School Vouchers and the Original Understanding of the Establishment Clause*

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On June 27, 2002, the Supreme Court of the United States handed down a decision in the controversial Ohio Pilot Scholarship Program case. The Ohio program included tuition aid, commonly called "vouchers," for students who attended religious schools. In *Zelman v. Doris Simmons-Harris*, a 5-4 majority of the Supreme Court upheld the Cleveland voucher scheme, ruling that it is not a "law respecting an establishment of religion."[1] The Ohio program resulted from a 1994 order of the United States District Court in Cleveland that directed the Ohio Superintendent of Education to address the educational crisis in Cleveland's public schools. The Ohio legislature and the governor responded with a program, the constitutionality of which was ultimately decided by the United States Supreme Court.[2] The Court of Appeals for the Sixth Circuit, in a 2-1 decision, had ruled that the program violated the First Amendment's Establishment Clause.[3]

School officials, the general public, and legal analysts are sharply divided over the Establishment Clause issue and over the question of whether the issuing of school vouchers constitutes good public policy. The arguments take many forms, but in general, opponents of vouchers believe such financial assistance to parents of students in religious schools creates a chasm in the wall of separation between church and state and undermines the public schools. Proponents believe that vouchers provide an opportunity, particularly for low-income families, to escape substandard schools and that vouchers broaden the freedom of educational choice in a manner that does not violate the Establishment Clause. This article will focus on the voucher case and relevant Supreme Court precedents. Since the determinative factor in constitutional cases is not what justices have said about the Constitution, but the Constitution itself, I will also examine the original understanding of the Establishment Clause as a foundation for analyzing the voucher issue. The policy question is sometimes treated as indistinguishable from the constitutional question. Insofar as possible, I treat these questions as independent and concentrate my analysis on whether the voucher program challenged in this case violates the Establishment Clause.

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The Ohio Pilot Scholarship Program

The Ohio program provides scholarships according to family income. The law requires participating secular and religious private schools to cap tuition at $2500 per student per year; the state pays 90 percent of whatever tuition the school actually charges for low-income families. For these families, participating private schools may charge a family a co-payment of up to $250. For families not qualifying as low-income, the state pays 75 percent of the school's tuition up to a maximum of $1875 and there is no cap on co-payment. The scholarships for children attending private schools are payable to the parents of the children. The parents must then endorse the checks to the school to pay tuition.[4]

Schools must register to be eligible to enroll scholarship students. Private schools that meet the state's educational standards and are located within the boundaries of the Cleveland school district may participate. Public schools located in districts adjacent to the district in which the voucher program is implemented may also register for the program and receive payments, but none of these schools has registered for the voucher program. Public schools in adjacent districts have a substantial financial disincentive to accept voucher payments of $2,250 since expenditures for each student within their own districts are backed by $7,097 in public funding. Tutorial aid assistance is available to any student in a covered district who chooses to remain in public school. Low-income students may receive 90 percent of the amount charged for tutoring up to $360. Students from higher-income families receive 75 percent of that amount. During the 1998-99 school year, approximately 1400 students in the Cleveland public schools received tutorial aid, and the number was expected to double the following year.[5]

During the 1999-2000 school year, 3,761 students enrolled in the scholarship (voucher) program. Sixty percent of the students in the program were from families at or below the poverty level. Although at one time as many as 22 percent of the students enrolled in the program attended nonreligious private schools, during the 1999-2000 school year 96 percent were enrolled in sectarian schools. During this period, 82 percent of the 56 schools registered to participate in the program were church-affiliated.[6] The voucher program places no restrictions on the use of funds made available under the program.[7]

Chief Justice Rehnquist's Opinion of the Court

Justices O'Connor, Scalia, Kennedy and Thomas joined Chief Justice Rehnquist's opinion of the Court. O'Connor and Thomas filed concurring

opinions. Stevens, Souter, Breyer and Ginsburg dissented. All the dissenters except Ginsburg filed dissenting opinions; she, as well as the other dissenting justices, joined Souter's lengthy dissenting opinion.[8]

The Court concluded its opinion by summarizing its ruling:

> In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.[9]

Rehnquist recognizes at the beginning of the Court's opinion that the challenged program was initiated for the valid secular purpose of giving educational assistance to poor children in a failed public school system. He then focuses on the question of whether the Ohio program is unconstitutional because it "has the forbidden 'effect' of advancing or inhibiting religion."[10] He reviews a number of Supreme Court opinions in which he characterizes the relevant test as whether "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals...."[11]

In *Mueller v. Allen*, the Court upheld a Minnesota program authorizing tax deductions for educational expenses, including private school tuition, even though almost all of the program's beneficiaries were parents of children who attended religious schools. The Court concluded in *Mueller* that the benefit extended to all parents, whether their children attended public, religious or nonsectarian private schools.[12] *Mueller* distinguished the Minnesota program from that involved in *Committee for Public Education v. Nyquist*. *Nyquist* invalidated governmental assistance, one aspect of which involved tuition grants to low-income families. The grants were limited to parents of children in non-public schools. While *Nyquist* lauded the goal of perpetuating "a pluralistic educational environment," it ruled that direct aid to sectarian schools is invalid if there are not effective means to guarantee that the public funds will be used "exclusively for secular, neutral, and nonideological purposes."[13] In *Mueller*, the Court regarded as critical the fact that the tax deduction was available for both private and public school expenses and that the aid was channeled through individual parents rather than going directly to the schools.[14] Rehnquist distinguishes the Ohio program at issue in *Zelman* from *Nyquist* because the New York program's

function "was 'unmistakably to provide desired financial support for nonpublic, sectarian institutions'" and to provide incentive for parents to enroll their children in sectarian schools.[15]

