.


127 For further discussion of this point in the context of historic preservation, see Lupu & Tuttle, supra note 122, at 1174.

lenged program had the "primary effect" 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. 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. 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. The chief difficulty lies in determining the circumstances under which one should be held responsible.

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 worry. 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 of "genuine choice" that measured whether or not the state was, in fact, exerting practical pressures on Cleveland parents to send their children to religious schools.

129 Id. at 222.
130 For a more sustained analysis of the "primary effects" test, see Lupu & Tuttle, supra note 9, at 557-59.
131 Id. at 559.
132 This 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, 223-24 (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, supra note 9, at 556-59.
In an earlier article,\textsuperscript{133} 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.\textsuperscript{134} In particular, we suggested that the Ohio voucher program 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.\textsuperscript{135} We do not claim that our approach is the only one responsive to the possibility of state-created incentives to undertake religious training. Justice O'Connor's opinion would have been much stronger, however, had she made explicit the need for an inquiry into such incentives.

3. Justice Thomas's Concurrence

Like Justice O'Connor, Justice Thomas joined the Court opinion but wrote separately and alone as well. His concurrence highlighted two major themes. First, he began and ended by emphasizing the connection between \textit{Brown v. Board of Education}\textsuperscript{136} and \textit{Zelman}.\textsuperscript{137} \textit{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.\textsuperscript{138} Justice Thomas reminded us quite eloquently of the ways in which school voucher plans, once thought to be

\textsuperscript{133} Lupu & Tuttle, \textit{supra} note 9.

\textsuperscript{134} In our analysis, the precise nature of the state's affirmative duty would vary relative to the extent to which the state required beneficiaries to avail themselves of a particular service (e.g., compulsory school attendance laws for minors or court-mandated substance abuse treatment) and the extent to which the state intended the service to comprehensively transform the beneficiary. \textit{See id.} at 594-98.

\textsuperscript{135} \textit{Id.} at 598-601. The Milwaukee voucher program represents the best example of such measures. \textit{See} \textit{Jackson v. Benson}, 578 N.W.2d 602 (Wis. 1998).

\textsuperscript{136} 347 U.S. 483 (1954).


potential engines of "white flight," might help redeem the commitments made fifty years ago in *Brown*.

Second, Justice Thomas provocatively suggested that the Court's decision in *Everson v. Board of Education*,139 which declared the Establishment Clause applicable to the states, should be reconsidered.140 Justice Black's opinion for the Court in *Everson* announced this proposition without any careful inquiry,141 and none of the other Justices writing in *Everson* challenged him. Ever since, the Supreme Court has treated the question as entirely settled.142 Several commentators have strenuously questioned this conclusion as a historical and textual matter,143 however, and Justice Thomas—consistent with his willingness to re-examine first principles144—urged that the Court limit its intervention into religious liberty issues arising under state law to those properly cognizable under the Free Exercise Clause.145

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139 330 U.S. 1 (1947).
140 *Zelman*, 122 S. Ct. at 2480–82 (Thomas, J., concurring).
141 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 (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 Fourteenth Amendment. *See, e.g.*, *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).
143 In his concurrence, Justice Thomas cited William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DePaul L. Rev. 1191, 1192–94 (1990) (arguing for a return to the original understanding of the Fourteenth Amendment that would not incorporate the Bill of Rights against the states), and Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157–60 (1991) (arguing that the Establishment Clause was designed in part to protect the states against a Congressionally forced disestablishment of state religions, and therefore should not have been incorporated into the Fourteenth Amendment and applied to the states).
145 *Zelman*, 122 S. Ct. at 2482 (Thomas, J., concurring).
This is not the place for us to confront head-on this challenge to a half-century’s understanding of the place of the Establishment Clause in American constitutional law. 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-\textit{Zelman} litigation. Justice Thomas hints that free exercise values, but not purely 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 II.A, below.

4. The Dissents

a. Justice Souter’s Dissent

Justice Souter has for years been the Court’s most active Separationist, and his \textit{Zelman} opinion is consistent with that reputation. The longest of all the \textit{Zelman} opinions, it begins with a dramatic assertion that \textit{Zelman} has effectively dismantled \textit{Everson}, the Court’s germinal Establishment Clause decision. The dissent then proceeds in three sections. Section I traces and attempts to synthesize all of the Court’s decisions about aid to religious entities since \textit{Everson}. From this review, Section I concludes that the \textit{Zelman} opinion marks the first time that the Court has ever (1) deemed irrelevant “the substantiability of the aid,” or (2) “held purely formal criteria to suffice for

\begin{itemize}
\item 148 Justice Souter’s dissent is thirty-four pages in the slip opinions, compared to twenty-one for the Court, fifteen for Justice O’Connor, ten for Justice Thomas, thirteen for Justice Breyer, and three for Justice Stevens.
\item 149 \textit{Everson} v. Bd. of Educ., 330 U.S. 1 (1947). In a five-to-four decision, \textit{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.
\item 150 \textit{Zelman}, 122 S. Ct. at 2486–90 (Souter, J., dissenting).
\item 151 \textit{Id.} at 2490 (Souter, J., dissenting).\end{itemize}
Section II argues that the Cleveland voucher program does not satisfy the Court's own criteria of neutrality and private choice, 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, Section 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. Here, the opinion emphasizes the threat that government largesse of any kind may present to the independence of a school's religious mission, and the hazards of political divisiveness on sectarian lines.

