VOUCHERS AND RELIGIOUS SCHOOLS: THE NEW CONSTITUTIONAL QUESTIONS

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In *Zelman v. Simmons-Harris*,[1] the Supreme Court upheld the constitutionality of including religious schools in programs of vouchers given to families for elementary and secondary education. The decision was treated, by both supporters and detractors, as a "landmark" development in the constitutional relationship between religion and American government.[2] Indeed, *Zelman* indicates that most carefully designed voucher programs that include religious schools will survive challenge under the First Amendment's Establishment Clause. Part I of this Article will explain why I reach that conclusion.[3]

But despite its importance, *Zelman* represents only the first round in the legal battle over whether families should be able to use tuition grants at religiously affiliated schools. The second

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[1]536 U.S. 639, 122 S. Ct. 2460 (2002).

[2]See, e.g., Warren Richey and Gail Russell Chaddock, *Key Win for School Vouchers*, Christian Sci. Monitor, June 28, 2002, at 1, 2002 WL 6426626 (*Zelman* is "a landmark First Amendment decision"); Jeffrey Bell, *The Decline of Secularism*, The Weekly Standard, July 15, 2002, at 1112, 2002 WL 14707849 (*Zelman* "has the feel of a watershed moment [toward a] more favorable vision of religion's place in the public square"); David G. Savage, *School Vouchers Win Backing of High Court*, L.A. Times, June 28, 2002, at A1, 2002 WL 2486279 (*Zelman* is "clearly the worst church-state decision in the past 50 years," according to Barry Lynn of Americans United for Separation of Church and State).

[3]See part I-C.

round is already underway, with lawsuits challenging various state constitutional provisions and laws that may bar the use of a state's vouchers at religious schools even if the Establishment Clause permits it. For example, in September 2002, six families in Maine sued to challenge a state law that offers students in remote rural districts, without a public high school, free tuition to attend a nearby public or private high school, but which refuses the tuition if the private school is religious.[4] The families allege that the Maine program unconstitutionally discriminates against families who choose religious schools for their children. A number of states have constitutional provisions or laws that impose such a restriction or could be read to do so.[5] Those provisions can block school choice plans from being enacted in the first place, or serve as the basis for excluding religious schools from such a plan, either by legislative decision or by court ruling.

But as the Maine case indicates, if a state provision excludes religious schools from a choice plan, that exclusion may actually be forbidden by the First Amendment's guarantees of freedom of religion and freedom of speech. Part II of this Article examines this round of questions, and concludes that there is a strong case that state provisions that specifically bar the use of vouchers at religious schools violate the First Amendment by discriminating against religion in violation of the Free Exercise Clause, by discriminating against religious expression in violation of the Free Speech Clause, or at least by imposing an unconstitutional condition on the receipt of state educational benefits. If a state makes vouchers available for use at private schools, it must authorize their use at religious schools as well. Although *Zelman* does not dictate this conclusion, it points in that direction, as I will try to show.

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[4]See, e.g., Robert Tomsho, *Vouchers Are on the Docket: Wave of Suits Aimed at Toppling Restrictions Is Expected*, Wall St. J., Sept. 19, 2002, at A10, 2002 WL-WSJ 3406518.

[5]For more detailed summary of the state provisions, see *infra* notes __-__ and accompanying text

Finally, even if a school is not excluded from participation in a choice plan just because it is religious, it might be excluded because of other conditions on participation. A voucher-eligible school might be required to refrain from discriminating based on various characteristics – race, sex, religion, sexual orientation – in hiring employees or in admitting students. It might be required to teach certain subjects, or refrain from certain teaching certain ideas. If those conditions conflict with the practices of a private school, religious or secular, the school might challenge its disqualification, again with First Amendment claims of freedom of speech, association, or religion. Part III analyzes those constitutional objections, and concludes that they present a more mixed case than the exclusion of schools solely because they are religious. Some of these non-religious conditions are subject to strong challenge, but others are more likely to be upheld.[6]

I. *ZELMAN* AND ITS KEY IDEAS

A. The Holding

The program involved in *Zelman* was enacted by the Ohio legislature as a response to the failure of Cleveland's public schools, which have ranked "among the worst performing [i]n the nation": in 1996 only one in 10 ninth graders passed a basic proficiency examination, and in 1995 a federal judge placed the district under state control.[7] Under the program, a student in the

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[6]In discussing these constitutional questions, I pass no judgment on vouchers as a matter of educational policy. I believe that vouchers continue to be an experiment worth exploring, especially for low-income families caught in failing public school systems. But I do not claim that vouchers are the key to a better education for students, cf. *Zelman*, 122 S. Ct. at 2480, 2484 (Thomas, J., concurring). If a state believes that reforming its own schools alone is the best educational policy, that course is open to it. The argument here is simply that if the state provides vouchers that families may use at private schools, it must extend the eligibility to religious schools as well. For one example of the debates on the educational policy issues and the existing data, cf. Paul E. Peterson, *A Call for Citywide Voucher Demonstration Programs*, with Martin Carnoy, *Should States Implement Vouchers Even if They Are Constitutional?*, in The Next Chapter in Educational Policy: Contrasting Views on Strengthening Education Following the Cleveland Voucher Ruling, available at http://www.pewforum.org.

[7]*Zelman*, 122 S. Ct. at 2463.

Cleveland public schools could remain in the public schools and receive a grant to pay for extra tutorial sessions, or the student could attend a private school or certain other public schools and receive a grant (a "scholarship") to pay for tuition, up to a maximum of $2,250 and 90 percent of tuition costs. Low-income students were eligible for a higher amount, and had a lower tuition "co-pay," than higher-income students.[8] The eligible schools included not only any private school in Cleveland, but also any public school district adjacent to Cleveland, that decided to participate in the program. An adjacent public school that chose to participate would receive the $2,250 payment from the state in addition to the state's ordinary share of per-pupil funding for each voucher student.[9] The program was challenged by taxpayers on the ground that authorizing the use of vouchers for tuition at religious schools violated the Establishment Clause, and the case reached the Supreme Court after the Sixth Circuit struck down the program.[10]

Had the Court employed the method of Establishment Clause analysis that it used for many years in the 1970s and 80s, it would have asked whether the religiously affiliated schools participating in the Cleveland program were "pervasively sectarian"[11] – that is, did they "provide an integrated secular and religious education [in which] the teaching process is, to a large extent, devoted to the inculcation of religious values and belief."[12] Such schools would be barred from receiving any "substantial aid to [their] educational function";[13] attempts to restrict such aid to

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[8]*Id.* at 2464 (citing Ohio Rev. Code. Ann. §§ 3313.978(A), (C)(1)).

[9]122 S. Ct. at 2463 & n.1 (citing §§ 3313.976(C), 3317.03(I)(1)).

[10]Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).

[11]See, e.g., Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985).

[12]Meek v. Pittenger, 421 U.S. 349, 366 (1975); see also, e.g., Committee for Public Education v. Nyquist, 413 U.S. 756, 767-68 (1973); Lemon v. Kurtzman, 403 U.S. 602, 615-16 (1971).

[13]*Meek*, 421 U.S. 366; *Ball*, 473 U.S. at 395.

secular classes only would be struck down as creating "excessive entanglement" with religion;[14] and if any significant number of the subsidized schools were of this nature, the program would be struck down on its face. That analysis would have doomed the Cleveland program.

But for almost 20 years before *Zelman*, the Court had increasingly switched to a very different analysis: one that asks not whether a religious school in fact receives aid, but rather whether the government has skewed aid toward the choice of a religious school. Put differently, in the Court's terms, the question now is whether the program is one of "true private choice" – under which aid flows to a religious school not because of any favoritism for religion in the terms of the program, but because the individual beneficiaries of the aid choose to use it at the religious school.[15]

In *Zelman* the Court held that the Cleveland program was one of "true private choice." As I will explain in the next section, this is a key point: that the use of state money at a religious school is attributable to the choice of the individual, not a decision of the state. *Zelman* does not give this example, but in earlier decision the Court and individual justices have said that such a program is "less like a direct subsidy" to religious teaching "and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution."[16]

The Court emphasized three features in finding Cleveland's program to be one of "true private choice." First, the program's terms were "neutral in all respects toward religion": families were eligible to receive vouchers, and schools to participate, "without reference to" whether they

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[14] *Lemon*, 403 U.S. at 619; Aguilar v. Felton, 473 U.S. 402 (1985).

[15] See, e.g., Mueller v. Allen, 463 U.S. 388, 399-400 (1983); Witters v. Dept. of Services, 474 U.S. 481, 487 (1986); Zobrest v. Catalina Foothills Dist., 509 U.S. 1, 10-11 (1993).

[16] Mitchell v. Helms, 530 U.S. 793, 841 (2000) (O'Connor, J., concurring in the judgment) (citing *Witters,* 474 U.S. at 486-87).

were religious.[17] The provisions for aid to religious schools were no more favorable than those for other schools: indeed they offered less than half of the assistance given to community (i.e. charter) schools and magnet schools in the Cleveland district, and less than half of the assistance to a participating suburban public school, which as noted above would receive a voucher on top of the state's regular contribution to the per-pupil cost.[18] Neutrality of terms, the Court says, promotes parental choice, because when the terms are neutral they create "no 'financial incentive[s]'that 'ske[w]' the program toward religious schools."[19] Neutrality in this sense is fairly simple for a voucher program to satisfy. The state should simply make aid usable at religious schools on the same terms as for non-religious schools.

Second, the Court emphasized that the Cleveland program provided aid not "directly to religious schools," but only to individual beneficiaries – parents and families – "who, in turn, direct the aid to religious schools . . . of their own choosing."[20] With respect to direct aid programs, the Court cited Justice O'Connor's concurring opinion in *Mitchell v. Helms*, which had provided the crucial votes to uphold the loans there of instructional materials and equipment to religious schools but only on the premise that the materials would be used for secular and not for religious teaching.[21] But as O'Connor herself made clear, this restriction to secular uses does not apply to a program that

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[17] *Zelman*, 122 S. Ct. at 2467.

[18] *Id.* at 2468; see *supra* note 8 and accompanying text. In addition, parents choosing religious and other private schools had to make a co-payment of 10 percent of tuition (up to $250), while parents choosing public schools did not. *Id.*

[19] *Id.* at 2468 (brackets in original) (quoting *Witters*, 474 U.S. at 486-87).

[20] *Id.* at 2465-66.

[21] *Id.* at 2466 (citing *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring in the judgment)).

aids individuals and lets them choose where to spend the aid.[22] Thus even a "pervasively sectarian" school is not disabled from benefitting from such aid, and the state need not do the monitoring (to limit the aid to secular classes) that the Court had previously found objectionable.