Rehnquist also uses *Witters v. Washington Dept. of Services for the Blind* to support the Court's decision in *Zelman*.[16] In *Witters*, a unanimous Court upheld a law that authorized payment to a visually handicapped person for vocational rehabilitation services. The recipient wished to use the funds to pay his tuition at a Christian college to prepare him for a career in church work. Rehnquist observes that in *Witters*, any aid flowing to religious institutions does so only because of the independent private choices of individual recipients and the program is available for both private and public education.[17]

Rehnquist quotes *Zobrest v. Catalina Foothills School District*, a case upholding the constitutionality of a publicly funded sign-language interpreter who provided services to a deaf child enrolled in a religious school.[18] The Court reasoned in *Zobrest* (Rehnquist delivered the opinion) that the program's benefits flowed primarily to disabled children, not to sectarian schools; when benefits are provided to a broad class of citizens who are not defined with reference to religion, government aid is not "readily subject to an Establishment Clause challenge."[19] The attenuated financial benefit accruing to the sectarian institution did not invalidate the provision of neutral benefits to a broad class of citizens and this benefit did not create a financial incentive favoring the choice of a sectarian school.[20]

Rehnquist's majority opinion in *Zelman* makes but summary reference to *Mitchell v. Helms,*[21] perhaps in part because there was no majority opinion in that case. Justice Thomas delivered the plurality opinion in *Mitchell*; three other justices joined him. *Mitchell* involved a federal statute under which funds were distributed to state and local government agencies. The funds enabled these agencies to purchase and then lend educational items, such as library materials and computer software and hardware, to public and private schools. The Court ruled that this statute did not violate the Establishment Clause. The plurality opinion accords central importance to its view that the aid in this case was allocated on a neutral, secular basis that neither favors nor disfavors religion and is available to both religious and secular schools on a non-discriminatory basis. In determining whether indoctrination is attributable to the state, the plurality emphasized the principle of neutrality that had been used in previous cases. If eligibility is neutral, that is "[i]f the religious, irreligious, and areligious" are all eligible for governmental aid that furthers a secular purpose, "indoctrination" on the part of a particular recipient is not "at the behest of the government." In *Mitchell*, the plurality also emphasized that even direct aid to

schools does not constitute governmental support of religion if the aid is neutrally available and passes through the hands of numerous citizens (either figuratively or literally) who are free to direct the aid elsewhere.[22]

Justice O'Connor, joined by Breyer, concurred with the plurality's judgment in *Mitchell*, but objected to the importance the plurality assigns to neutrality.[23] O'Connor and Breyer believe that *Agostini v. Felton* should control in *Mitchell*. *Agostini's* three criteria are "(1) whether the aid results in governmental indoctrination, (2) whether the program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion."[24] The concurring justices believe the program challenged in *Mitchell* meets these criteria. Justice Souter's dissenting opinion in *Mitchell* is joined by Stevens and Ginsburg. In summary, they believe the program in question breaches the "wall of separation" because of the program's effects.[25] One would anticipate that O'Connor and Breyer would play key roles in deciding the issue of vouchers in *Zelman*. As it turned out, O'Connor would join the plurality, whose opinion in *Mitchell* has been examined, and Breyer would join the dissenters in *Zelman*.

After reviewing previous case law, Rehnquist's opinion of the Court in *Zelman* summarizes the educational opportunities provided to Cleveland students: "They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school." Rehnquist's opinion emphasizes the entire range of educational opportunities available in Cleveland.[26] He thereby shifts the opinion's emphasis toward the liberty underlying independent decisions of private individuals and away from the argument that the Ohio program constitutes an endorsement of religious schooling in violation of the Establishment Clause. He frames the Establishment Clause issue as whether Ohio is "coercing parents into sending their children to religious schools." He believes this question can be answered only by "evaluating *all* options Ohio provides Cleveland schoolchildren."[27] Rehnquist refutes a statement in Justice Souter's dissenting opinion that the program is not neutral because students are eligible only for tutorial aid and not vouchers if they attend traditional public schools:

> Public schools in Cleveland already receive $7,097 in public funding per pupil—$4,167 of which is attributable to the State. . . . Program students who receive tutoring aid and remain enrolled in traditional public schools therefore di-

> rect almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school."[28]

Rehnquist also addresses Souter's claim that 96 percent of the voucher recipients attend religious schools. The Chief Justice believes that a neutral aid program should not be declared unconstitutional because of the large number of private schools that are sectarian nor because most voucher recipients attend religious schools: "'such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.'"[29] Although rejecting the substitution of statistical evidence for principled standards, Rehnquist observes that the 96 percent figure in Souter's dissent ignores the some 1,900 Cleveland students enrolled in alternative community schools, the approximately 13,000 enrolled in alternative magnet schools, and the more than 1,400 enrolled in traditional public schools with tutorial assistance. Including these students among those enrolled in nontraditional schools drops the percentage attending sectarian schools from 96 percent to fewer than 20 percent.[30]

In spite of the Court's treatment of these statistical matters, its opinion rests on principle rather than on enrollment figures. The Ohio law is neutral regarding religion: aid is available to a wide group of individuals defined only by residence in a specific school district and financial need, and the program allows individuals genuine choice among public and private, secular and religious schools.