The most complimentary thing we can say about Justice Souter's dissent is that the opinion is true to his longstanding convictions. Those convictions, however, stand in need of normative defense. Only 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. In Section III, Justice Souter rejected the idea that private choice, however structured or facilitated, can save the Cleveland program; indeed, at the end of Section II, he conceded that a program of more substantial tuition grants, which would have widened choice, would only exacerbate the

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152 Id. (Souter, J., dissenting).
153 Id. at 2490–97 (Souter, J., dissenting).
154 Id. at 2497–502 (Souter, J., dissenting).
155 Id. at 2498–501 (Souter, J., dissenting).
156 Id. at 2501–02 (Souter, J., dissenting). These are elaborated in more detail by Justice Breyer. See infra Part I.B.4.b.
157 We argued that private choice indeed should rechannel constitutional thinking, see Lupu & Tuttle, supra note 9, but we analyzed the state's role in structuring that choice far more demandingly than did the Zelman Court, id. at 594–604, and we concluded that the Cleveland program impermissibly steered Cleveland students into religious experience. Id. at 604–05. Among scholars, we are the only ones of whom we are aware who defended a choice-focused paradigm but did not defend the constitutionality of the Cleveland voucher arrangements.
problem with which he is concerned—substantial state aid for the religious teaching function of sectarian schools.\textsuperscript{158}

With respect to a direct-aid program, the case for prohibiting state subsidy of religious instruction must be rethought. As we argue above in our discussion of Justice O’Connor’s opinion, the case does \textit{not} rest on protecting the conscience of taxpayers, who might be compelled to support a wide range of views from which they dissent. Nor does the case rest on the need to ensure that religious institutions remain independent of 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 support of their charities that perform secularly valuable work,\textsuperscript{159} 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 Constitution’s prohibition on religious establishment, and protection of religious liberty, are 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 engine of civil policy.”\textsuperscript{160}

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 \textit{Zelman}. Justice Souter, and the dissenters who join him, seem to us mired in now-antiquated and unpersuasive theories of church-state separation.\textsuperscript{161} As a result,\textsuperscript{158} \textit{Zelman}, 122 S. Ct. at 2496-502 (Souter, J., dissenting).

\textsuperscript{159} \textit{Id.} at 2474-75 (O’Connor, J., concurring).

\textsuperscript{160} \textit{Madison}, supra note 124, at 29, 32. For elaboration of this point, see Vincent Blasi, \textit{School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance}, 87 \textit{Cornell L. Rev.} 783 (2002).

\textsuperscript{161} 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 generation of American citizens. \textit{See generally} Ira C. Lupu, \textit{The Increasingly Anachronistic Case Against School Vouchers}, 13 \textit{Notre Dame J.L. Ethics & Pub.}
they were simply unwilling to 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 non-establishment between direct and indirect aid.

Unable to answer Justice O'Connor and the remainder of the majority on its terms, Justice Souter and his fellow dissenters were content to parrot the arguments of voucher challengers on the non-neutrality 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. If they had argued on her terms, rather than their own, they might have persuaded her that Ohio had not done enough to avoid steering Cleveland schoolchildren into religious experience as the price of escape from the inadequacies of the public system. 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’s Dissent

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 entities. In Lemon v. Kurtzman and, again, two years later in Committee for Public Education v. Nyquist, Supreme Court majorities relied on this as one of the

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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—decided in the same Term as Nyquist—quickly prompted the Justices to realize that a great many political issues, not limited to aid to religious 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 has no logical stopping place, and would effectively disable government from responding to matters of profound moral significance.

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, some political process must be employed to determine their content. Inevitably, such processes, whether they be matters of administration for elected school boards, discretionary decisions by school administrators, or policy determinations officially delegated to students, 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 faith.

Whatever the contemporary persuasiveness of these arguments in the context of government speech, however, they do not carry over

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166 See Lee v. Weisman, 505 U.S. 577, 580 (1992) (finding that school principals were improperly permitted by the school board to promote religion by allowing members of the clergy to speak at graduation).
168 Id. (finding the same prayer unconstitutional even when the majority of the student body voted to maintain the policy).
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. All accredited schools, whether they are Jewish, Buddhist, Muslim, Christian, secular humanist, or otherwise, 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 United States that, if anything, should embarrass a Court that spawned the regime of no-aid Separationism out of deeply anti-Catholic premises. He worries about attempts to suppress Islamic teaching or other unpopular views in voucher schools, apparently without realizing the extent to which this echoes nineteenth and twentieth 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 persecution by 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. 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 a cause, not a cure, of social strife. The religious wars in the United States in

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170 At two places in his opinion, Justice Breyer cites Hamburger, *supra* note 141, for references to Protestant-Catholic conflict over school financing. *Zelman* v. Simmons Harris, 122 S. Ct. 2460, 2504 (2002) (Breyer, J., dissenting). Justice Breyer seems unaware of the general thrust of Professor Hamburger's argument, which is that Separationist principles, including those from *Everson* and its progeny, may only have aggravated the very conflict that Justice Breyer's Separationist principles purport to avoid.

171 *Zelman*, 122 S. Ct. at 2501, 2506-07.

172 Id. at 2504-07.

173 See infra Part II.B.
the early twenty-first 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.\footnote{See generally James Davison Hunter, \textit{Culture Wars: The Struggle To Define America} (1991) (arguing that the United States has moved from a society characterized by a division among religions, to a society characterized by a division between religious and non-religious).} A doctrine that would permit the state to support secular, but not religious, private schools is likely to aggravate precisely the sort of conflict with which Justice Breyer, and those who joined him, purport to be concerned.