Finally, the Court emphasized that the program offered "genuine opportunities for Cleveland parents to select secular educational options" as alternatives to religious schools.[23] The reasoning implicit in this factor is that if there are actually no secular alternatives to religious schools, then even under formally neutral program terms, families have no "genuine choice" and the effect of the program is to "coerc[e]" them into choosing religious schools.[24] But the Court was relatively flexible in determining whether there were sufficient secular options, finding a number in Cleveland that qualified: secular private schools, magnet and charter schools in the Cleveland public system, and even the extra tutoring in the regular public schools.[25]

In particular, the majority refused to infer a lack of genuine options from the high percentage of religious choices in the program (in one year, 96 percent of those who chose vouchers used them at religious schools, which made up 82 percent of the participating private schools). The Court noted that the 82 percent figure was virtually identical to the percentage of religious schools among

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[22]*Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring in the judgment).

[23]*Zelman*, 122 S. Ct. at 2469.

[24]*Id.* at 2470.

[25]*Id.* at 2469. None of the eligible suburban public school districts chose to participate in the program, so the Court ultimately did not count them as alternatives. *Id.* at 2469. Although the Sixth Circuit argued that the reason for their demurral was that the $2,250 voucher was too small to cover their per-pupil costs, 234 F.3d at 959, it ignored that the adjacent schools would receive not only the voucher, but also their per-pupil share of state funding, for each voucher student – raising the amount provided to anywhere from $4,750 to $6,544 per student. 122 S. Ct. at 2463 & n.1. This was much closer to their per-pupil cost, although still below it. The lack of participation by suburban schools therefore may be attributed in significant part to the well-documented reluctance of suburbanites to have inner-city students in their schools. See James E. Ryan and Michael Heise, *The Political Economy of School Choice*, 111 Yale L. J. 2043, 2082 (2002) ("The possibility that school choice might introduce a substantial number of urban students into suburban schools thus makes choice threatening to many suburban parents and homeowners alike.").

Ohio private schools generally and thus could not plausibly be attributed to any features of the program.[26] More importantly, the Court said that the percentage of religious choices among voucher choices was irrelevant, for two reasons. First, "[t]he constitutionality of a neutral [aid] program" should not turn on how recipients actually choose to use the aid.[27] Second, the question of genuine alternatives "must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren" – including the many "nontraditional" options in the public school system, which if included would have dropped the percentage of students enrolled in religious schools down to 20 percent.[28] Both of these points deserve fuller consideration, because they constitute the conceptual foundations of *Zelman* and are important for analyzing further constitutional questions about vouchers.

B. *Zelman*'s Key Ideas: A Brief Defense

The first of *Zelman*'s key premises is that when an individual receives a voucher provided on a neutral basis and then uses it at a religious school, the "advancement of a religious mission [is] attributable to the individual recipient, not to the government."[29] The government merely provides the aid to citizens and, given the neutrality of the terms, creates no incentives for families to choose religious schools over others; therefore, as the majority several times emphasizes, the aid reaches religious schools "only by way of the deliberate private choices of numerous individuals."[30] *Zelman* brings this theme to full fruition, although it had been emphasized, in virtually identical language,

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[26]*Zelman*, 122 S. Ct. at 2469-70.

[27]*Id.* at 2470.

[28]*Id.* at 2469 (emphasis in original), 2470-71.

[29]122 S. Ct. at 2467.

[30]*Id.*; see, e.g., *id.* at 2465 ("aid reaches religious schools only a result of the genuine and independent choices of private individuals").

in a long series of earlier decisions.[31] In those, both the majority and individual justices had said that a "true private choice" program of benefits was like "the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution."[32] This rationale amounts to a holding of "no state action" advancing religion. As the unanimous majority put it in upholding Larry Witters' use of aid for religious education, the fact that money reaches a religious does not "result from a *state* action sponsoring or subsidizing religion";[33] "the circuit between government and religion is broken";[34] "the decision to support religious education is made by the individual, not by the State."[35] With *Zelman*, the private-choice rationale now fully governs cases involving state aid to individuals.

The private-choice rationale leads logically to the Court's conclusion that the amount of aid actually used at religious schools is irrelevant. The religious schools are already operating, for reasons independent of the state, and families choose to use their grants at those schools for reasons that are likewise independent of the state: the family's religious ideology, the school's educational performance or its disciplinary policies.

The Court's dismissal of the actual results of voucher choices has drawn fire from commentators. Ira Lupu and Robert Tuttle, for example, argue that the state was responsible for the Cleveland results because the high preexisting percentage of religious schools made them a

[31]See Mueller v. Allen, 463 U.S. 388, 399 (1983); *Witters I*, 474 U.S. at 487; Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 9-10 (1993); Mitchell v. Helms, 530 U.S. 793, 813 (2000) (plurality opinion of Thomas, J.); *id.* at 842-43 (O'Connor, J., concurring in the judgment).

[32]*Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring) (following *Witters I*, 474 U.S. at 486-87).

[33]*Witters I*, 474 U.S. at 488.

[34]*Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring).

[35]*Witters I*, 474 U.S. at 488; accord *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring).

dominant option, especially in the light of the poor quality of the unreformed Cleveland public schools.[36] Thus, although Lupu and Tuttle support the constitutionality of some school choice arrangements, they argue that the Cleveland program "steered families toward religious experience," and that the state should have "an affirmative duty . . . to take steps to improve the mix," for example by requiring suburban public schools to participate.[37] Along the same lines, Steven Green and (before *Zelman*) Alan Brownstein have both argued that voucher programs "lead to greater religious inequality" because small faiths find it more difficult than larger faiths to set up schools and to satisfy the typical eligibility criteria for receiving voucher students.[38] Both Green and Brownstein criticize the "private choice" rationale for emphasizing form over substance – for overlooking the disparate impact that choice programs have in favor of certain faiths that operate K-12 schools.[39]

Such arguments, however, typically fail to confront the fact that absent a voucher program, the state's funding arrangement likely has as much or more of a disparate impact on choices concerning religious education. Absent vouchers, the state funds only one, secular category of schools: public schools (including variations such as charter schools and magnet schools). Because these various public options must be secular in nature – the Establishment Clause forbids religious

[36]Ira C. Lupu and Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. ___ [draft 39] (forthcoming April 2003); see also Ira C. Lupu and Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian-Service Providers*, 18 J. L. & Pol. 539, 595-97 (2002).

[37]Lupu and Tuttle, Zelman's *Future*, *supra* note 36, at __ [draft 39]; Lupu and Tuttle, *Sites of Redemption*, *supra* note 36, at 599-600.

[38]Steven K. Green, *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, 38 Willamette L. Rev. 549, 559 (2002); Alan Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 Conn. L. Rev. 871, 920-23 (1999).

[39]Green, *supra* note 36, at 573 (*Zelman*'s "holding reveals a high degree of formalism"); Brownstein, *supra* note 36, at 922 (criticizing vouchers for exacerbating "substantive inequality" among faiths).

teaching or exercises as part of their program[40] – they are unacceptable or at least deeply unattractive to many devout religious families of varying faiths. Other families, again of varying faiths, may find religious schools attractive because of the moral atmosphere and discipline they provide.[41] Thus, as Eugene Volokh has put it, the fact that "[r]ight now, all standard K-12 spending goes to secular education" is "itsel[f] a powerful 'disparate impact' favoring secular uses and disfavoring religious uses."[42] To argue that voucher aid in practice "steers" students toward religious schools requires overlooking or minimizing the extent to which a world without religious-school vouchers, in practice, "steers" students away from religious and toward secular schools. Any movement of students from public schools to religious schools after a school choice enactment reflects, at least in part, that the previous funding arrangement in effect favored secular education over the religious alternative. Even if the choice enactment fails (as the Cleveland program did) to bring in the whole range of secular private schools, it nevertheless adds significantly to the number of schooling options, which prima facie would cause a significant reduction in amount of steering from that present when public schools were the only state-subsidized option. For this reason, I think that Professors Lupu and Tuttle are too demanding when they dismiss out of hand the state's argument that it was not politically feasible to mandate the participation of suburban public schools.[43] To set

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[40]See, e.g., Edwards v. Aguillard, 482 U.S. 578 (1987) (teaching of divine creation); Stone v. Graham, 449 U.S. 39 (1980) (teaching of Ten Commandments as binding morals); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible readings); Engel v. Vitale, 370 U.S. 421 (1962) (official prayers).

[41]See, e.g., Anthony Bryk et al., Catholic Schools and the Common Good 297-304 (1993) (emphasizing sense of community and "inspirational ideology" of personal dignity as factors in success and attractiveness of Catholic students); Andrew M. Greeley, Catholic High Schools and Minority Students (1982) (emphasizing disciplinary policies as one factor).

[42]Eugene Volokh, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341, 348 (1999).

[43]*Id.* at 599 ("The absence of political will . . . hardly constitutes a good faith defense to a claim that the State has failed to meet its constitutional obligations.").

a standard that is, in political terms, unrealistically high is to ensure that voucher programs will not be enacted or survive – and thus it is to perpetuate the monopoly of public schools, with their own strong effect of pushing many parents away from religious schools.[44] Again, once one recognizes that "steering" effects occur under either course – excluding religious schools or including them – the better course usually is to refrain from flat-out exclusion of (that is, discrimination against) religious schools.[45] It is certainly the better course when colorable secular alternatives exist, as was the case in Cleveland.[46]

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[44]Or the overly demanding standard with respect to religious schools may ensure that only choice programs limited to secular private schools will be permitted – in which case the disfavoring of religious schools will not be merely in impact, but by the very terms of the program.

Elsewhere in their argument, Professors Lupu and Tuttle accept political feasibility as a defense of the Cleveland program's design. They are skeptical of the Sixth Circuit's argument that the low voucher amount made the program unconstitutional favoritism for religious schools because they "often have lower overhead costs [and] supplemental income from private donations" (234 F.3d at 959 (citing Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999))). They defend the state on the ground that it "inevitably must allocate a total budget amount to these vouchers, and each increase in the value of the Scholarship will presumably produce a decrease in the total number of students." *Sites of Redemption*, *supra* note 36, at 601. I agree with their dismissal of the "voucher too low" argument, but it seems inconsistent with their other demands on the state. If the failure to mandate suburban-school participation reflects merely "[t]he absence of political will," then so, one might say, do the budgetary limits: to "meet its constitutional obligations," the state simply should (must) increase the amount of money so that large numbers of students can still be served but with larger vouchers. Given the dynamics of suburban opposition that Professors Ryan and Heise describe, see *supra* note 25, the suburban-participation hurdle looks just as insurmountable as are budgetary hurdles. And given the good effects that choice programs might have, not only for education but for the religious choice of some parents, the courts should not mandate unrealistically high hurdles.

[45]As the *Zelman* majority noted, the record failed to show that the scholarship amount had disfavored secular private schools as a whole. Even with the scholarship limited to $2,250, a number of new secular private schools had formed in response to the program. *Zelman*, 122 S. Ct. at 2469 n.4. The percentage of voucher-cashing students who chose religious schools (rather than secular private schools) was as low as 78 percent in one year (*id.* at 2471), and that figure – like the percentage of participating schools that were religious – was very close to the overall percentage of Ohio private schools that were religions (81 percent). These figures beliefs the claim size of the voucher "steered" families toward religious schools over secular private alternatives.