The *Zelman* Court also assumes that the Establishment Clause limits state and national laws in an identical manner, an assumption that has been validated by the Court since *Everson v. Board* (1947).[31] *Everson*, however, did not seriously examine the application of the Establishment Clause to the states; it merely assumed that the clause bound the states in the same manner as it did the national government.[32] This assumption has been the cause of some of the difficulties in the Court's Establishment Clause decisions, a difficulty that remains as a result of *Zelman*.[33]

Justice O'Connor's Concurring Opinion

O'Connor emphasizes two points in her concurring opinion. Acknowledging that *Zelman* "takes an important step," she does not believe it marks a dramatic break from the Court's Establishment Clause jurisprudence. In regard to the "true private choice" principle underlying the Court's decision,

she wishes to elaborate on the Court's inclusion of the alternatives to religious education that are available to Cleveland parents.[34]

O'Connor asserts that *Zelman* does not depart from Establishment Clause precedents. The key elements of these precedents are neutral administration of the aid and whether those benefiting from indirect aid have a genuine choice among nonreligious and religious organizations when determining where they will direct that aid.[35] If a program meets these requirements, she believes that it is consistent with the Court's Establishment Clause jurisprudence. In rejecting Justice Souter's reading of *Everson*, O'Connor quotes from the Court's characterization of the First Amendment in that case: [It] "'requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.'"[36] Her opinion refutes a number of conclusions Souter reaches in his dissent regarding the availability of genuine nonreligious options for Cleveland school children. O'Connor reasons that the range of school options offers genuine private choice to parents and that the program does not violate the Establishment Clause.

In terms of prior indirect aid cases, O'Connor acknowledges that *Zelman* upholds a voucher program that reaches religious schools with no restrictions on use of the funds. She justifies her opinion, in part, because of the wide range of educational alternatives from which parents may choose and because of the total amount the voucher program spent on religious schools: at most, $8.2 million in public funds was directed to religious schools in 1999-2000. Even with a much smaller number of students attending community schools than religious schools, the state spent $9.4 million on students in community schools; the state expended 114.8 million on magnet schools during that year.[37]

O'Connor asserts that the sum of $8.2 million pales when compared to funds that all levels of government currently provide religious institutions. One substantial element in government support involves tax exemptions, which, she observes, "have 'much the same effect as [cash grants] . . . of the amount of tax [avoided].'"[38] She lists a number of tax advantages that accrue to religious institutions such as those from federal and state corporate income tax, property tax, and deductions for contributions to charitable groups, some of which are religious. Among the other examples she lists are federal and state tax credits for educational expenses, some of which are spent at religious schools, the Pell Grant program, the G. I. Bill of Rights, and the Child Care and Development Block Grant Program. Medicare funds account for 36 percent of the revenue of religious hospitals.[39] It is clear that government benefits to religious organizations are extensive. O'Connor characterizes the voucher program as providing support to reli-

gious institutions that is “neither substantial nor atypical of existing government programs.”[40] O’Connor’s opinion suggests that if a voucher program provides “substantial” support to religion, she would find it invalid under the Establishment Clause. Because O’Connor’s “substantiality” standard is unduly subjective, it puts both courts and the political branches in a sea of uncertainty. Absent any reference to substantiality in the Constitution’s text, this subjective judgment should be left to the political branches.

Justice Thomas’s Concurring Opinion

Justice Thomas joins fully in the Court’s opinion, but his concurrence focuses on two aspects of originalist jurisprudence that are relevant to the constitutionality of the Ohio program. He thinks this program easily passes the Court’s stringent Establishment Clause test, but he questions whether this stringent test should be applied to both state and national action. He summarizes the purpose of the provision that “Congress shall make no law respecting an establishment of religion.” This provision is clearly directed toward Congress, not the states, and, as Thomas recognizes, seems to prohibit Congress both from establishing a national church *and* from interfering with any state establishments by passing any law that respects an establishment of religion. The Religion Clauses applied to the states only after the Supreme Court ruled that the Fourteenth Amendment’s provisions included these clauses. Thomas believes the clause “prohibiting the free exercise” of religion is a reasonable fit within the Fourteenth Amendment provision prohibiting any state from denying any person of “liberty . . . without due process of law.”[41] The Establishment Clause is another matter, however. Thomas rejects an interpretation of the Fourteenth Amendment that would invalidate “neutral programs of school choice through incorporation of the Establishment Clause.” Since the Establishment Clause was understood, in part, to prohibit federal interference with any state establishments, it turns the clause on its head to use it to strike down a state law designed to advance the individual’s liberty (protected from state interference by the Fourteenth Amendment) through the exercise of educational choice. Thomas believes an originalist understanding of the Establishment Clause prohibits the national government from making any law respecting an establishment of religion, but state law may “include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest.”[42]

The other major point in Thomas’s concurrence pertains to the core purpose of the Fourteenth Amendment, the amendment that has been used to apply the Religion Clauses to the states. He believes that at the time the

Fourteenth Amendment was adopted in response to the Civil War, public education offered African-Americans a means of personal liberation and prepared them for functioning in a free society. He concludes that the current quality of public education varies across districts and public education has failed inner-city students:

> Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities. Opponents of the program raise formalistic concerns about the Establishment Clause but ignore the core purposes of the Fourteenth Amendment.[43]

Thomas concludes that an expansive interpretation of the Establishment Clause as it applies to the states converts "the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform," reform that may benefit those the Fourteenth Amendment was designed to serve.[44]

Notwithstanding the long line of precedents that use the same Establishment Clause standards whether state or national law is concerned, Thomas believes that different standards are appropriate. He asserts that, given the original understanding of the clause, using identical standards for state and national law does violence to the principles of the clause.