\section*{II. The Legal Horizon for Voucher Financing of Religious Providers}

Unlike those landmark court decisions that terminate a government practice—\textit{de jure} racial segregation, or the criminalization of abortion, for example—\textit{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.\footnote{In a very important recent commentary, Jim Ryan and Michael Heise have analyzed these forces across the range of issues concerning school choice. Ryan & Heise, supra note 78; see also Martha Minow, \textit{Partners, Not Rivals: Privatization and the Public Good} (2002) (discussing the shifting relationships between government and private, religious, and nonprofit organizations).} These forces include, on the anti-voucher side, suburbanites determined to insulate their public school systems from poorer urbanites;\footnote{See, e.g., \textit{Vouchers: What the Research Shows}, People for the American Way (Aug. 8, 2002), at http://www.pfaw.org/pfaw/general/default.aspx?oid=3014. Some opponents of voucher plans that include private school are strenuous advocates of choice among public schools. See, e.g., Richard Kahlenberg, \textit{All Together Now: Creating Middle Class Schools Through Public School Choice} (2001).} public school teacher unions;\footnote{Id. These unions financed the anti-voucher litigation in \textit{Zelman}, and shaped the way in which the litigation proceeded. \textit{Id.} They were central actors in the litigation over the Milwaukee voucher program, upheld in \textit{Jackson v. Benson}, 578 N.W.2d 602 (Wis. 1998), and are also involved in the current court challenge to the Florida voucher program.} secular liberals committed to preserving the identity-shaping mission of the common school;\footnote{See Ryan & Heise, supra note 78, at 2045-88.} and others who fear that voucher programs will drain resources from public schools. These groups are opposed...
by a coalition of urban parents, primarily African-American, 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; and those who see parental choice movements as the best way of promoting both fairness and educational opportunity to less affluent families.

179 The most prominent supporter of school choice in the African-American community is the Black Alliance for Educational Options, whose website is at http://www.baeo.org (last visited Feb. 5, 2003).


We cannot predict with any assurance the outcome of the political struggles that have already begun to develop in Zelman's aftermath.\textsuperscript{182} 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 constitutional law as their principal weapon even before the Court handed down the Zelman opinion.\textsuperscript{183} Instead, they have shifted their legal strategy for challenging educational voucher


183 \textit{See, for example,} the remarks of a leading anti-voucher litigator and general counsel to the People for the American Way, Elliot Mincberg, 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.
plans, and now rely 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, 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." The section proceeds, however, with a section suggesting limits on religious freedom, and then adds the following: "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, but this last provision of Article 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 provi-
sion. 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, "To hold that this [mechanism of intervening private choice]
avoids the [constitutional] prohibition in Article I, [§] 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."!

The Florida Constitution's strict limits on funding religious insti-
tutions are not unusual. As a number of scholars have pointed out in
recent years, nearly forty state constitutions, depending on the count-
ning criteria, contain explicit provisions barring the use of public
money at religious schools or other religious institutions. These
provisions have a common and troubled historical provenance; virtu-
ally all of them seem to have been a product of Protestant-Catholic
conflict over education in the nineteenth and early twentieth cen-
tury. Catholics, many of whom were recent immigrants, objected to
the Protestant character of the public schools and sought to change
that character or secure funding for their own schools. Protestants

190 Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. 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 668 (Fla. Dist. Ct. App. 2000), or had been dismissed voluntarily. Holmes, 2002 WL 1809079, at *1 n.1. The court in Holmes also announced, with no supporting analysis, that any federal Establishment Clause claims concerning the Florida program had been "resolved" in Zelman. Id.

191 Id. at *1.

192 Id. at *4. An 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 (Aug. 11, 2002), http://www.religionandsocialpolicy.org/news/article.cfm?id=78.


194 The best telling of this history is in Philip Hamburger's important new book. See HAMBURGER, supra note 141, at 191-478.
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." Although Blaine’s efforts at the federal level failed, the cause he championed led to constitutional change in a number of states, and shaped the drafting of constitutions for states that later entered the Union. 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. Still others may yet be construed to “mirror” the Supreme Court’s interpretations of the federal Establishment Clause.

In addition to Professor Hamburger’s recent book, sources on the Blaine Amendment include Viteritti, supra note 181, at 153; Garnett & Garnett, supra note 181, at 337–38; and Steven K. Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992).

Eric Treene argues that at least six 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, supra note 193, at 8 & n.43.

See id. at 3; see also Heytens, supra note 193, at 123.

See Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 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, 621–23 (Wis. 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 203, 212 (Ohio 1999). Neither the Wisconsin nor the Ohio provision, however, included a sweeping, Florida-type bar on direct or indirect aid to a religious institution.

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. Whether state courts should embrace mirroring interpretations of various provisions, including those related to religion, is controversial. 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 Employment Division v. Smith, 494 U.S. 872 (1990)). 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); Bagley v. Raymond Sch. Dist., 728 A.2d 127 (Me. 1999). Both Bagley and Strout
Moreover, the logic of the Supreme Court’s opinion in *Zelman*, which emphasizes the fact of parental choice rather than state transfer of scholarship funds to religious schools, may influence the judicial interpretation of some state constitutions in which the scope of a 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.

Courts in a number of states—including, as of this writing, Florida—may resist such interpretations of their Blaine Amendments. Washington provides the best-known example of a state with a still-robust Separationist approach to these questions. 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, the Washington Supreme Court held on remand of the case that the state constitution’s Blaine Amendment nevertheless precluded such use.

In July of 2002, however, a panel of the U.S. Court of Appeals for the Ninth 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*, the panel ruled two to one 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

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 results. Shortly after the decision in *Zelman*, a group of Maine parents renewed their challenge to the Maine policy upheld in *Bagley*. See Tess Nacelewicz, *Six Maine Families Sue over Vouchers*, PORTLAND PRESS-HERALD, Sept. 19, 2002, at 1A.