Lupu and Tuttle do make a somewhat more persuasive argument that the state could have reduced the informal pressure on parents toward religious worship by allowing parents to opt their children out of religious worship at a participating school (as the Milwaukee choice program did). *Sites of Redemption*, *supra* note 36, at 598-99. Such a provision, although it might discourage some providers from participating, would probably not have been the deal-breaker that mandating suburban-district participation would have been. For discussion of the opt-out condition on a school's participation, see *infra* notes __-__ and accompanying text.

[46]In other words, before the challengers succeeded in securing the exclusion of the religious-school option, the Court was right to demand that they prove that secular alternatives were clearly inadequate. Although Lupu and Tuttle question the adequacy of the secular alternatives, see *Sites of Redemption*, *supra* note 36, at 601-04, the fact is that in relevant years many more parents chose those alternatives than chose religious schools (in one year, 13,000 in magnet

Likewise, to argue that school choice worsens the unequal position of minority faiths, one has to assume that the existing public schools are acceptable for those faiths. If a small religious group cannot afford to open its own schools with a voucher program, then it certainly cannot do so without a voucher program; in other words, in the absence of such a program its members would surely be limited to public schools. The arguments of several Orthodox Jewish groups in *Zelman* confirm that public schools are unacceptable for families of some minority faiths, and that school choice increases their ability to follow their conscience in choosing their children's education – indeed, for low-income families vouchers may be essential to their pursuit of conscience. The amicus brief of the Orthodox Orthodox groups stated that "Jewish education is a key, if not the key, to Jewish continuity and survival"; that "Jewish religious school education is the most reliable means of teaching the values of the Jewish faith to Jewish children"; that "many Jewish parents are financially unable to pay even the minimum necessary to gain entrance to a Jewish day school"; and that school choice programs "enable parents with even the most modest means to select [Jewish and other] alternatives to designated public schools."[47] To quote Professor Volokh again: "True, [under school choice] some poor parents will still be unable to find a school that fits their particular religious beliefs – but under the current system, many more parents are in this boat."[48]

The primary rejoinder to this argument is that many members of minority faiths greatly prefer a public school to a school that would instruct their children in another faith. But it is

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schools and 1,900 in charter schools, compared with about 3,500 in religious schools; see *Zelman*, 122 S. Ct. at 2464, 2470-71). Although this is not conclusive as to the quality of the secular schools, it is quite probative, as Justice O'Connor pointed out, that so many parents chose them. *Id.* at 2477 (O'Connor, J., concurring).

[47]Brief of National Jewish Commission on Law and Public Affairs (COLPA) as Amicus Curiae in Support of Petitioners, at 3-4, in *Zelman* (available at 2001 WL 1480708).

[48]Volokh, *supra* note __, at 350.

extremely unlikely that school choice will even come close to eliminating the public school option in any locality. Moreover, as Professor Volokh has argued, the way to deal with this remote possibility is to mandate the continuation of a public school in districts where school choice operates, not to take the extreme step of invalidating vouchers altogether.[49] In short, although differential effects from a formally neutral voucher program may be a matter of concern, they scarcely justify having a constitutional rule that requires flat-out, facial discrimination against religion. Including religious schools on equal terms in a school choice program is not a mere matter of form; it does good things for religious liberty and equality as a matter of substance.

Zelman implicitly recognizes the above points in its second key premise. The Court said that to assess whether families have genuine secular alternatives, one must take into account "*all* options Ohio provides Cleveland schoolchildren," including the various public alternatives to the regular public schools: community (charter) schools, magnet schools, and supplemental tutoring in the regular schools.[50] To state this proposition explicitly was important. In its 1970s decisions striking down programs of aid to private schools, the Court had often focused on the aid program in isolation and then objected that the vast majority of eligible schools were religious.[51] This, of course, ignored the fact that the state already provided a complete subsidy, a free education, to children attending public schools. The no-aid decisions explicitly or implicitly assumed that public schools were the neutral baseline, and aid to private schools therefore a departure in favor of religion: as one decision

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[49]*Id.*

[50]*Zelman*, 122 S. Ct. at 2469.

[51]See, e.g., *Nyquist*, 413 U.S. at 782 n.38 (finding it "important" that tuition grants went only to private-school families; "the significantly religious character of the statute's beneficiaries" made the program different from one offered to "all schoolchildren, those in public as well as those in private schools"); *Meek*, 421 U.S. at 364 (objecting that "the primary beneficiaries of [program loaning instructional materials and equipment] are nonpublic schools with a predominantly sectarian character").

blithely put it, "grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools 'totally at state expense.'"[52] But that assumption obviously begs the question, if one sees the public schools not as the neutral baseline but as one of the secular alternatives to religious schools. Again, this perspective had come more and more to underlie the Court's recent decisions, but *Zelman* makes it explicit and – importantly – takes into account the state's aid to public schools even though that aid occurs outside of the particular program in question.[53]

These two key ideas underlie *Zelman*. As I will try to show in part II, these ideas are quite relevant to the next constitutional question, which is whether a state's exclusion of religious schools from a voucher program not only is not required by the First Amendment, but is actually forbidden by it as a form of anti-religious discrimination. To be sure, that question may also be heavily influenced by the Court's commitment to federalism – a state's discretion to exclude religious schools even if does not have to. But the key substantive rationales of *Zelman*, I will argue, support the argument that excluding the religious school choice is unconstitutional.

C. *Zelman* and Future Establishment Clause Challenges to School Choice

Zelman's analysis suggests that it will be relatively easy for a voucher program that includes religious schools to satisfy the Establishment Clause. Consider the two common contexts.

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[52]*Nyquist*, 413 U.S. at 782 n.38.

[53]See also Paul E. Salmanca, *Choice Programs and Market-Based Separationism*, 50 Buff. L. Rev. 931, 975-76 (2002).

To say that public schools should be considered as secular alternatives to religious schools is not to say that they should be considered if they are educationally inadequate, as the unreformed Cleveland public schools were. In the context of a failing system, the adequacy of the public schools as an option probably depends on there being other reforms to the system. See *infra* note 55 and accompanying text.

First, consider the situation of vouchers for low-income families in failing public schools, as in Cleveland. This is the most likely situation for the enactment of a voucher program, in political terms, because of the moral argument for giving low-income families some power to choose better performing schools, a power their higher-income counterparts already exercise.[54] Most of the notable failing public school systems are large urban systems; these almost always have charter or magnet schools,[55] which *Zelman* treats as genuine options (indeed, under *Zelman* even extra tutoring in public schools counts). To be sure, there is a strong argument that the entirely *unreformed* public schools of a failing system cannot count as a genuine alternative to religious schools; the very premise of choice legislation in such a context is that the public schools are inadequate.[56] I agree with Professors Lupu and Tuttle that a commitment to true parental choice in matters of religion and education entails some scrutiny of the quality and desirability of secular alternatives. But when public-school reforms are available options, *Zelman* correctly signals a less than rigid attitude toward assessing their quantity and their quality: the majority implies that challengers bear the burden of showing the lack of genuine options, and Justice O'Connor's concurrence explicitly says that the demands on alternatives should not be strict.[57] This flexibility is appropriate. A strict

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[54]See Ryan and Heise, *supra* note 25, at 2085. For the moral and policy argument in favor of vouchers for low-income families, see, e.g., John E. Coons and Stephen Sugarman, Education by Choice (1978); Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society (1996); Nicole Stelle Garnett and Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 Tex. Rev. L & Pol. 301, 341-49, 357-60 (2000).

[55]See, e.g., *id.* at 2076 & n.168 (citing Kate Zernike, *Suburbs Face Tests as Charter Schools Continue To Spread*, N.Y. Times, Dec. 18, 2000, at A1) (as of 2000, more than two-thirds of the approximately 2,000 charter schools in the nation were are located in cities).

[56]The *Zelman* majority at first suggested that "remain[ing] in public school as before" was a genuine option (122 S. Ct. at 2469), but it ultimately left the regular public schools out of the list of options with which religious schools were compared, *id.* at 2470-71. But see Richard T. Welcher, Note, *If A Public School Is Labeled "Failing," Could More Really Be Less?*, 77 Notre Dame L. Rev. 293 (2001) (arguing that a school should be considered a "choice" if it remains open for parents to use).

[57]*Id.* at 2467; *id.* at 2477 (O'Connor, J., concurring) (secular options "need not be superior to religious schools in every respect," but only"adequate substitutes for religious schools in the eyes of parents").

attitude toward the adequacy of secular alternatives might mandate the exclusion of religious schools in many neutral voucher programs. As I argued above,[58] such flat discrimination against religious choices such as this surely does not serve the value of choice. A voucher program with religious schools included generally works an increase in families' choice, even if the program has some imperfections, and such incremental improvements should not be barred by suddenly demanding that the secular alternatives be sparkling in quality.

Turning to the second context, imagine that a state goes beyond addressing a failing system and offers vouchers for any family in the state as an alternative to public school. Such a program is very unlikely to be enacted, in part because it is not limited to the most morally compelling case of low-income students in failing public schools.[59] Still, the program would likely be upheld under the reasoning of *Zelman*, at least as to most schools in the state. Most public schools would be educationally adequate and thus, unlike the failing system, would count as a genuine alternative to religious schools. And if the regular public schools count, they will almost always dwarf private-school enrollment.

The broader hypothetical program does bring up an ambiguity in *Zelman*. The Court stopped short of overruling *Committee for Public Education v. Nyquist*,[60] the early 1970s decision that had struck down a tuition grant program similar in many respects to the Cleveland vouchers. Instead the majority distinguished the *Nyquist* program on the ground that, unlike Ohio's, it did not itself include any public schools and its purpose was to "'offe[r] . . . an incentive to parents to send their

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[58]See *supra* notes 38-45 and accompanying text.

[59]See Heise and Ryan, *supra* note 25, at 2079-81 (describing defeat of broad voucher programs in several states in 1990s).

[60]413 U.S. 756.

children to sectarian schools.'"[61] These distinctions might be used to challenge a statewide voucher program that simply covered private schools as an alternative to traditional public schools; such a program, viewed in isolation, might be seen as primarily aiding religious schools, rather than low-income parents as the Ohio program did. But if these distinctions actually become crucial to such a challenge, they are unlikely to survive. They are thoroughly at odds with the general thrust of *Zelman* – that the court must consider "*all* [genuine] options Ohio provides Cleveland schoolchildren," including those outside the specific program such as the charter, magnet, and even (if they are adequate) regular public schools.

II. STATE NO-AID PROVISIONS AND FEDERAL CONSTITUTIONAL CHALLENGES TO THEM

The approval of vouchers under the federal Constitution shifts the stage to state courts and the many state provisions that are more explicit than the Establishment Clause in restricting aid to religious education. The classic example of the difference between federal and state rules is the *Witters* litigation in Washington, where a blind student was excluded from receiving otherwise-available state funds for his disability because he was taking religion classes at a Bible college. After the U.S. Supreme Court ruled that the Establishment Clause did not require that Larry Witters be so excluded,[62] the Washington Supreme Court upheld the exclusion on the basis of the state constitution.[63] Thus, under a number of these state provisions, even when families could use vouchers at secular private schools, they could not do so at religious schools or for religious courses of study. In many states, if the legislature enacts a voucher program permitting use at religious

[61] *Zelman*, 122 S. Ct. at 2472.