Justice Souter's Dissenting Opinion

Justice Souter asserts in his lengthy dissent that *Zelman* is a simple case to resolve. The Ohio program violates the principle set forth in *Everson v. Board of Education*: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[45] He describes the vouchers as paying for instruction in both secular and religious subjects in schools that teach religion and in which all subjects are imbued with a religious dimension: public tax money pays for teaching religion, a clear violation of the Establishment Clause. He regards the Court's opinion in *Zelman* as a doctrinally bankrupt fourth stage in Establishment Clause jurisprudence.[46] From 1947 to 1968, the unquestioned principle was "no aid to religion through school benefits." The second stage, which lasted about 15 years, consisted of the Court's effort to rule against aid that might be divertible from secular to religious activities. Beginning in 1983, divertibility

was replaced by the approval of aid that was "unlikely to afford substantial benefits to religious schools" if the aid were offered without regard to the recipient's religious character, and, if it were "channeled" to the religious institution only as a result of the free choice of a private individual.

In *Zelman*, Souter sees a new stage of doctrine in which the amount of aid has no constitutional significance if the aid is offered in a neutral manner and private choice directs it to a religious school. He believes the *Zelman* Court's neutrality and private choice are nothing but "verbal formalism." Because there are too few private secular school slots open and religious schools can afford to enroll a much greater number of voucher students, Souter thinks the choice parents have is a Hobson's choice, *i.e.*, if they use the vouchers they will likely have to attend a religious school.[47] He observes that a great majority of families using vouchers at religious schools were not of the school's faith, but rather chose religious schools to take advantage of the educational opportunity they afforded. Furthermore, Souter asserts that religious schools have another advantage because of subsidies from the church, donations, and lower salaries for teachers and administrators, all of which lower costs and tuition.[48] He also objects to the Court's rejection of the substantiality of aid as a criterion in determining violations of the Establishment Clause and observes that the Court's criterion would allow nearly limitless aid to parochial schools. He believes that the voucher program approves aid to religious schools that is unprecedented and that substantially underwrites religious indoctrination.[49]

Souter devotes a significant portion of his dissent to enumerating the objectives underlying the Establishment Clause. The vouchers compel tax money to be used to support an "establishment of religion." He fears that in the wake of tax support, religious schools will become increasingly secular as they attempt to meet requirements for eligibility. For example, in Ohio, church schools are required not to discriminate on the basis of religion, and, as a result, may not give admission preference to children of the school's faith.[50] In light of movements underway to increase the dollar amount of vouchers, Souter fears that the independence of private schools will be compromised as these schools become more dependent on public aid. Furthermore, he asserts that discord will result as one sect begins to compete with another for public support and as taxpayers increasingly feel their freedom of conscience is being violated. Souter believes that the Establishment Clause has protected the free exercise of religion by keeping religion relatively private within sectarian pulpits and classrooms where it does not incite social discord. In light of his opposition to the Court's decision, Souter voices his own hope that the political branches will refuse to enact voucher programs and thereby save the nation from the consequences of the Court's decision.[51]

Souter's appeal to the political branches seems incongruous. He regards the Establishment Clause as equally applicable to the nation and to the states. He is essentially arguing that the Court made a mistake in *Zelman*, so it now falls to the political branches to correct that mistake by choosing a policy of no vouchers for religious schools. This is an ironic plea given Souter's belief that it is the Court's responsibility to be the umpire of the Establishment Clause's prohibitions on the states regardless of a state's own view of a policy's wisdom and constitutionality. One purpose of the clause was to insulate state policy toward religion from national interference. Ohio has chosen, but Souter objects to the choice it made and to the Court's unwillingness to correct what he regards as a mistaken policy. Souter's fundamental objection is that *Zelman* approves substantial state funds being spent on religious teaching, a practice he believes is at odds with the principle underlying the Establishment Clause.[52] Much of the Court's opinion and that of the dissenters can usefully be analyzed by examining the original understanding of the Establishment Clause.