201 *Witters v. State Comm’n for the Blind*, 771 P.2d 1119 (1989). Article I, section 11 of the Washington 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.” *Wash. Const.* art 1, § 11. Washington appears to be a true “separationist” state, holding religious institutions to be constitutionally distinctive for purposes of both benefits, see *Witters*, 771 P.2d at 1119, and burdens. See *First Covenant Church v. Seattle*, 840 P.2d 174 (Wash. 1992). For further discussion of *First Covenant* and its place in Separationist thinking, see Lupu & Tuttle, supra note 39.
202 299 F.3d 748 (9th Cir. 2002).
part of a course of study at state-run schools. The challenged exclusion, the panel majority ruled, burdened the students' 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.

Several scholars have analyzed the federal constitutional problem presented by Washington 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 parallel interpretations of the First Amendment's Establishment Clause for normative 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.

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

203  Id. at 753. The opinion is oblique on this point, and some ambiguity remains concerning the state's treatment of courses on theology taught at state universities. Id. at 755–56.

204 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 v. City of 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 an ordinance aimed at cruelty to animals, which was 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 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 appears to have engaged. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (denial of funding to religious student group was impermissible viewpoint discrimination).

205 See Heytens, supra note 193, at 140–53; Treene, supra note 193, at 12–13.
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 only religious institutions from receiving benefits is presumptively unconstitutional, but state policies that provide special accommodations for religious causes and institutions, and treat them more favorably than their secular counterparts, are likewise presumptively invalid.  

Such a doctrine is in sharp tension with the Supreme Court’s invitation to legislatures in Employment Division v. Smith to make precisely such generic accommodations of religion. 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. 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. Those who adopt this argument, as did the Ninth Circuit panel in Davey v. Locke, presume that all generic 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.

206 This theory would force a change in the result in decisions like East Bay Local Development 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 Lupu & Tuttle, supra note 39.


208 For debate on the constitutionality of such accommodations, compare Lupu, supra note 146, with Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685 (1992).

209 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).


211 This standard of review is drawn from Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), which involved the imposition of coercive, animal pro-
The Free Exercise Clause 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.\(^\text{212}\) 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.\(^\text{213}\) The state's obligation either to refrain from intervening in such disputes,\(^\text{214}\) or to adjudicate them under principles that can be applied without reference to religious matters,\(^\text{215}\) has costs as well as benefits for religious communities. These limits on the state reduce government interference in religious affairs, but also deprive religious factions of the opportunity for authoritative dispute resolution by the state.\(^\text{216}\)

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 constitutionally suspect, each and every religion-specific doctrine under the federal religion clauses becomes protection legislation upon a particular religious sect, rather than the limitation of a government benefit to secular organizations.


\(^{213}\)For discussion of relevant principles, see, for example, Jones v. Wolf, 443 U.S. 595, 602-03 (1979); Serbian East Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-12 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449-50 (1969); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17 (1929); and Watson v. Jones, 80 U.S. (13 Wall.) 679, 702-13 (1871).

\(^{214}\)Jones, 443 U.S. at 602-03.

\(^{215}\)Id.

\(^{216}\)Frederick Mark Gedicks, A Two-Track Theory of the Establishment Clause, 43 B.C. L. Rev. 1071, 1074 (2002). 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 Univ. of Am., 83 F.3d 455, 460-65 (D.C. Cir. 1996). We discuss the ministerial exception at length in Lupu & Tuttle, supra note 39, at 62-63, 72-74, 90-92. 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.
constitutionally doubtful as well.\textsuperscript{217} An interpretation of the Free Exercise Clause that casts doubt on many longstanding constitutional norms seems questionable indeed.\textsuperscript{218}

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 cases, including \textit{Agostini v. Felton},\textsuperscript{219} \textit{Mitchell v. Helms},\textsuperscript{220} and \textit{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 \textit{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 no authority to have a non-establishment policy broader than whatever five Justices of the U.S. Supreme Court 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 is hard to imagine a doctrine more hostile to notions of re-


\textsuperscript{218} In reaching its conclusion that all discriminations against religious entities are constitutionally suspect, the Ninth Circuit panel in \textit{Davey v. Locke} relied heavily on McDaniel v. Paty, 435 U.S. 618 (1978). \textit{See Davey}, 299 F.3d at 752-58. 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 Ninth Circuit did not explore any such distinction.

\textsuperscript{219} 521 U.S. 203 (1997).

\textsuperscript{220} 530 U.S. 793 (2000).
spect for state law, and in particular to the tradition of independent state constitutional law. Although Justice Thomas of course was imagining that states would be pro-religion rather than the opposite, he 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 each state should be free to make its 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.

Separationism aside, there is one stark way for a state to reconcile a strenuous Separationist policy with norms of equality, from wherever they are drawn. Equality can be achieved by equalizing down as well as up. States can simultaneously comply with their Blaine Amendments and norms of equality simply by treating religious and nonrel-

221 There have been several eloquent calls for 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); Judith S. Kaye, State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions, 70 N.Y.U.L. Rev. 1 (1995). Indeed, friends of religious liberty, upset at the Supreme Court’s decision in Smith, 494 U.S. at 872, 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. 1992). For discussion of this trend, see generally 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 Smith).