[62] *Witters*, 474 U.S. at 481.

[63] Witters v. State Comm'n for the Blind, 112 Wash. 2d 363, 771 P.2d 1119 (Wash. 1989).

schools, the state provision will serve as a basis for a court challenge, as was the case not only in Cleveland, but for similar choice programs for parents in failing public systems in Milwaukee and Florida.[64] Or the state provision may cause the legislature itself to exclude religious schools. Finally, the state provision may prevent the issue from ever coming to litigation, by blocking the enactment of any choice program in the first place. So school choice proponents have begun a concerted effort to undermine the state restrictions by raising federal constitutional challenges, often in contexts other than elementary or secondary-school vouchers.[65]

Before turning to the federal constitutional challenges, I first briefly examine the varieties of state provisions and how they might be interpreted concerning elementary and secondary-school vouchers.

A. State Provisions and Their Interpretation

The stricter state no-aid provisions vary in their precise terms and history, although they fall into identifiable categories.[66] Some of them date to the founding of the nation; others, as will be

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[64]Cf. Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602 (1998) (upholding Milwaukee choice program against state as well as federal challenges); with Holmes v. Bush, No. CV 99-3370, at 4 (Fla. 2d Jud. Cir., Leon Cty., Aug. 5, 2002) (striking down Florida program under state constitution).

[65]See, e.g., Davey v. Locke, 299 F.3d 748 (9th Cir. 2002) (upholding federal challenge to exclusion of theology students from Washington state higher-education scholarships); Frank E. Lockwood, *Student Sues Over Scholarship – State Bars Stipends at Church Schools*, Lexington Herald Leader, Dec. 7, 2002, at C1, 2002 WL 102229581 (lawsuit challenging exclusion of religion major from Kentucky state college scholarships); *Boyette v. Galvin*, No. 98-CV-10377-GAO (D. Mass.) (lawsuit challenging Massachusetts Anti-Aid Amendment of 1855) (filings available at http://www.becketfund.org); *Pucket v. Rounds*, No. 03-CV-5033 (D.S.D.) (complaint filed April 2003 challenging South Dakota's exclusion of religious-school students from free school busing under state constitutional provision) (summarized at http://www.becketfund.org).

[66]Catalogs and analyses of the state provisions include Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L & Pub. Pol'y ___ (forthcoming 2003) (draft on file with author); Toby Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117 (2000); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L & Pub. Pol'y 657, 681-99 (1998); Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 Ed. Law. Rep. 1 (1997); Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing the Separation of Church and State Through State Constitutional Provisions*, 71 Va. L. Rev. 625, 638-42 (1985). Most of these summaries are

discussed, arose in a period of intense public hostility to Catholic education in the mid- to late 1800s and were modeled on the failed 1875 Blaine Amendment to the U.S. Constitution.[67] The state provisions raise two broad questions of interpretation.

First, will the state provision in fact be read to forbid the use of voucher-type aid at religious schools? Because their terms and history vary, they can be interpreted in different ways. Some of their features suggest that they do forbid the use of such aid at religious schools. For example, Washington state's provision says that state money not only may not be "appropriated for" religious teaching, but may not be even "applied to" such teaching.[68] From this, the state court in the second *Witters* case reasoned that even if the terms of the aid program for disabled students were facially neutral, the aid could not be used in any instance for – that is, "applied to" – religious instruction.[69] Contrast the focus of *Zelman* on whether the terms of the program skew aid toward a religious use, not whether the aid is used for religion in a particular instance. Moreover, some state provisions bar not only "direct" but also "indirect" aid.[70] *Zelman* emphasized the fact that voucher money flows to a religious school only indirectly through the choices of private individuals. But that distinction may be of no help to vouchers under some state constitutions: for example, a Florida trial judge recently struck down the state's scholarship program for students in failing public school districts,

far more comprehensive than I attempt to be here.

[67]See part II-B-5.

[68]Wash. Const. art. I, § 11.

[69]Witters v. State Comm. for the Blind, 112 Wash. 2d 363, 370, 771 P.2d 1119, 1122, cert. denied, 493 U.S. 850 (1989). For an analogous argument under different language, see *Chittenden*, 169 Vt. at 326, 738 A.2d at 551 (rejecting the argument that only state favoritism for religious schools is prohibited, noting that "[r]ather than prohibiting compelled support of a particular or state-selected place of worship, [the Vermont provision] prohibits compelled support of '*any* place of worship'") (emphasis in original).

[70]See, e.g., Fla. Const. art. I, § 3 (prohibiting taking money from the treasury "directly or indirectly in aid of . . . any sectarian institution"); see Kemerer, *supra* note 58, at 6 (listing other states).

holding that to approve the program because the money flowed through parents "would be the functional equivalent of redacting the word 'indirectly' from [the provision in the state] Constitution."[71]

On the other hand, some features of state provisions might indicate that they would not forbid the use of vouchers at religious schools. For example, when a provision says that aid may not be used to "support" or "benefit" religious schools, a court may conclude that vouchers instead support or benefit the child or the family. Several courts have upheld the use of state tuition grants at religious colleges under this reasoning.[72] And the Wisconsin Supreme Court essentially adopted this distinction in upholding the Milwaukee school choice program under the provision forbidding spending state money "for the benefit of . . . religious or theological seminaries."[73] If state courts become convinced that barring the use of vouchers at religious schools is unfair or even violates the First Amendment – as the next section argues is the case – then they may be inclined to interpret their no-aid provisions narrowly.[74] One of the leading school-choice advocates, the Institute for Justice, reports that about half of the state provisions – approximately 20 – have been read as more

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[71]Holmes v. Bush, No. CV 99-3370, *supra* note 56, at 4.

[72]See, e.g., Americans United for Separation of Church and State Fund v. State, 648 P.2d 1072 (Colo. 1982); Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972) (per curiam), app. dism., 413 U.S. 92 (1973); Kemerer, *supra* note 58, at 12-13.

[73]Wisc. Const. art I, § 18 (interpreted in Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602, cert. denied, 525 U.S. 997 (1998)). The court held that religiously affiliated elementary schools were "seminaries," but that the neutrality of the aid and its channeling through families meant that the benefit to religious schools was only "incidental" and "attenuated." 218 Wis. 2d at 878-79, 578 N.W.2d at 621.

[74]For example, in Kotterman v. Killian, 193 Ariz. 273, 972 P.2d 606 (1999), the Arizona Supreme Court held that its state provisions did not forbid the provision of a tax credit up to $500 for families paying tuition for their children at private, including religious, schools. The court said that "[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace'" (*id.* at 291, 972 P.2d at 624), and although it held that the Arizona provision was unconnected to the Blaine Amendment campaign, it clearly was uncomfortable with cutting off all state efforts to provide assistance to families using religious schools.

restrictive than the federal Establishment Clause (and therefore could possibly, though not necessarily, be read to invalidate the inclusion of religious schools in a choice program).[75]

If a state provision restricts the use of voucher-type aid, how far does the restriction go? The following is not comprehensive, but one can identify three broad categories.

1. Aid to religious schools. Many state restrictions bar aid in support of or to benefit "any sectarian school,"[76] or "any school . . . controlled by any church, sectarian or religious denomination,"[77] or any "religious or theological seminaries."[78] Whatever the exact phrasing, these provisions share the common feature of barring aid to the religiously affiliated school as a whole entity, not just to the religious teaching that occurs in it. Provisions of this sort typically were modeled on or inspired by the 1875 Blaine Amendment, which in various forms would have added to the Fourteenth Amendment a rule that no state money "shall ever be under the control of any religious sect" or be given to any "school . . . wherein the creeds of any particular religious or anti-religious sect, organization, or denomination shall be taught."[79]

2. Aid to religious instruction. Some state restrictions bar aid to support religious teaching: for example, the Washington state provision already discussed forbids appropriating or applying aid "to any religious worship, exercise, or instruction."[80] In theory, such language might allow a family

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[75]See Institute for Justice, *Signals from State Courts on School Choice: How the Courts are Interpreting State Constitutional Religion* Clauses, available at http://www.ij.org/cases/index.html. See also http://www.blaineamendments.org (website maintained by Becket Fund for Religious Liberty).

[76]See, e.g., S.D. Const. art. VI, § 3.

[77]See, e.g., Idaho Const. art. IX, § 5.; see generally Kemerer, *supra* note 58, at 6-9.

[78]Wisc. Const. art. I, § 18.

[79]Michael W. McConnell, John H. Garvey, and Thomas C. Berg, Religion and the Constitution 452-53 (2002) (quoting two versions of the Blaine Amendment); see *infra* part II-B-5.

[80]Wash. Const. art. I, § 11.

to use aid for the secular component(s) of a religious-school education, but bar such use for the religious component. The Vermont Supreme Court suggested this possibility when it struck down the provision of tuition, under a program similar to Maine's, to a rural student who would use it at a religious high school.[81] The state provision prohibited "compell[ing]" any person to "support any place of worship, . . . contrary to the dictates of conscience";[82] but the court read it not to bar "compelled support for a place of worship unless the compelled support is for the 'worship' itself."[83] Thus the court emphasized that the unrestricted tuition payments encompassed a school's religious teaching as well as its educational components, and it suggested that the state might be able to narrow the program to a permissible scope.[84]

3. Aid to private schools. Finally, some state provisions bar aid for any private schools, religious or secular – for example, by declaring that no state money may be used to aid any school "not publicly owned and under the exclusive control, order and supervision of public officers."[85] Such a restriction has the broadest scope. But that very breadth may make it the hardest to challenge under the federal Constitution, as we will see,[86] because it does not single out schools on the basis of their religious affiliation or teaching.

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[81]Chittenden Town School Dist. v. Dept. of Education, 169 Vt. 310, 738 A.2d 539 (1999).

[82]Vt. Const. ch. I, art. 3.

[83]*Chittenden*, 169 Vt. at 325, 738 A.2d at 550.

[84]*Id.*

[85]Mass. Const. art. XVIII; see Kemerer, *supra* note 58, at 15-16 (listing similar provisions).

[86]See *infra* part II-B-4.

B. Federal Challenges to State Bans

If a state provision does bar the use of vouchers at religious schools, there will be federal constitutional challenges to the exclusion. The basic principle underlying the challenges is that it is unjust for the state to deny educational benefits, to which a child or family would otherwise be entitled, on the basis that the family chooses to educate the child in a religious setting or integrate religious teaching into the schooling. As the Supreme Court said in *Brown v. Board of Education*,[87] the state's provision of educational benefits in the first place "recogni[zes] the importance of education to our democratic society" – the fact that no child "may reasonably be expected to succeed in life if he is denied the opportunity of an education."[88] The Court therefore emphasized that if a state provides such assistance, it must "ma[ke it] available to all on equal terms";[89] and while *Brown* obviously involved inequality based on race, its spirit suggests that differential treatment in the provision of educational benefits must be scrutinized with care. When the differential treatment is to deny educational benefits to families simply because the school they choose is religious, unrelated to the school's educational quality, principles of freedom of religion and expression become dominant. Parents have the constitutional right to send their children to religious schools as part of their right, recognized for decades, to "direc[t] the rearing off their offspring" and determine their "religious upbringing and education . . . in their early and formative years."[90] To deny benefits based on this choice may therefore violate the Constitution in several respects, which the following

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[87] 347 U.S. 483 (1954).