The Original Understanding of the Establishment Clause

Much of the demand for a Bill of Rights arose from the antifederalist forces that opposed adoption of the Constitution because they believed that a strong national government would interfere with state powers and individual liberty. This is well illustrated by the Religion Clauses: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[53] A proposed amendment including a provision that "no State shall infringe the equal rights of conscience" failed in the first Congress. Congressman Tucker opposed the amendment on the grounds that it would be better "not to interfere with the states any more than we already do [in the recently ratified Constitution]."[54]

There is no question that one aim of the Constitution was to avoid religious strife. The First Amendment placed limitations on the national government. At the same time, in responding to sentiments that jealously defended state powers, it left states free to accommodate (or even establish) religion as the states saw fit. Professor Wilber Katz and Mark DeWolfe Howe are among those who recognize the principle of federalism within the First Amendment. In Katz's words: "It seems undeniable that the First Amendment operated, and was intended to operate, to protect from Congressional interference the varying state policies of church establishment."[55]

The amendments proposed by the First Congress that we call the Bill of Rights, including the Establishment Clause, applied only to the national government. In the debates over the Religion Clauses, Congressman Sylvester

objected to the form proposed: "no religion shall be established by law, nor shall the equal rights of conscience be infringed." He feared that "it might be thought to have a tendency to abolish religion altogether."[56] Congressman Huntington feared that the proposed Establishment Clause might be construed to prevent "a federal court from enforcing a minister's wage claim against his parish."[57] He also desired an amendment that would not "patronize those who professed no religion at all."[58] Congressman Madison then suggested inserting the word *national* before *religion*: "[h]e believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[59] Madison withdrew his suggestion in response to an antifederalist objection voiced by Congressman Gerry that the word *national* implied a consolidated government rather than a government in which important powers were retained by the states. It is also instructive that within two days after the final wording of the Establishment Clause was adopted, Congress approved a resolution establishing a day of thanksgiving to acknowledge "the many signal favors of Almighty God."[60] Michael Malbin provides an accurate summary of the purposes underlying the Establishment Clause:

> It not only prohibits [Congress from passing laws] which "'tend' to establish a religion; it also prohibits Congress from passing laws 'with respect to' an establishment of religion. In other words, it prohibits Congress from passing any law that would affect the religious establishments in the states."[61]

The accommodation or support of religion was an important component of political opinion within many states at the time of the founding (and it continues to be so if popular reaction to the Ninth Circuit Court of Appeals' decision to prohibit the words "under God" in the Pledge of Allegiance is any guide).[62] The states' reliance on religious sources in its public law is reflected in the common law accepted and adapted by the states with the understanding that "Christianity is part and parcel" of the common law.[63]

Leonard Levy, a staunch proponent of the wall of separation, asserts that the wall will not fall if it is allowed to leak "just a little at the seams." While Levy clearly proceeds from different premises than those of the Court in *Zelman*, his observations are instructive. Levy argues that "silly suits, such as those seeking to have declared unconstitutional the words 'under God' in the pledge of allegiance or in the money motto 'In God We Trust,'" have the effect of undermining cooperative relationships between government and religion and damaging the wall of separation doctrine by

"making it look over-rigid and ridiculous."[64] Such suits, which seek to scrub any reference to God from public life, may inspire the very strife that the Constitution attempted to prevent. It is clear that the same public sentiment that rejects interference with free exercise of one's religious beliefs nonetheless accepts and values the influence that religious beliefs may exert on our public life. These influences include a belief that we are not fully human unless we restrain our passions, care for our fellow human beings, guide ourselves by standards that are eternally important, and participate in a social order with a purpose that transcends the mere desires or interests of its members.[65] The original understanding of the Establishment Clause left the states free to support religion in a manner that accomplishes these purposes.

Zelman and the Original Understanding

It is instructive to review the facts in *Zelman*. Ohio attempted to address the crisis in the Cleveland schools and advance desegregation through the challenged program. The program includes private religious and secular schools, schools in adjacent districts, community schools, magnet schools, and it provides tuition reimbursement to parents for tutoring in Cleveland's public schools. Religious schools are not the sole beneficiaries of the choices provided for students and parents. Even after *Zelman*, neither Ohio nor any other state (or school district) is required to provide school vouchers. The Court ruled that the political branches of the state government in Ohio may constitutionally provide school vouchers if they choose to do so.

Beginning with *Everson's* application of the Establishment Clause to the states, the Supreme Court has used the clause to accomplish what it was designed to prevent. This problem is reflected in *Zelman's* dissenting opinions. Justice Thomas has history on his side when he argues that the dissenters in *Zelman* turn the Establishment Clause on its head by applying the Establishment Clause to the states through the Fourteenth Amendment's Liberty Clause. Thomas accepts the application of the Free Exercise to the States through the Fourteenth Amendment's Liberty Clause, but he rejects the application of the Establishment Clause to the states through the Fourteenth Amendment. The clause was designed both to prevent national laws that would establish religion and to protect state support of religion from national intervention. The dissenters and numerous previous Court decisions empower the national government, primarily the Supreme Court, to accomplish one of the things the Establishment Clause was intended to prevent. In adjudicating Establishment Clause cases in which state action is involved, the Court is, indeed, interfering with state law "respecting an

establishment of religion." The Liberty Clause of the Fourteenth Amendment presumably protects against state interference with free exercise of religion, but it is fundamentally problematic to apply the Establishment Clause to the states through either the Fourteenth Amendment's Liberty Clause or its Privileges or Immunities Clause. A number of Bill of Rights' provisions such as the speech and press provisions speak to personal freedoms as does the Free Exercise Clause. The Establishment Clause does not; it simply prohibits laws "respecting an establishment of religion."[66] Among the purposes of the Establishment Clause was protection of state support of religion from national interference. It is extremely difficult to use the clause to invalidate state support of religion that does not violate the free exercise of religion or other liberty protected by the Fourteenth Amendment, yet the Court has done just that. The dissenters would follow suit in *Zelman*. They would have a stronger argument if the national government were providing the financial support that is at issue in *Zelman*. Despite the purposes of the Establishment Clause, the *Zelman* Court (except for Thomas's concurrence) makes no distinction between national and state action. Perhaps this is because the incorporation of the Establishment Clause (i.e., its application to the states) through the Fourteenth Amendment is so firmly established in previous cases that the Court chooses not to address this issue.[67]