222 We have tried to do some of this work ourselves. See Lupu & Tuttle, supra note 39; Lupu & Tuttle, supra note 9.

223 See, e.g., Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272 (1987) (holding that 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 maternity benefits).
gious 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.224

This strategy, however, cannot help the broader voucher movement, with 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, 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 Blaine Amendments 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 Blaine Amendments 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 that the judge-made doctrine that excluded “pervasively sectarian” entities from government assistance was a product of anti-Catholic bigotry.225 The underlying premise of the 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 likely 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. City of Hialeah,226 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,227 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

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224 This is the approach advocated in Kahlenberg, supra note 178.
225 Mitchell, 530 U.S. at 828.
227 456 U.S. 228 (1982).
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\(^{228}\) 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. In Washington v. Davis\(^{229}\) 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\(^{230}\), 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 from claims of unconstitutional motivation. In Hunter v. Underwood\(^{231}\) 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\(^{232}\) it ruled that Colorado’s attempt to constitutionalize a prohibition on protecting gays and lesbians from discrimination had been motivated by a constitutionally forbidden anti-homosexual animus.

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\(^{228}\) 299 F.3d 748 (9th Cir. 2002) (holding that state’s interest in not appropriating money to a religious organization was not compelling).

\(^{229}\) 426 U.S. 229 (1976).

\(^{230}\) Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252 (1977); see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (holding that 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).

\(^{231}\) 471 U.S. 222 (1985).

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 Blaine Amendments, 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, 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 frequently required states newly entering the Union to include a Blaine-type provision in their constitutions as a condition of entry. In such states, the legislature may never have focused precisely on the content of the Blaine Amendment, which arrived from Congress as part of an aggregated bundle of constitutional provisions. With respect to such states, challengers may have to show that the Congress(es) that required a Blaine Amendment as a condition of entry into the Union were moved by impermissible hostility to the Roman Catholic Church. Evidence of this may not be easy to find, and, influenced by the decision in United States v. O'Brien, courts may not be receptive in any event to evidence of covert unconstitutional motivation on the part of Congress.

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

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234 Treene, supra note 193, 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 Babalu Aye v. City of Hialeah, 508 U.S. 520, 557-59 (1993) (Scalia, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 637-39 (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.

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 nineteenth 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*236 and *Richardson v. Ramirez*.237 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;238 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.239

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 five of the Fourteenth 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*240—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

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236 *Hunter*, 471 U.S. at 222.
238 *Hunter*, 471 U.S. at 227–33.
239 *Richardson*, 418 U.S. at 54. 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 nineteenth 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 invalid solely because it had been corrupted by covert, impermissible motivation.
240 384 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., in Puerto Rico. The underlying theory of power to enact this measure under section five of the Fourteenth Amendment was that the state restriction of the franchise to those literate in English 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.
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 five, however, even if politically feasible, would no doubt face formidable constitutional obstacles. First, City of Boerne v. Flores, and the Supreme Court’s still more recent decisions on state sovereign immunity, 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 the same direction on constitutional 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, and one wonders if it would protect state non-establishments with equal force. 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

242 See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Congress did not abrogate state sovereign immunity in passing the Americans with Disability Act).
243 City of Boerne, 521 U.S. at 536.
245 This of course is one of the central points of Justice Thomas’s concurring opinion in Zelman. See supra note 143 and accompanying text.
246 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, 1616–24 (1995).
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.

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 character are likely to press for a variety of conditions that 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. Others in the voucher wars disagree with our basic position, 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 non-discrimination 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 scholarship, and it

247 See, e.g., Minow, supra note 175, at 92–93 (arguing that "school voucher plans must preserve public values in the schools found eligible for the vouchers").
249 The statute required selection among eligible students to be random, subject to categorical priorities (low-income before others) and an exception for siblings of
explicitly prohibited discrimination based on race, religion, and ethnicity.\textsuperscript{250}

Another possible condition, narrowly tailored to voucher students only, may attach to religious education and experience expected of those students. Milwaukee, for example, requires participating schools to offer voucher students an opt-out from religious training.\textsuperscript{251} Cleveland does not so require, and Florida has taken a compromise position, permitting students to remain passive when confronted with obligations of religious affirmation.\textsuperscript{252}

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 a student body that includes 10\% 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 50\% of the students who are 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 reasonably related to the state's programmatic purpose in financing their education should easily withstand constitutional scrutiny.\textsuperscript{253}

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 other-

\textsuperscript{251} Id. § 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.
\textsuperscript{252} See Jackson v. Benson, 578 N.W.2d 602, 609 (Wis. 1998).
\textsuperscript{253} Cf. Wyman v. James, 400 U.S. 309 (1971) (holding that welfare assistance may be conditioned on consent to reasonable home visits, which do not have to meet the probable cause requirements of the Fourth Amendment).
wise 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. 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 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.

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," and another forbidding such schools from teaching "hatred of any person or group on the basis of race, ethnicity, national origin, or religion." The scope of the anti-discrimination provision in Ohio is un-

255 We strongly doubt the constitutionality of an exemption from accountability requirements for religious schools alone. See infra text accompanying notes 279–82.
257 Id. § 3313.976(A)(6).
certain; no party in *Zelman* challenged it, and it may or may not apply to admission of non-voucher 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, 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.\(^{258}\) 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.\(^{259}\)

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 school.\(^{260}\) The Supreme Court's decision in *Boy Scouts of America v. Dale*\(^{261}\) protects

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259 See *Cohen v. California*, 403 U.S. 15 (1971) (holding that 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. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (distinguishing between advocacy and incitement).

260 A comparable claim by religious schools to engage in racial or 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) (rejecting claim of free exercise immunity from Internal Revenue Code's requirement of no racial discrimination in academic policies as condition of tax exemption for religiously affiliated college); *Runyon v. McCrory*, 427 U.S. 160 (1976) (racial discrimination by private academies violates Civil Rights Act of 1866).