[88] *Id.* at 493.

[89] *Id.*

[90] Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (citing and following Pierce v. Society of Sisters, 268 U.S. 510 (1925).

sub-sections discuss in turn. It may violate the Free Exercise Clause's core principle that laws may not single out religious activity for a disability; it may impose an unconstitutional condition on the choice of religious education; and it may impermissibly discriminate against religious schools and their families on the basis of the viewpoint they bring to education, thereby violating the Free Speech Clause. [91] Finally, some of the state constitutional provisions may be constitutionally tainted because they rested historically on a discriminatory animus toward Roman Catholics; four justices recently have gone so far as to conclude that "hostility to aid to pervasively sectarian schools has a shameful pedigree" and is "born of bigotry."[92]

These arguments run up against the two countering themes. The first is state's rights: that a state should have discretion to exclude religious schools from vouchers, to preserve a strict separation of church and state, even if *Zelman* teaches that the Establishment Clause does not require it. We know, of course, that the current Court has a strong general commitment to federalism.[93]

The second countering theme is that the state should have discretion in how it spends money. A series of decisions uphold the government's ability to put various conditions on funding, on the ground that merely withholding affirmative aid does not impinge on constitutional liberties. Representative decisions in this vein include *Rust v. Sullivan*,[94] upholding the "gag rule" on abortion counseling and referral by entities receiving Title X federal family-planning funds, and *Regan v. Taxation with Representation*,[95] upholding the denial of tax-exempt status to organizations that

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[91]See *infra* parts II-B-1, II-B-2, and II-B-3.

[92]Mitchell v. Helms, 530 U.S. 793, 832 (2000) (plurality opinion of Thomas, J.); see *infra* part II-B-5..

[93]See, e.g., Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898 (1997).

[94]500 U.S. 173 (1991).

[95]461 U.S. 540 (1983).

engaging in political lobbying or campaigning.

Despite these countering themes, I believe that the case for invalidating many of the state provisions is quite powerful, for the reasons in the following subsections. In particular, the logic of *Zelman* points to this conclusion. Although the precise decision was that including religious schools in voucher programs is permissible, its reasoning suggests that such inclusion is mandatory when secular private schools are eligible.

1. Discrimination Against Private Persons' Religious Exercise

Perhaps the most straightforward argument against the state exclusions is that the Free Exercise Clause simply prohibits discrimination against private persons' religious conduct. Recently the Court has refashioned free exercise doctrine to emphasize the value of nondiscrimination against religion. Under *Employment Division v. Smith*,[96] free exercise now only rarely requires exemption of religious conduct from a generally applicable, religion-neutral law. But conversely, under both *Smith* and *Church of the Lukumi Babalu Aye v. City of Hialeah*,[97] laws that single out religious conduct for discriminatory regulation are subject to "the most rigorous of scrutiny" and are invalid except "in rare cases";[98] as *Smith* put it, the state may not ban acts "only when they are engaged in for religious reasons."[99] State provisions that explicitly bar aid to religious schools or religious instruction plainly single out religion, and are not generally applicable or religion-neutral.

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[96]494 U.S. 872, 879 (1990).

[97]508 U.S. 520 (1993).

[98]*Id.* at 546.

[99]494 U.S. at 877.

The key question is whether these principles flatly forbidding discrimination apply when religious conduct is singled out not for coercive regulation – as in *Lukumi*, which involved a criminal prohibition on ritual animal sacrifice – but for the denial of a benefit such as an educational voucher.[100] There are strong reasons to think that the Free Exercise Clause does flatly prohibit discrimination against private religious conduct in the distribution of government benefits. The Court invalidated denials of benefits in two free exercise decisions: *McDaniel v. Paty*,[101] which held that a state could not refuse to let clergy serve in the legislature, and *Sherbert v. Verner*.[102] which held that states could not deny unemployment compensation to persons who refused a job because it would require them to work on their Sabbath. *McDaniel* in particular has come to stand for the proposition that the state may not deny a benefit simply because the actor is religious; that was the theme of Justice Brennan's influential concurrence, which argued that the legislative disqualification "impose[d] a unique disability upon those who exhibit a defined intensity of involvement in protected religious activity."[103] *Lukumi* and *Smith* both treat *McDaniel* as invalidating a law that "'impose[s] special disabilities on the basis of . . . religious status'";[104] *Lukumi* also contains several phrasings indicating that the fact that a law disfavors or singles out

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[100]If the Free Exercise Clause does not simply forbid discrimination in all such instances – if sometimes the government may deny a benefit based on religion without thereby "prohibiting the free exercise" – then the question is whether the denial is of the sort that imposes an "unconstitutional condition" on religious exercise. The next sub-section takes up that more complicated question. See *infra* part II-B-2.

[101]435 U.S. 618 (1978).

[102]374 U.S. 398 (1963).

[103]435 U.S. at 632 (Brennan, J., concurring in the judgment).

[104]*Lukumi*, 508 U.S. at 533 (quoting *Smith*, 494 U.S. at 877; and citing *McDaniel*, 435 U.S. 618).

religion is sufficient to invalidate it.[105] All of these passages apply with equal force if the state denies educational benefits because the family chooses to use them at a religious school.

A flat rule against singling out religion for a disability makes sense in other ways. It fits with *Smith*'s refashioning of free exercise into a right against discrimination; indeed, it may be a *quid pro quo* for *Smith*'s destruction of most compelled free exercise accommodations. It fits with rules on the Establishment Clause side, which would suggest that special favoritism for religious schools in a voucher program would be unconstitutional. It fits with the free speech argument, to be discussed later,[106] that singling out religious-school choices for exclusion constitutes impermissible discrimination against religious viewpoints.

If the foregoing argument is valid, then the exclusion of religious schools from an otherwise available voucher benefit is presumptively unconstitutional, with no further analysis needed. However, the Court in decisions such as *Rust v. Sullivan* and *Regan v. TWR* has indicated that the government may sometimes withhold aid based even on activity that is constitutionally protected from direct regulation. Those decisions permit the government to discriminate against the activity in the sense of singling it out for the withholding of benefits. The same might be true of religious conduct under the Free Exercise Clause. Accordingly, it makes sense to turn to analysis under the "unconstitutional conditions" doctrine, which is the primary method by which the Court distinguishes permissible denials of benefits from impermissible ones.

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[105]See *id.* at 532 (invalidating the animal-sacrifice laws as attempt to disfavor [the Santeria] religion because of the religious ceremonies it commands"); *id.* (stating that the Free Exercise Clause bars a law that "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons").

[106]See *infra* part II-B-3.

2. Unconstitutional Conditions Analysis

Challengers argue that the exclusion of religious-school choices from a voucher program is an unconstitutional condition: the state conditions educational aid on the recipient family's willingness to forego its constitutional right to choose religious schooling for its children.

The unconstitutional conditions doctrine is a complicated area of the law,[107] but it is clear that unconstitutional conditions challenges today face some significant hurdles. The Court has held that a government condition does not impinge on a given right merely by withholding funding for the exercise of the right. For example, in both *Rust v. Sullivan* and *Regan v. TWR*, the Court held that prohibiting certain speech by the subsidized program or organization – abortion counseling by Title X family-planning projects, lobbying and electioneering by tax-exempt entities – did not infringe on free speech rights because the recipient could engage in that speech by creating a separate organization from the one receiving the federal funds.[108] Accordingly, the *Rust* condition did not "den[y recipients] the right to engage in abortion-related activities," it merely "refused to fund such activities out of the public fisc."[109]

Notwithstanding these decisions, however, there is a strong case that the denial of tuition vouchers to families who choose to use religious schools imposes an unconstitutional condition on religious exercise.

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[107]For discussion, see, e.g., Robert C. Post, *Subsidized Speech*, 106 Yale L. J. 151 (1996); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); Symposium, *Unconstitutional Conditions*, 26 San Diego L. Rev. (1989); Richard A. Epstein, *The Supreme Court, 1987 Term – Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984); William Van Alstyne, *the Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

[108]*Rust*, 500 U.S. at 196 (grantee "simply is required to conduct [abortion speech] through programs that are separate and independent from the project that receives Title X funds"); *Regan*, 461 U.S. at 545 (noting that separate § 501(c)(4) organization could still engage in lobbying and electioneering).

[109]*Rust*, 500 U.S. at 198.

a. Penalty on choice of religious education. The Court's unconstitutional conditions rulings make clear that while the government may withhold a subsidy from a constitutionally protected activity, it may not penalize that activity by imposing costs beyond the refusal to fund the activity. The leading example of this principle is *FCC v. League of Women Voters*,[110] which struck down the ban on federally funded broadcasters engaging in editorializing even with their own funds. The Court reasoned, among other things, that because a "station has no way of limiting the use of its federal funds to all noneditorializing activities, . . . it is barred from using even wholly private funds to finance its editorial activity."[111] In other words, by accepting the subsidy the broadcaster suffered the separate cost of losing the ability to editorialize even with its own funds. *Rust* later made clear that this distinction is crucial: as we have seen, it approved the restriction on abortion speech because Title X recipients could engage in such speech in a separate organization.[112]

The same principle helps explains other decisions finding an unconstitutional condition. The refusal of property tax exemptions for individuals who would not swear loyalty to the government went far beyond merely refusing to subsidize an individual's anti-government speech; *Speiser v. Randall*[113] struck down the condition as a penalty on free speech rights. And to fire a state university professor because of certain controversial statements goes far beyond merely refusing to subsidize

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[110]468 U.S. 364 (1984).

[111]*Id.* at 400.

[112]*Rust*, 500 U.S. at 197 (distinguishing the broadcast editorializing ban from the abortion gag rule on the ground that a broadcaster could not "'make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities'") (quoting *League of Women Voters*, 468 U.S. at 400).

[113]357 U.S. 513 (1958).

those statements; *Perry v. Sindermann*[114] held that terminating the benefit of state employment violated the First Amendment.