Significant evidence indicates that the original understanding of the Establishment Clause was intended to prohibit aid that preferred one sect to another. While the clause required Congress to be neutral among sects, it was not intended to forbid encouragement of religion in general. During the debates over the Religion Clauses in the First Congress, Madison characterized the fear underlying the proposed amendment that Congress might "establish a religion, and enforce the legal observation of it by law" or "compel men to worship God in any manner contrary to their conscience."[68] During the time it was debating the First Amendment, Congress re-enacted the Northwest Ordinance, including a provision that generally supported religion: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[69]

The Ohio law at issue in *Zelman* does not provide vouchers for one particular sect. It includes not only all religious schools, but secular private schools and public schools in adjacent school districts as well. The Ohio program also provides funds to reimburse tutoring expenses for students who choose to remain in the public schools. Although the dissenters object that most students utilizing school vouchers attend religious schools, the law itself not only avoids preferential aid to one sect, but it includes private secular and public schools as well.

Conclusion

Zelman marks an important change in the Supreme Court's Establishment Clause jurisprudence. Tuition aid supports religious teaching in a way that differs, for example, from the computers and instructional materials provided religious schools through federal grants upheld in *Mitchell v. Helms*.[70] The Ohio program provides financial aid to students, some of whom use it to attend schools that provide religious instruction. The aid is not restricted to secular instructional costs in the religious schools. Students are eligible for aid by virtue of their residence in the school district, and low-income families are given priority. The program permits an individual to choose among public and private, secular and religious schools. The aid comes to schools only as a result of a student's choice. It seems clear that the Court would find direct aid to religious instruction a violation of the Establishment Clause.

The Court rules that the Ohio program does not coerce parents into choosing a religious school. The Court's use of *coerce* is reminiscent of Madison's explanation of the meaning of the Establishment Clause in the First Congress: "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would *compel* others to conform."[71] Far from coercing, compelling, or providing even an incentive to parents, the Court opines that parents have a financial *disincentive* to choose a religious school. The Ohio program requires parents to copay a portion of the religious school's tuition compared to paying no tuition if the student attends a public school.[72]

Justice Souter, who believes that the public funding of vouchers for religious education uses tax money to support religion, articulates the most fundamental criticism of the Court's opinion. The Court asserts that the private choice of parents frees the program from public support of religious instruction since parents, not the government, make the choice to use the vouchers at religious schools. The Court addresses the issue of the cost to the taxpayer being less for students who attend religious schools than for those who attend public schools: "Program students who receive tutoring aid and remain enrolled in traditional public schools therefore direct almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school." While the Court does not explicitly make this assertion, the implicit consequence of its observation is that the taxpayer saves money when a public school student chooses to attend a private school, whether it is secular or religious.

In an earlier case, the Court asserted that besides providing an educational alternative, parochial schools provide "wholesome competition with

the public schools, and may in some instances relieve the tax burden incident to operating public schools."[73] The Court also observed that parents of private school students "bear a particularly great financial burden in educating their children."[74] Leonard Levy refers to this burden as "double taxation," i.e., some parents pay taxes to support the public schools as well as tuition for their children in private schools.[75] Government support of religious schools relieves this burden and also aids the "free exercise" of religion of those who wish to be educated in religious schools. Since the Court has effectively scrubbed religion from the public schools, there is an argument for some public support of those who desire to have religion included in their children's education. Excluding parochial schools from the educational choices provided by the Ohio program would penalize religion in a manner James Madison regarded as objectionable: no one '"ought on account of religion be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities.'"[76]

Keeping public schools free from sectarian strife in order to provide a neutral forum for citizens of a diverse democracy has been an important goal of the Court's Establishment Clause jurisprudence.[77] *Zelman* seems to stand for the proposition that financial aid to those who desire religious education included in their children's schooling is also an important goal. The Court's decision in *Zelman* is consistent with much of the evidence surrounding the adoption of the Establishment Clause, except the Court's opinion makes no distinction between state and national support of religion.

Justice Souter is correct insofar as he asserts that as a result of *Zelman*, the political branches of government are free to provide vouchers or not as they see fit. The policy issues involved in these political decisions are complex and embody both goals of secular education in a diverse democracy and those of religious education. One policy consideration is whether religious schools should be required to compromise their religious mission by accommodating it to requirements legislative bodies mandate for voucher students. In Milwaukee, for example, religious schools are required to allow voucher students to be exempt from any religious activity that their parents or they find objectionable.[78]

Zelman will remain a controversial decision. Levy provides an insightful characterization of the Supreme Court's Establishment Clause cases: "The Court rarely convinces those who think it wrong, perhaps because no establishment clause question can be dissected so precisely that it has only one side and because . . . [r]eligion goes to the core of human existence."[79] These insights counsel caution in expecting too much from the Supreme Court and justify leaving questions such as school vouchers to the compromise and democratic will of the political process as the Court did in *Zelman*.