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.262

Once the state offers benefits in exchange for limitations on expression or association, 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. That said, virtually every school engaged in day-long instruction of the young receives such benefits, and they cannot be easily rejected. Perhaps the most important and universal such benefit is accreditation, which permits parents to satisfy the compulsory attendance laws by sending their children to an approved school. States have relied on this benefit of accreditation to justify a variety of autonomy-limiting regulations on curriculum, teacher credentials, and other attributes of educational institutions.263 The financial support that vouchers bring

262 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., EEOC v. Catholic Univ. of Am., 83 F.3d 455, 460–65 (D.C. Cir. 1996); McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972). 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.

263 See New Life Baptist Church Acad. v. East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (Breyer, J.) (holding state has broad power to impose conditions of accreditation on religious school). Justice Breyer cited this opinion in his Zelman dissent. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2506 (Breyer, J., dissenting).
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, 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 v. Society of Sisters* 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.

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. On this score, it will be impossible to persuade judges that anti-discrimination conditions that apply to the admission of students, or to hiring for 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

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265 268 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*.

266 In *Vouchers Within Reason*, Professor James G. 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. See *Dwyer*, supra note 181. 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*.

267 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).
It may be that religious schools can insist that classes in theology, or other aspects of religious culture, be taught only by 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.

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.” Analyzing this sort of restriction requires attention to a line of decisions, most recently capped by Legal Services Corp. v. Velázquez, in which the Supreme Court has drawn a series of lines between acceptable and unacceptable restrictions on speech by government-financed private entities.

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269 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 Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds: Hearing Before the House Subcomm. on the Constitution of the Comm. on the Judiciary, 107th Cong. 32 (2001) (statement of Ira. C. Lupu, Louis Harkey Mayo Research Professor of Law, George Washington School of Law), available at http://www.house.gov/judiciary/72981 (last visited Feb. 5, 2003).

270 531 U.S. 533 (2001). Velázquez produced a surprising five-to-four invalidation of an expressive restriction on a government-funded private entity. Four of the five Justices in the Zelman majority are also in the Velázquez 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 Velázquez, 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.
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, or carrying pregnancies to full term—through the financing of private speakers, and the government contracting for some service independent of the delivery of any particular message. 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 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.

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274 See O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 (1996); Bd. of Comm'rs v. Umbehr, 518 U.S. 668 (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.
275 We recognize that our formulation leaves open the problem of a faith that 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 Ys 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
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.\textsuperscript{276} 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 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 religious animosity toward 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. \textit{Rosenberger v. Rectors & Visitors of the University of Virginia}\textsuperscript{277} and \textit{Widmar v. Vincent}\textsuperscript{278} 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

\textsuperscript{276} See Finley, 524 U.S. at 612; Rust, 500 U.S. at 197; FCC v. League of Women Voters of Cal., 468 U.S. 364, 400 (1984).

\textsuperscript{277} 515 U.S. 819 (1995).

\textsuperscript{278} 454 U.S. 263 (1981).
and more focused purpose of delivering educational service to the young in the community. Thus, 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. For example, a voucher program may exclude schools that teach that the Earth is flat, even though a public forum on the shape of the planet may not exclude such a view.

We consider one final question concerning conditions on voucher schools. If religious 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. The leading pro-exemption decision, Corp. of Presiding Bishop v. Amos,279 upheld a statutory exemption for religious entities from the prohibition on religious discrimination in Title VII of the 1964 Civil Rights Act.280 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, that have the quality of religious preferences rather than equalizers, have fared badly in the Supreme Court,281 and the constitutional presumption is against them. Accommodations of religious institutions alone are justifiable only when, as in Amos, 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 cre-

281 See Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (holding that statute creating special school district following village lines, for a religious enclave incorporated as a village to exclude all but its practitioners, violated Establishment Clause); Tex. Monthly v. Bullock, 489 U.S. 1 (1989) (holding that sales tax exemption provided by Texas statute for religious periodicals violated Establishment Clause); Estate of Thornton v. Caldor, 472 U.S. 703 (1985) (holding that the Connecticut statute that provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath, violates the Establishment Clause). For a more complete discussion, see Lupu, supra note 146 (arguing for equal treatment instead of accommodation).
dentials (as distinguished from religious identity), to name a few, is quite weak.

As we have argued elsewhere, 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. 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, and 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. Moreover, major bills have been introduced, in both the

282 Lupu & Tuttle, supra note 39.
283 The lower courts have already recognized this. See Freedom From Religion Found. v. McCallum, 214 F. Supp. 2d 905 (W.D. Wis. 2002) (McCallum II), aff'd, No. 02-3102, 2003 U.S. LEXIS 6301 (7th Cir. Apr. 2, 2003); see also infra note 292.
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House\textsuperscript{286} and Senate\textsuperscript{287} 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.\textsuperscript{288} Some of them explicitly affirm the right of faith-based organizations to prefer co-religionists in their hiring,\textsuperscript{289} though such discrimination is forbidden with respect to service beneficiaries.\textsuperscript{290} All such proposals explicitly forbid faith-based organizations that obtain contracts with government from engaging in religious proselytizing, worship, or instruction with government funds.\textsuperscript{291}

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.\textsuperscript{292}
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*293 and *Agostini v. Felton*,294 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.295

Given its approval of voucher programs that transfer funds from government to private religious organizations, *Zelman* represents 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

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293 530 U.S. 793 (2000).