The outright denial of an education voucher to one who chooses to use it at a religious school is best seen as a penalty, not just a refusal to subsidize. The key lies in recognizing, as the Court long has done, that religiously affiliated schools provide not only religious instruction, but also education of secular value in the common subjects – math, English, social studies, science – that all accredited schools provide.[115] Standardized testing and other measures of educational success make it impossible to deny that religious schools offer such secular value.[116] Therefore, to deny an educational voucher altogether goes beyond merely refusing to fund religious teaching. As Professor (now Judge) Michael McConnell argued in an important analysis:

> [I]f a family chooses to integrate a religious element into primary or secondary schooling, not only must they bear the costs of the religious education, but they also forfeit all public subsidy for education, including secular subjects. [A state ban,] then, is structurally parallel to *League of Women Voters* and *Perry*. It extracts a penalty – and a large one – for the exercise of constitutional rights.[117]

The Ninth Circuit reached the same conclusion recently in *Davey v. Locke*,[118] holding that the Free Exercise Clause invalidated a Washington state program that offered scholarships to college students but excluded those majoring in theology. The court held the condition unconstitutional because it was "coercive" in a way that the condition in *Rust* was not:

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[114]408 U.S. 593 (1972).

[115]See, e.g., Board of Education v. Allen, 392 U.S. 236, 245, 247 (1968) (noting that "religious schools pursue two goals, religious instruction and secular education," and that private and religious schools "pla[y] a significant and valuable role in raising national levels of knowledge, competence, and experience").

[116]See, e.g., Bryk, *supra* note 39; Greeley, *supra* note 39.

[117]Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989, 1017 (1991).

[118]299 F.3d 748 (9th Cir. 2002).

> Grantees in the *Rust* line of cases could have their cake and eat it, too; that is, they could accept the grant and use it for the program's restricted purpose, yet remain free to tap non-government resources for non-favored activities which could then be conducted independently. Davey cannot. If he accepts the Scholarship, he may not pursue a degree in theology (whether or not he has non-government funds to do so). If he pursues a degree in theology, he gets no Scholarship.[119]

Restated slightly, *Davey* likewise rests on the premise that religiously informed education – even the theology degree in this case – provides more than just religious instruction.[120] Thus, even if the state wishes to avoid funding religious instruction, it cannot carry this to the point of withdrawing the scholarship altogether when the student chooses a theology major. As *Davey* noted, by its denial the state communicates the message that pursuing a college degree is a valuable activity "'unless the student pursues a degree in theology from a religious perspective'" – which necessarily "communicates disfavor" by the state and "discriminates in distributing the subsidy in such a way as to suppress a religious point of view."[121] All the more obviously, a decent elementary or secondary school education in English, math, and science provides secular educational value, even if it takes place in a thoroughly religious setting – and to withhold aid for that secular value because of the setting in which it is provided is to penalize a family's choice of education.

The imposition of a penalty also relates to the fact that the state is denying benefits to an individual (or family). Unlike the organizations in *Rust* and *Regan*, the individual cannot pursue the activity of religious education through a separate entity. The individual or family either receives the voucher or does not. Denying the benefit to the individual is a penalty, as was the denial of

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[119]*Id.* at 757.

[120]A theology student, like others, is gaining qualifications that will help him or her seek a job and become a productive member of society, which was the rationale on which the Washington scholarship program rested. See *id.* at 756 (noting that the program was based on "'the benefit to the state [from] assuring the development of [students'] talents'").

[121]*Id.* (quotes in original).

unemployment benefits in *Sherbert* and the denial of eligibility for the legislature in *McDaniel*.

The penalty on constitutional rights is clear when the state provision by its terms prohibits support for the religious school as an entity (the first category in the section above).[122] By denying aid for the school as a whole, such a provision by definition refuses aid attributable to the secular education that religious schools provide.

When the state provision bars aid on a narrower basis (the second category above),[123] the matter is a bit more complicated. Consider, for example, the Washington constitutional language that "no public money shall be appropriated or applied to any religious worship, exercise, or instruction."[124] In theory, this would permit a family to use state assistance for the secular teaching at a religious school, though not for the religious instruction. The Vermont Supreme Court, in striking down tuition aid for rural students, suggested that a program narrowed to supporting secular functions might be valid.[125] If a state may permissibly withhold funding from religious teaching itself, then such restrictions may satisfy the unconstitutional conditions approach of *Rust*, because the bar goes no further than the religious instruction and does not penalize the secular education. In fact, however, these facially narrower rules usually still lead to a total denial of tuition vouchers at religious schools. The Vermont court struck down the use of tuition aid at a religious high school altogether, and the Washington court applied the ban on funding religious instruction to bar any

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[122]See *supra* notes 66-69 and accompanying text.

[123]See *supra* notes 70-74 and accompanying text.

[124]Wash. Const. art. I, § 11.

[125]*Chittenden*, 169 Vt. at 352, 738 A.2d at 562-63 (invalidating the tuition aid only because "there are no restrictions that prevent the use of public money to fund religious education," and "express[ing] no opinion on how the [state] can or should address this deficiency should it attempt to craft a complying tuition-payment scheme").

funds for Larry Witters at the bible school.[126] Even the facially narrower provisions, then, may produce the same results as the broader ones – a ban on the use of vouchers at a religious school, period.

The theory behind outright bars, undoubtedly, is that tuition vouchers support all aspects of a religious school's operations; it is impossible to separate the secular components from the religious ones, and therefore in order to avoid assistance to the religious components, vouchers must be denied altogether. When the Supreme Court was still interpreting the Establishment Clause to require that government aid support only secular functions, it struck down even minimal tuition reimbursements because they lacked "an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes."[127] After *Zelman*, of course, the Establishment Clause no longer requires such separation for aid that individuals direct to a religious school by their own choice. But now the question concerns the state's discretion to refuse funding. If the state may legitimately refuse to provide aid attributable to religious teaching, then the question of whether and how religious teaching and secular teaching can be separated arises again, and that question requires some discussion.

b. Separating and measuring religious and secular components. The issue of separating subsidized from non-subsidized activities also arose under the *Rust*-*Regan* line of unconstitutional conditions cases. There the Court allowed the government to require that the non-funded speech – abortion counseling and political lobbying, respectively – be conducted in a distinct organization, mandating "a certain degree of separation . . . in order to ensure the integrity of the federally funded

[126]*Id.*; *Witters II*, 112 Wash. 2d at 369, 771 P.2d at 1121-22.

[127]Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973).

program."[128]

The analogous solution would be for a religious school set up a separate program teaching religion classes, held at a different time of day (perhaps after school) and kept financially independent from the rest of the school program (which alone could receive families' vouchers). But this will not do away with the penalty on religious choice, if the very act of separating the two programs contradicts the beliefs of the organization or the beneficiaries. As McConnell has pointed out,

> many of those who choose religious schools [as well as the school's sponsors themselves] believe that secular knowledge cannot be rigidly separated from the religious without gravely distorting the child's education. To separate the secular from the religious is to suggest that religion is irrelevant to the things of this world. . . . From this perspective, it is not sufficient to introduce religious education on the side.[129]

The solution of bifurcation still by its terms singles out those religions that cannot accept such "bracketing" of religious teaching, and penalizes them by denying them the entire state educational benefit. In the words of four justices, it puts a penalty on "those who take their religion seriously, who think that their religion should affect the whole of their lives."[130] We should not simply accept the state's asserted need for a complete separation of non-subsidized activity if that separation continues to penalize a constitutional right.

The burden here distinguishes the voucher case from *Rust*, where the Court rejected an analogous argument that bifurcation would distort the nature of the aid recipients' activities. The plaintiffs argued that requiring Title X doctors to forego abortion-related advice would corrupt the

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[128] *Rust*, 500 U.S. at 198.

[129] McConnell, *supra* note 107, at 1017-18.

[130] *Mitchell*, 530 U.S. at 827-28 (plurality opinion of Thomas, J.) (rejecting extra restrictions on aid to "pervasively sectarian schools").

medical family-planning advice they gave and would interfere with their professional relationship with their patients. But the Court answered that doctors could "bracket" the abortion advice because "nothing in [the regulations] requires a doctor to represent as his own any opinion that he does not in fact hold" and, since the Title X program did not purport to offer "comprehensive medical advice," the doctor "is always free to make clear that advice regarding abortion is simply beyond the scope of the program."[131] Whether or not this reasoning was correct on *Rust*'s facts, it plainly does not apply to the daily, year-by-year education of young children: that is a far more "comprehensive" activity, and therefore, for many religious schools and families, it is much more burdensome to separate or bracket the two elements of secular and religious education.

There are various ways to measure the secular and religious components, and allocate aid accordingly, without requiring the religious school to segregate its religious teaching into a corner of the school day. Recall, at the outset, that the size of vouchers in enacted programs is typically substantially less than the per-pupil cost for public schools: in Cleveland, for example, the $2,250 voucher was only a third to a half the per-pupil expenditure given to the various public school options (charter, magnet, and regular public schools and adjacent public districts).[132] As Jesse Choper suggested a number of years ago, the state's interest is in receiving the full secular educational value for its expenditure, and if the religious school has equal educational quality then it offers full value.[133] Under that reasoning, a religious-school voucher could equal the per-pupil funding for public schools and still be supporting the secular educational component of the religious school. In any event, unquestionably a voucher of one half of the public-school per-pupil

[131] *Rust*, 505 U.S. at 200.

[132] *Zelman*, 122 S. Ct. at 2469.

[133] Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 So. Cal. L. Rev. 260 (1968).

expenditure reflects no more than the secular value that the religious school provides, and therefore a school should not be excluded from such a program because it offers religious instruction. The religious component of a religious school's education can also be represented in a co-pay that the recipient family must pay on top of the grant they receive: in Cleveland, the co-pay was 10 percent of tuition, up to $250.[134]

A number of other measures of that value have been explored by Michael McConnell and Richard Posner, in an article applying the economics of joint-cost pricing to the problem of measuring the religious and secular costs of a religious education.[135] Some of these measures of the religious component would be complex for a legislature to calculate, and some would be difficult for a court to set as a principled constitutional line. But again, in the programs that have been enacted to date, the voucher size falls within any reasonable assessment of the religious school's secular educational contribution. By contrast, a ban on the use of vouchers at religious schools values the secular educational contribution of the school at zero – a judgment that is empirically unsupportable and, as the Ninth Circuit put it, "necessarily communicates disfavor, and discriminates . . . in such a way as to suppress a religious point of view."[136]

3. Viewpoint Discrimination Analysis

The third rubric for challenging the exclusion of religious schools from voucher programs is that of viewpoint discrimination, which is strongly presumed unconstitutional under the Free Speech Clause – in this case, discrimination against a family's choice of school on the ground that

[134]*Zelman*, 122 S. Ct. at 2464.

[135]Michael W. McConnell and Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 20-30 (1989).

[136]*Davey*, 299 F.3d at 756.

the school educates from a religious viewpoint. Surely a private school's education of its students is a form of speech and expression – by both the school itself and the parents who choose it.[137] Thus the only question is whether the denial of vouchers unconstitutionally discriminates against such educational speech based on religious viewpoint. The foundation for this challenge is *Rosenberger v. Rector of Univ. of Virginia*,[138] in which the Court held that the university engaged in viewpoint discrimination when it subsidized a wide range of student publications by paying their production bills, but refused such support to an evangelical Christian magazine on the ground that it was a "religious publication."