Notes

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1. U.S. Constitution, amend 1.
2. *Susan Tave Zelman, Superintendent of Public Instruction of Ohio, et al., Petitioners v. Doris Simmons-Harris et al.; Hanna Perkins School, et al., Petitioners v. Doris Simmons-Harris et al.; Senel Taylor, et al., Petitioners v. Doris Simmons-Harris et al.*, 122 S.Ct. 2460 (2002)[hereinafter cited as *Zelman*].
3. *Doris Simmons-Harris v. Superintendent of Public Instruction, State of Ohio*, 234 F.3d 945 (C.A.6)(2000)[hereinafter cited as *Simmons*].
4. *Zelman*, 2462-64.
5. Ibid., 2464.
6. Ibid., 2464.
7. *Simmons*, 949.
8. *Zelman*, 2462.
9. Ibid., 2473.
10. Ibid., 2462-63, 2465.
11. Ibid., 2465-66
12. Ibid., 2466, citing *Mueller v. Allen*, 463 U.S. 388, 397 (1983).
13. 413 U.S. 756, 780-83 (1973)
14. 463 U.S. 388, 398-99.
15. *Zelman*, 2472, citing *Committee for Public education & Religious Liberty v. Nyquist*, 413 U.S. 756, 783, 786 (1973).
16. *Zelman*, 2466, citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481(1986).
17. *Zelman*, 2466.
18. 509 U.S. 1 (1993).
19. *Zelman*, 2463-64.
20. 509 U.S. 1, 8.
21. 120 S.Ct. 2530 (2000). For more extensive treatment of *Mitchell v. Helms*, see Lane V. Sunderland, “In Search of an Establishment Principle: The Original Understanding, Pre-Game Prayers, and Aid to Religious Schools,” *Religion & Education* 28, no. 2 (2001): 1-32.
22. 120 S.Ct. 2530., 2541-44.
23. Ibid., 2556 (O’Connor, J., joined by Breyer, J., concurring).
24. 521 U.S. 203 (1997), cited at 120 S.Ct. 2556. In *Agostini*, the Court

upheld a federally funded program providing remedial instruction to disadvantaged children on a neutral basis when government employees give the instruction on the premises of sectarian schools.

25. 2572-73,, 2575-77 (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting).

26. *Zelman*, 2469.

27. Ibid., 2469.

28. Ibid., 2468 n. 3.

29. Ibid., 2470, quoting *Mueller v. Allen*, 463 U.S. at 401.

30. Ibid., 2470-71.

31. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).

32. C. Herman Pritchett, *Constitutional Civil Liberties* (Englewood Cliffs: Prentice-Hall, Inc., 1984), 130.

33. See the section of this article dealing with the original understanding of the Establishment Clause and its relationship to *Zelman*. Justice Thomas treats this problem in his concurring opinion.

34. *Zelman*, 2473 (O'Connor, J., concurring).

35. Ibid., 2476-77.

36. Ibid., 2476, citing *Everson v. Board of Education*, 330 U.S. 1 (1947). Justice Souter quotes from *Everson* in his dissent: "'No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Ibid., 16, quoted in *Zelman*, 2485-86 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting). In *Everson*, the Court upheld reimbursement of parents of public and Catholic school students for public transportation costs.

37. *Zelman*, 2473-74.

38. Ibid., 2475, quoting *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983).

39. *Zelman*, 2474-75. O'Connor cites the Court's decisions in cases upholding public support of religious organizations. *Mueller v. Allen*, 463 U.S. 388 (1983) upheld Minnesota's policy of tax deductions for educational expenses; *Walz v. Tax Commission*, 397 U.S. 664 (1970) upheld an exemption for religious organizations from New York property tax, cited in *Zelman* at 2474.

40. Ibid., 2475.

41. Thomas does not simply accept the incorporation doctrine, but he acknowledges that the Fourteenth Amendment's Liberty Clause protects religious liberty rights.

42. *Zelman*, 2480-82. (Thomas, J., concurring).
43. Ibid, 283-84.
44. Ibid.
45. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) cited in *Zelman* at 2485-86 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting). Justice Breyer also delivers a separate dissent in which he amplifies the issue of social divisiveness along religious lines that he believes the Ohio system will lead to and identifies the prevention of such divisiveness as one of the primary reasons underlying the Establishment Clause, *Zelman*, 2502-08 (Breyer, J., dissenting). Justice Stevens writes a separate dissent in which he asserts that the range of choices students have within the public schools is irrelevant to whether the Establishment Clause allows the state to pay tuition for students at religious schools, *Zelman*, 2484-85 (Stevens, J., dissenting).
46. *Zelman*, 2485-86 (Souter, J., joined by Stevens, Ginsburg and Breyer, dissenting).
47. Ibid., 2486, 2496-97. Souter also disagrees with the Court's argument in *Zelman* that students attending public schools direct nearly twice as much state funding to their chosen school as do program students who use vouchers to attend private schools. He quotes from the Court's opinion in *Nyquist*: "'We do not agree with the suggestion . . . that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. . . . The grants to parents of private school children are given in addition to the right that they have to send their children to public schools "totally at state expense." And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause.'" Ibid., 2491 n. 7, quoting *Committee for Public Education v. Nyquist*, 413 U.S 756, 782-83 n. 38.
48. *Zelman*, 2494, 2495 n. 15.
49. Ibid., 2490, 2498.
50. Ibid., 2498-99.
51. Ibid., 2500-02.
52. Ibid., 2494.
53. U.S. Constitution, amend 1.
54. Joseph Gales, Sr., *The Debates and Proceedings in the Congress of*