295 See *McCallum*, 179 F. Supp. at 979–80 (McCallum I). 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. *Foster*, 2002 U.S. Dist. LEXIS 13778 (ordering preliminary injunction against aspects of Louisiana abstinence program found to violate Establishment Clause). In November of 2002, the parties settled the *Foster* case, in an agreement that eliminated the ban on funding “pervasively sectarian institutions” but maintained the other restrictions and monitoring requirements of the court’s order. Settlement Agreement, *Foster*, 2002 U.S. Dist. LEXIS 13778 (on file with authors).

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 as child care, there tends to be a healthy mix of religious and non-religious providers.\footnote{We discuss this in detail in Lupu & Tuttle, supra note 9, at 564.} 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 twelve-step programs count as "religious."\footnote{See, e.g., DeStefano v. Emergency Hous. Group, 247 F.3d 397, 407 (2d Cir. 2001) (holding Alcoholics Anonymous program was a religion under Establishment Clause analysis); 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), reaaff'd after remand, 173 F.3d 120 (2d Cir. 1999).} The preponderance of faith-based providers arises, at least in part, because some 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,\footnote{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"). Americans United for Separ-
teach sexual abstinence to teenagers, 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 Zeblman liberates the government from any obligation to ensure that the secular options are as plentiful or as attractive as the religious ones.

The pair of decisions in Freedom From Religion Foundation v. McCallum highlights both the distinction between direct and indirect financing, and 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 Faith Works 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.” The program included (1) a faith-enhanced, twelve-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 de-

300 See Foster, 2002 U.S. Dist. LEXIS 13778.  
302 McCallum, 179 F. Supp. 2d at 958, 963 (McCallum I).
pend on the number 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 DWD-financed program was "attributable to the state." 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 Alcoholics Anonymous (AA) meetings at which attendance by participants was mandatory, and counselors were always available "to facilitate a transformation of the mind and soul" of participants. Moreover, the court expressed the view that traditional AA meetings, even without the faith enhancement, are "religious as a matter of law." 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.

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 Correc-

303 Id. at 971 (McCallum I).
304 Id. at 968 (McCallum I).
305 Id. (McCallum I) (citing Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996)).
306 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 funds may not be used to attempt to support either religious or anti-religious activities," id. at 964, the court also observed that 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 violated 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 982.
tions (DOC), in substance abuse treatment at Faith Works, among other providers.\textsuperscript{307} 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.\textsuperscript{308} 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.\textsuperscript{309} Drawing heavily from the Supreme Court's decision in \textit{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, private choice."\textsuperscript{310} 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.\textsuperscript{311} Second, the judge found that "there is no evidence suggesting that offenders who reject a particular program are punished in any way."\textsuperscript{312}

\textsuperscript{307} The factual details in this paragraph are from \textit{Freedom From Religion Foundation v. McCallum}, 214 F. Supp. 2d 905 (W.D. Wis. 2002) (\textit{McCallum II}).

\textsuperscript{308} 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.

\textsuperscript{309} \textit{Id.} at 907–08 (\textit{McCallum II}).

\textsuperscript{310} \textit{Id.} at 907 (\textit{McCallum II}).

\textsuperscript{311} \textit{Id.} at 915 (\textit{McCallum II}). 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.

\textsuperscript{312} \textit{Id.} (\textit{McCallum II}). Following \textit{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.
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* 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 schoolchild, 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 of-
fender receives a recommendation to attend a religious facility from a state agent, one 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.  

In an opinion released just as this article was going to press, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's ruling in favor of the Wisconsin DOC. The opinion, by Judge Richard Posner, held that the DOC program was constitutionally acceptable, because the program relied on beneficiary choice as a mechanism for channeling funds to Faith Works, and because beneficiaries had (as Zelman requires) a genuine and independent choice between Faith Works and other, secular treatment centers. Judge Posner emphasized certain key features of the program. First, parole officers, who offer to offenders the choice between incarceration or treatment, and the further choice among treatment options, made only "nonbinding recommendations" to offenders. The evidence revealed that when these officers made such recommendations of Faith Works, they explained that the program has a Christian element and they were obliged to offer "a secular halfway house as an alternative." Furthermore, the plaintiffs presented no evidence that religious bias, rather than a good faith appraisal of the treatment programs and their appropriateness for particular offenders, had influenced these recommendations. Second, Judge Posner concluded that recommendations of Faith Works, based in part on the fact that it was the only long-term program available, should not be considered

313 Judge Crabb's analytic lapse may be attributable in part to the plaintiff's failure to litigate the choice question more thoroughly. The 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.)

314 Freedom From Religion Found. v. McCallum, No. 02-3102, 2003 U.S. LEXIS 6301 (7th Cir. Apr. 2, 2003) (Posner, J.). The Seventh Circuit's Faith Works opinion has the potential to be very significant. An opinion from Judge Posner on a question of first impression, which the Faith Works case represents, will influence other judges confronted with the same question, and may influence decisions by potential plaintiffs on whether or not to litigate about such questions. Moreover, the extension of Zelman so robustly to faith-intensive social services other than education will provide a legal boost to the President's proposed drug treatment plan.

315 Id. at *2.

316 Id.
impermissible steering to, and government preference for, religious over secular programs. Religious programs should not be punished for their generosity or quality, or be given incentives to reduce their services in order to be no more desirable than the secular options. If all options had to be equal in this way, Judge Posner reasoned, there would be a race to the bottom, as secular programs continuously reduced what they offered in order to disqualify the potentially superior religious options for among those that officers could recommend.