The Court's argument in *Rosenberger*, slightly paraphrased, explains why excluding religious schools from voucher programs discriminates against religious viewpoints on educating children. "Religion," the majority said, "may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of [educational] subjects may be discussed and considered. [Under state bans on aid, t]he prohibited perspective [of a religious school] result[s] in the refusal to make [voucher] payments."[139] Because viewpoint discrimination is the most suspect form of speech abridgement, *Rosenberger* held that the exclusion of religious publications from university assistance could only be justified if providing the assistance on equal terms to religious publications would violate the Establishment Clause. The Court held that the assistance would not be an establishment – for essentially the same reasons on which *Zelman* later

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[137]"Schools that are freely chosen are the proxies for parental ideas that seek entry into the public dialogue. . . . The school is a loudspeaker for those who freely support it with their presence and wish to cooperate in its message." Garnett and Garnett, *supra* note 53, at 360-61 (quoting Coons and Sugarman, *supra* note 53, at 17).

[138]515 U.S. 819 (1995).

[139]*Id.* at 831.

relied in upholding vouchers.

On the other side, *Rust v. Sullivan* again provides the asserted basis for upholding the denial of benefits. The Court there held that the Title X restrictions on abortion counseling and referrals did not impose a discriminatory burden on speech favorable to abortion. It argued that when the government "selectively fund[s] a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way, . . . the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[140] The Court added that "[w]e have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded."[141]

The exclusion of religious schools from an elementary and secondary voucher program falls substantially closer to the exclusion of religious publications in *Rosenberger*, and thus should be invalid, for a pair of reasons.

a. The nature of the program. The boundary between the two categories – impermissible viewpoint discrimination versus permissible funding of a favored activity – was further defined in *Rosenberger* and later decisions. *Rosenberger*, for example, said that

> [in *Rust*] the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. [W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

[140]*Rust*, 500 U.S. at 193.

[141]*Id.* at 194-95.

> It does not follow, however, . . . that viewpoint-based restrictions are proper when [as in *Rosenberger*] the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.[142]

Later decisions make roughly parallel distinctions between "the government's right . . . to use its own funds to advance a particular message"[143] and the restrictions on the government's discretion once it operates a "program designed to facilitate private speech."[144]

Where do elementary and secondary-school choice programs fit in this two-category framework? In assessing that question, I will take the framework as a given, even though it has come in for substantial criticism on the ground that the categories are not separable: the government is permitted to some extent to define the contours of a private-speech forum, but that definition itself can reflect a governmental policy decision.[145] Even if the two categories overlap, one can still judge which characterization of a particular program makes more sense: is government expressing its own particular policy preference, or is it facilitating speech by a range of private organizations?

School choice programs fall much closer, at least in many cases, to the wide-ranging funding program in *Rosenberger* than to the highly selective policy choice in *Rust*. Recall the logic of *Zelman* that the decision of how and where to use the neutral voucher assistance is made by the individual family and is not attributable to the state.[146] At a minimum, this means that the speech

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[142]*Rosenberger*, 515 U.S. at 834.

[143]Board of Regents v. Southworth, 529 U.S. 217, 229 (2000).

[144]Legal Services Corp. v. Velazquez, 531 U.S. 533, 542 (2001).

[145]See, e.g., Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1431, 1382 (2001) (finding the distinction "incoherent" because "[t]he government can speak . . . through its forum definition, as well as through expression of a point of view").

[146]See *supra* part I-B-1.

supported by a voucher program is not "a governmental message" or "a message [the government] favors." The religious education must be non-governmental speech, or else the Establishment Clause would forbid government to support it.[147]

A voucher program not only involves private speech and speakers, it typically "encourage[s] a diversity of views" from them in a way significantly like the *Rosenberger* program. Most voucher program have as their raison d'etre to open to parents a greater diversity of affordable school choices. Thus, they typically set relatively few restrictions on participating schools. In Cleveland, essentially any private school meeting the state's basic accreditation requirements was eligible as long as it did not discriminate based on race, ethnicity, or religion and did not teach "unlawful behavior or . . . hatred of any person or group" based on race, religion, or ethnicity.[148] The unsuccessful California voucher proposal of 1995 explicitly sought a wide diversity of schools: it provided that "[p]rivate schools [receiving vouchers] shall be accorded maximum flexibility to educate their students and shall be free from unnecessary, burdensome, or onerous regulation," and that regulation of private schools could not be increased without a 75 percent vote of the legislature.[149]

The open nature of a voucher program is clear to the extent that the program's stated goal is to enable parents to choose the ideological cast of their children's schooling. But even when the

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[147]For a similar argument, see Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 716 (1997) ("Private schools redeeming vouchers are not . . . receiving 'state money.' A necessary premise of the constitutional validity of such arrangements is that schools whose students bring government-provided financial assistance, made available on a religion-neutral basis, have not lost one iota of their private capacity.").

[148]Ohio Rev. Code § 3313.976.

[149]Proposition 174, subpart (b)(4) (proposed Amendment to Cal. Const. art. IX, § 17) (quoted in Cynthia Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 174*, 31 Cal. W. L. Rev. 193, 205 n.79 (1995)).

stated goal is primarily to improve educational quality, what matters is that the means chosen to that goal is diversity of schools (diversity, for example, as a means to increase quality through competition). As Robert Post has emphasized, even the wide-ranging forum for student publications in *Rosenberger* was adopted to further the university's purpose of "achievement of education":[150] presumably, to give students experience in expressing their view and hearing and responding to others.[151] Moreover, the state is barred from withholding aid from a private speaker based on viewpoint even when the funding program does not amount (as *Rosenberger*'s did) to a full-fledged public forum. That is the teaching of *Legal Services Corp. v. Velazquez*,[152] which held that denying otherwise-available legal services funding for arguments challenging federal welfare laws was unconstitutional viewpoint discrimination even though the funding did not create a public forum and was not designed solely "to 'encourage a diversity of views.'"[153] "[T]he salient point," *Velazquez* said, "is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message."[154]

One can certainly imagine voucher programs that fall much closer to government speech or policymaking than to the facilitation of private speech. If the state set up a program of closely-regulated voucher-participating schools, prescribing the details of their curriculum and other aspects of their operations, then the situation would resemble the selective policy choice that (as the Court

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[150]Robert Post, *Subsidized Speech*, 106 Yale L. J. 151, 165 (1996).

[151]See 515 U.S. at 824 (quoting University's judgment that supporting students "'relate[s] to the educational purpose of the University'" because "'the availability of a wide range of opportunities' for its students 'tends to enhance the University environment'").

[152]531 U.S. 533 (2001).

[153]*Id.* at 542.

[154]*Id.* at 542.

saw it) characterized the *Rust* program. It is a familiar idea in speech and religion doctrine that when the government oversees the content of a person's speech, the speech becomes the government's.[155] But voucher programs are typically not like that, and one that is cannot include religious schools in the first place.

To be sure, even the typical elementary and secondary-school voucher program is not identical to a wide-open speech forum such as that in *Rosenberger*. Even if the state does not regulate private school curricula in detail, it shows some concern with their content – more concern than there typically is with the content of extracurricular expression at a university, which the Court has called "a traditional sphere of free expression . . . fundamental to the functioning of our society."[156] But even if a voucher program falls short of a full-fledged speech forum, that does not give the state discretion to exclude religious schools from the program. The exclusion is invalid for an independent reason.

b. The nature of the exclusion. When religious schools are excluded from a choice program, what matters is not just the nature of the program but also the nature of the exclusion. As I have already noted, by now the Court has developed a strong rule refusing to accept the exclusion of religious speech from an opportunity open to comparable secular speech.[157] The most instructive of these decisions indicate that the singling out of religious viewpoints for exclusion is inappropriate because it bears no relation to the definition of the forum that the government has created. Thus,

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[155]See, e.g., Lee v. Weisman, 505 U.S. 577, 588 (1992) (rabbi's prayer at middle-school graduation was state-sponsored religion in violation of Establishment Clause where school principal provided rabbi with guidelines for prayer and thereby "directed and controlled [its] content").

[156]*Rust*, 500 U.S. at 200.

[157]See *supra* notes 127-30 and accompanying text (discussing *Widmar*; *Lamb's Chapel*; *Rosenberger*; *Pinette*; and *Good News Club*).

to decide this question one need not equate vouchers with the wide-ranging expressive forum in *Rosenberger*. Even in a "nonpublic" forum, restrictions on the speech of private individuals and groups must be "reasonable and viewpoint neutral."[158]

In both *Lamb's Chapel* and *Good News Club*, schools had opened their facilities for "social, civic, and recreational" meetings pursuant to New York state law, but previous court decisions had interpreted that law to exclude "religious purposes."[159] The school district in *Lamb's Chapel* denied permission for a church to use a classroom after hours to show a Christian film on "child-rearing and family values," objecting that the film "'appear[ed] to be church-related.'"[160] While hinting that the opening of classrooms to outside groups might have opened a public forum, the Court actually held that even if the forum was nonpublic,[161] the exclusion of the church was invalid. Because the film's focus on family issues fell within "social or civic purposes," the district had unconstitutionally "'denie[d] access to [the church] solely to suppress the point of view [it] espouse[d] on an otherwise includible subject.'"[162]

Likewise, in *Good News Club*, the school district interpreted access for "social, civic, and recreational" purposes to include "'any group that promote[d] the moral and character development of children'"[163] The Court held that this definition of the forum could not justify the exclusion of a club for elementary-school students that conducted Bible lessons, Christian songs, and prayer,

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[158]Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 800 (1985).

[159]*Lamb's Chapel*, 508 U.S. at 386-87.

[160]*Id.* at 393, 388-89.

[161]*Id.* at 391-92.

[162]*Id.* at 394 (quoting *Cornelius*, 473 U.S. at 806).

[163]*Good News Club*, 533 U.S. at 108.

since the club's activities taught morals and character. Again, although the district had discretion to define the subject matter that groups seeking access could discuss, it could not exclude a group within that subject matter on the basis of its viewpoint.[164]

These decisions are highly relevant to an educational voucher program. In them the Court recognizes, indeed presumes, that the exclusion of speech solely because of its religious viewpoint typically has no relevance to any legitimate goal of the program in question. This is so even if the program is judged under the relatively lenient standards applicable to "nonpublic" forums. Again, Robert Post makes the same point in his discussion of government-subsidized funding for speech. Post draws a distinction between publicly-funded "expressive domains," such as public parks, and "managerial domains" where "the state organizes its resources so as to achieve specified ends."[165] That distinction roughly parallels the distinction just discussed between the state promoting a particular educational policy (*Rust*) and throwing open its resources to permit wide-ranging speech (*Rosenberger*).[166] But Post argues that even if the publication-funding program in *Rosenberger* fell within the "managerial" domain because it promoted the university's goals, it still failed because of the difference between "restraints on speech that are instrumentally necessary to the attainment of legitimate managerial purposes, and those that are not. [*Rosenberger*] implicitly rest[s] upon the conclusion that the exclusion of speech promoting religious views is irrelevant to any legitimate

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[164]Although *Good News Club* accepted that the school district there had created a "limited public forum" (*id.* at 106), it applied the same test – reasonableness and viewpoint neutrality – that applies to nonpublic forums. *Id.* at 806 (quoting *Cornelius*, 473 U.S. at 806). Again, when the issue concerns the exclusion of a religious viewpoint concededly within the permitted subjects, it appears not to matter whether the government has created a public, or merely a nonpublic, forum.