the United States, vol. i (Washington: Gales and Seaton, 1834), 783-84. The House adopted this proposal, but it failed in the Senate.
55. W. G. Katz, *Religion and American Constitutions* (Evanston, IL: Northwestern University Press, 1964), 9. M. D. Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: The University of Chicago Press, 1965).
56. Gales, 757-58.
57. Howe, 20-21, citing ibid.
58. Gales, 758.
59. Gales, 758-59.
60. C. J. Antieau, A. T. Downey, & E. C. Roberts, *Freedom From Federal Establishment* (Milwaukee: Bruce Publishing Company, 1964), 59.
61. M. J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, DC: American Enterprise Institute for Public Policy Research, 1978), 15.
62. *Michael A. Newdow v. U.S. Congress; United States of America; William Jefferson Clinton, President of the United States; State of California; Elk Grove Unified School District; David W. Gordon, Superintendent EGUSD; Sacramento City Unified School District; Jim Sweeney, Superintendent SCUSD*, No. 00-16423 (U.S. Court of Appeals, 9th Cir. 2002).
63. Howe, 30. Howe makes subtle arguments regarding the "wall of separation" metaphor, the influence of federalism in the adoption of the Establishment Clause, and a number of other matters.
64. Levy believes public support of students' expenses is appropriate relief of the "double taxation of those who pay to send their children to private school." Levy would limit public support of religious schools to students' secular expenses. Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York: MacMillan Publishing Company, 1986), 176-80 [hereinafter cited as Levy, *The Establishment Clause* to distinguish it from Levy's essay that has the same title].
65. J. J. Poelvoorde, "The American Civil Religion and the American Constitution," In R.A. Goldwin & A. Kaufman (eds.) *How Does the Constitution Protect Religious Freedom?* (Washington: American Enterprise Institute for Public Policy Research, 1987), 145-46, 156, 160-161.
66. A. R. Amar, *The Bill of Rights: Creation and Reconstruction* (Harrisonburg, VA: R. R. Donnelley & Sons, 1998), 41. Another issue related to the Establishment Clause is the difficulty of establishing standing to sue. Standing requires that plaintiffs be injured or threatened with injury

by the governmental action being challenged. It is a barrier to suits that bring generalized policy complaints to the judiciary that are better resolved by the political branches. While standing is evident in a Free Exercise case challenging, for example, governmental coercion to participate in a religious exercise, it is much more difficult to show injury and standing to challenge in court the motto "In God We Trust" on our currency. *Flast v. Cohen*, 392 U.S. 83 (1968) addressed this issue and relaxed the requirements of standing in cases arising under the Establishment and Free Exercise Clauses. *Flast* involved a taxpayer challenge to the Elementary and Secondary Education Act of 1965. Nonetheless, *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982) rejected a taxpayer's suit claiming that the federal government had transferred surplus property to a church-run college in violation of the Establishment Clause.

67. L. W. Levy, "The Establishment Clause," In R. A. Goldwin & A. Kaufman (eds.) *How Does the Constitution Protect Religious Freedom?* (Washington: American Enterprise Institute for Public Policy Research, 1987), 86-88.

68. Gales, 757-58. For further treatment of the historical materials illuminating the original understanding of the Religion Clauses see Lane V. Sunderland, "Religious Freedom and Obedience to the Law," *Religion & Education* 27, no. 2 (2000): 20-23. For an academic treatment that rejects the nonpreferential interpretation of the Religion Clauses see Douglas Laycock, "'Nonpreferential' Aid to Religion: A False Claim About Original Intent," *William & Mary Law Review* 27 (1986): 875.

69. Antieau, 126.

70. Sunderland, "In Search of an Establishment Principle," 20-24.

71. Gales, 758-59 [italics added].

72. *Zelman*, 2468-69.

73. *Mueller v. Allen*, 463 U.S. 387, 401-02 (1983), quoting *Wolman v. Walter*, 423 U.S. 229, 262 (1977)(Powell, J., concurring in part, concurring in judgment in part, and dissenting in part). Rehnquist delivered the opinion of the Court in *Mueller*.

74. Mueller, 402.

75. Levy, *The Establishment Clause*, 180.

76. Gaillard Hunt, "James Madison and Religious Liberty," 1 *Annual Report of the American Historical Association* 163, 166-67 (1901), quoted in *City of Boerne v. Flores*, 117 S.Ct. 2157, 2181 (1977) (O'Connor, J., dissenting in part, joined by Breyer, J.). Madison's comment was made prior to enactment of the Virginia Declaration of Rights.

77. Ibid., 180.
78. Wisconsin Statutes Annotated 4008(E) (West, 1995) quoted in Stephen Macedo, "Symposium: II. The Constitution of Civil Society B. Religion and Civic Education Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values," *Chicago-Kent Law Review* 75 (2000): 439.
79. Ibid., 179.