In his view, offenders are not "coerced" into choosing religious options by the fact that these options might be superior in their effectiveness, or by the fact that parole officers communicate the relative effectiveness of options to guide the offenders' choices.

In some respects, we think the opinion is admirable, and appears correct on the record before the Seventh Circuit. The opinion emphasizes the importance of providing secular as well as religious options to offenders, the potential hazards of official bias in the process of recommending options, and the constitutional acceptability of having religious options with features that may make them more desirable than the secular choices available at a given moment. The Supreme Court's Zelman opinion made evident that challengers to such a program have the burden of persuasion if they assert the lack of "genuine and independent private choice," and the plaintiffs in the Faith Works case did not satisfy that burden.

Nevertheless, other courts may be a bit disquieted by the tone and approach reflected in this opinion. First, it is considerably less sensitive than it might have been to the government's obligation to remain neutral on the presence or absence of religion in the program. If a race to the bottom is a concern, which it may be, so too is the government's affirmative responsibility to avoid judgments that religion qua religion may be appropriate for some people under its control. Moreover, the opinion conflates official recommendations about schools with recommendations about drug treatment facilities, even though faith-based drug treatment is designed to be far more transformative of religious identity than is typical of many religious schools.

317 Id. at *6–7.
318 Id. at *9–10.
319 See supra discussion Part I.B.1.a.iii.
320 McCallum, 2002 U.S. LEXIS 6801, at *6 ("If recommending a religious institution constituted an establishment of religion, a public school guidance counselor could not recommend that a student apply to a Catholic college even if the counselor thought that the particular college would be the best choice for the particular student.").
This quality should lead the state to be scrupulously mindful of concerns about neutrality and potential coercion of beneficiaries.\footnote{In another case about substance abuse treatment, on a different factual record, a different outcome is distinctly possible. To be sure, the Supreme Court's opinion in \textit{Zelman} did little to encourage the lower courts to examine indirect funding programs so carefully. But a careful reading of Justice O'Connor's concurring opinion might lead some lower courts to do just that. For discussion of the ways in which that opinion differs from the Court's opinion, see \textit{supra} Part I.B.2.}

Despite \textit{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 \textit{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.\footnote{\textit{Cf. Goldberg v. Kelly}, 397 U.S. 254, 269 (1970) (stating that capacity of class of welfare recipients to communicate orally as compared to in writing should shape the requirements of procedural due process in welfare hearings).} Moreover, as we have argued elsewhere,\footnote{Lupu & Tuttle, \textit{supra} note 9, at 596–605.} the state should be held to a duty to take affirmative steps to ensure the presence of secular options. This duty was satisfied in \textit{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. \textit{Zelman}, especially as applied in \textit{McCallum II}, suggests that vouchers are indeed the path of least constitutional resistance for government partnerships with faith-intensive providers. As noted in Part II.B, however, voucher programs are 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,\footnote{For discussion of this phenomenon in the context of vouchers for child care, see Douglas Besharov & Nazanin Samari, \textit{Child Care Vouchers and Cash Payments}, in \textit{VOUCHERS AND THE PROVISION OF PUBLIC SERVICES} 195, 206–10 (C. Eugene Steuerle et al. eds., 2000).} 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.\footnote{For example, in \textit{Bellmore v. United Methodist Children's Home of the North Georgia Conference}, No. 2002–CV-56474 (Super. Ct., Fulton County, Ga. filed July 31, 2002), Lambda Legal Defense and Education Fund filed suit against officials of the State of
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 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.326

Georgia, alleging that the State had unconstitutionally financed the care of foster children in a Methodist Children’s Home that discriminated against non-Christians and against those who did not share its view of homosexuality. See News Releases, Lambda Legal (Aug. 1, 2002), at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1108. For our comment on the Bellmore litigation, see Legal Analysis, Roundtable on Religion and Social Welfare Policy (Sept. 19, 2002), at http://www.religionandsocialpolicy.org/legal/legal_update.cfm?id=11. 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. Editorial, Bush’s Conversion; He Welcomes a Scaled-Down “Faith-Based Bill”, PITTSBURGH POST-GAZETTE, Feb. 12, 2002, at A10; Glen Elsasser, Many Lack Faith in Charity Plan; Bush Faces Uphill Fight for Program, Chi. Trib., Apr. 16, 2001, at N8; Mary Leonard, In the End, a ‘No’ to Faith-Based Funding; Church-State Unease Gradually Undercut Bush’s Touted Plan on Charitable Aid, BOSTON GLOBE, Dec. 23, 2001, at D1; Mark O’Keefe, Another Trouble Spot for Charitable Choice: Hiring Policies; Would Groups Have To Employ Non-Believers?, DALLAS MORNING NEWS, May 5, 2001, at G5. We expect that proposals to use vouchers to pay for social services rendered at faith-based organizations would invite a similar debate.

326 See White House Fact Sheet, supra note 296 (White House statement on proposed voucher program for substance abuse); see also Jane Eisner, Making Marriage the
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 1940s to the 1980s is well behind us, but 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, offer a 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. By contrast, those who must make practical decisions about how and where we educate our children—especially children whose family wealth puts them in a disadvantageous position—and how we care for the least fortunate among us, do not enjoy such luxury. They face formidable challenges in reconciling those concerns with appropriate limits on state power in dealing with religious entities.

Choice for Parents; Church Can Play a Role, Especially Among Blacks, PHILA. INQUIRER, July 14, 2002, at C1 (attributing to Wade Horn, Assistant Secretary for Children and Families, Administration for Children and Families, U.S. Department of Health and Human Services, a plan to promote vouchers for premarital counseling).