[165]Post, *supra* note 146, at 164.

[166]See, e.g., *id.* at 169 (suggesting that the speech of Title X recipients in *Rust* fell not within "public discourse," but "instead within a managerial domain established by Title X" and its policy goals).

educational purposes served by the university's grant program."[167]

The same holds for the singling out of religious schools for exclusion from voucher participation; the exclusion is plainly irrelevant to any educational goal of the program. The education in a religious school can be perfectly good (or bad) without regard to whether it includes a religious component; there certainly is no evidence that as a class religious schools perform worse educationally than the alternatives.[168] Thus even if one sees a voucher program as fundamentally an educational policy choice by the state – as closer in nature to *Rust* than to *Rosenberger* – nevertheless the fact that the exclusion is based on the educationally irrelevant factor of religion should invalidate it, or at least substantially undercut it and call for a compelling justification by the state.

The Court's decisions on the exclusion of religious meetings allow the state to set the terms of access for various groups, but they forbid the state to engage in mere circularity by defining religious speech as inherently outside the forum's subject matter. The same should be true for vouchers. The state can set various conditions for eligibility – even conditions that serve other goals besides educational performance in the narrow sense – but once it makes vouchers available to private schools, it may not define schools out of the category simply because they are religious.

The student-meeting decisions are relevant to school choice programs even though they involved access to state facilities rather than to monetary benefits. The Court in *Velazquez* made clear that general public forum principles still "provide some instruction" in monetary cases as

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[167] *Id.* at 167.

[168] See *supra* notes 105-06 and accompanying text.

well.[169]

This second argument – that excluding religious schools from a choice program is particularly suspect – is narrower than the argument just preceding it – that voucher programs by nature aim at diverse expression and therefore are closer to the *Rosenberger* funding than to the *Rust* funding. Either argument points to the conclusion that excluding religious schools as such from a voucher program is viewpoint discriminatory (and thus strongly presumed unconstitutional). But the broader argument will also support challenges to other conditions on voucher participation besides the religious exclusion – conditions on matters such as what subjects the school teaches, whether it may discriminate in hiring teachers or admitting students, and so forth. Because these other conditions may relate to various educational and other policy goals, they are not subject to the narrower argument that religious exclusions are irrelevant and arbitrary. I will turn to those other conditions in Part III.

In any event, the combination of arguments – that vouchers have at least elements of an open forum, and that excluding religious schools is irrelevant to educational purposes and is viewpoint

[169] *Velazquez*, 531 U.S. at 543 ("As this suit involves a subsidy, limited forum cases such as [among others] *Lamb's Chapel*[ ] and *Rosenberger* may not be controlling in a strict sense, yet they do provide some instruction.").

The singling out of religious viewpoints differs from the conditions approved in another controversial context, federal funding for the arts. In National Endowment for the Arts v. Finley, 524 U.S. 569 (1998), the Court upheld the statutory requirement that the NEA, in evaluating an application for funding, consider "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1). The Court said that the fundamental criterion for NEA funding – a project's "artistic excellence and artistic merit" (*id.*) – was already "content-based" and did not "indiscriminately 'encourage a diversity of views of private speakers.'" *Finley*, 524 U.S. at 586 (quoting and distinguishing *Rosenberger*, 515 U.S. at 834). Thus far, arts funding shares some features with typical voucher programs: while not promoting a single government message, it judges recipients by a substantive, instrumental standard of artistic quality ("excellence") that has obvious parallels to the criteria for educational quality typically found in voucher programs. But *Finley* also emphasized that the "decency and respect" conditions "by their nature" did not engender discrimination "directed" against particular viewpoints, since different people would put different interpretations on the concepts, *id.* at 583 – and it suggested that a particular grant denial could be challenged if it was "shown to be the product of invidious viewpoint discrimination." *Id.* at 587. Whether this is actually a convincing defense of the NEA condition, the situation is clearly different with a condition excluding religious schools, which plainly amounts to "directed viewpoint discrimination." The NEA could hardly have a rule refusing to fund any project, however artistic, that reflects a religious viewpoint or sensibility.

discriminatory – make a strong case for subjecting the state exclusions to strict scrutiny. And again, the exclusion fails strict scrutiny because the Establishment Clause does not necessitate it and the stricter state view of separation does not qualify as compelling.

4. The Ultimate Value is Religious Choice, Not Formal Equality

The constitutional case against excluding religious schools from voucher programs appeals to Supreme Court precedents, such as *Lukumi* and *Rosenberger*, that emphasize nondiscriminatory treatment of religion. But an exclusive emphasis on nondiscrimination may give a misleading impression. In my view, the equal participation of religious entities in benefits programs does not rest ultimately on the maxim of formally equal treatment, that religious entities must be treated formally the same as other entities in all situations. Rather, equal treatment with respect to benefits ultimately serves a deeper constitutional value: preserving the choice of private individuals and groups in religious matters, minimizing the effect that government action has on those choices.[170]

If religious elementary and schools are ineligible to cash vouchers, then parents who would choose such schools are deterred from doing so because of the greater financial attractiveness of the state-supported secular schools, public or private (which the parents are forced to pay taxes to support). The deterrent is particularly severe for low-income families who cannot easily pay the tuition charged by a school unsubsidized by the state. Excluding religious options from voucher programs greatly distorts families' choices, and including religious schools on the same terms as others prima facie eliminates that distortion. This is "substantive" neutrality, in Douglas Laycock's words: the government seeks to minimize the incentives that its actions give to private persons

[170] I present the arguments in this section at greater length in Thomas C. Berg, *Why a State Exclusion of Religious School from School Choice Programs Is Unconstitutional*, 1 N. Car. J. First Am. L. ___ (forthcoming 2003).

either to practice or not practice religion.[171]

The Supreme Court approved vouchers under the Establishment Clause based on a theory of parental choice or substantive neutrality, not a theory of formal equality or mere sameness of treatment. *Zelman* held that the Cleveland scholarships were "a program of true private choice,"under which tax-generated money reaches religious schools "only as a result of the genuine and independent choices of private individuals."[172] Of the three factors that led to this conclusion, only one of them was the program's formal equality of terms – that it was "neutral in all respects toward religion"[173] – and even that factor mattered, the Court made clear, because it meant there was "no 'financial incentive[s]' that 'skew[ed]' the program toward religious schools."[174]

The other two factors directly point toward the value of individual choice. One was that the aid went not "directly to religious schools," but directly to parents and families "who in turn, direct the aid to religious schools . . . of their own choosing."[175] The Court signaled that it would continue to place special limits on government directly appropriating money for religious schools[176] – a distinction largely defensible in terms of individual choice, because with many direct appropriations the allocation is made by government officials rather than by the various families' choices of what school to attend.

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[171]Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-06 (1990).

[172]*Zelman*, 536 U.S. at 649, 122 S. Ct. at 2465.

[173]536 U.S. at 653, 122 S. Ct. at 2467.

[174]536 U.S. at 653, 122 S. Ct. at 2468 (quotations and first bracket in original; second bracket added).

[175]536 U.S. at 649, 122 S. Ct. at 2465.

[176]*Id.*

Finally and most importantly, *Zelman* required that there be "genuine opportunities for Cleveland parents to select secular educational options" as alternatives to religious schools.[177] The premise appears to be that if there were no real secular options, then parents' choice of religious schools was not "genuine and independent." This factor therefore represents an important step toward grounding the jurisprudence of aid to religious institutions firmly in the notion of individual choice concerning religious matters. In a discussion that, significantly, took up the longest part of the opinion, the majority held that Cleveland did offer genuine secular options. These included secular private schools and a variety of public options including charter ("community") schools, magnet schools, and supplemental tutoring in the regular public schools.[178]

So *Zelman* emphasizes religious choice; excluding religious schools from voucher programs distorts families' choices; and including religious schools on equal terms is the course most consistent with choice. In Laycock's terms, the equal inclusion of religious schools is the most substantively neutral course: it minimizes the incentives that the government creates either for or against religious practice. Nondiscrimination is the immediate principle, but it serves the ultimate value of religious choice.[179]

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[177] 536 U.S. at 655, 122 S. Ct. at 2469.

[178] 536 U.S. at 660, 122 S. Ct. at 2469-71.

[179] Religious choice as the foundational value is more consistent than formal equality with the overall logic of the First Amendment's Religion Clauses. Making formal equality the foundational value -- treatingreligion precisely the same as other ideals or perspectives in all circumstances -- is in tension with the existenc of the Religion Clauses themselves, which single out religion for unique constitutional treatment among other human activities. This distinctive constitutional treatment of religion is evident in cases involving religious expression by government in public institutions such as public schools, government buildings, and so forth. In that context, Establishment Clause case law treats religion is differently from virtually all other ideas and perspectives. Government may not speak religiously, teach that religion or any particular faith is true, or sponsor religious expression; but it may do all those things with respect to secular ideas and perspectives. That is the lesson of the decisions forbidding official school prayers, Bible readings, moral instruction in the Ten Commandments, and promotion of creationism. Engel v. Vitale, 370 U.S. 421 (1962) (prayers); Lee v. Weisman, 505 U.S. 577 (1992) (same); Abington School Dist. v. Schempp, 364 U.S. 203 (1963); Stone v. Graham, 449 U.S. 39 (1980); Edwards v. Aguillard, 482 U.S. 578 (1987) (creationism). The rule against government inculcation of religion within public schools and in other public institutions cannot be explained by a rule of formal equality. It is far

5. The Doubtful State Interests in Excluding Religious Schools

So far, I have argued that a rule barring the use of vouchers at religious schools should trigger strict constitutional scrutiny – whether because it discriminates against religious conduct, discriminates against expression from a religious viewpoint, or imposes an unconstitutional condition on religious activity. Each of these conclusions creates a strong presumption (if not a per se rule) that the exclusion of religious-school choices is unconstitutional. This next section turns to the other side of the constitutional ledger: the state's rationales for excluding religious schools from participation.

If the exclusion of religious schools is subject to strict scrutiny, a state would clearly lack sufficient reasons to justify the exclusion. A now lengthy list of decisions, from *Widmar v. Vincent*[180] through *Good News Club v. Milford Central School*,[181] makes clear that the exclusion of religious activity from a neutral, generally available program of benefits cannot satisfy strict scrutiny.[182] Each of these decisions treated the demands of the Establishment Clause as the only interest that would satisfy strict scrutiny; and under *Zelman*, of course, the Establishment Clause does not demand that religious schools be excluded from a "true private choice" voucher program. *Widmar* explicitly held that the interest "in achieving greater separation of church and State" under the Missouri Constitution was not "sufficiently 'compelling' to justify content-based discrimination"

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more easily explained under the principle of religious choice: it leaves religious persuasion to the choice and activity of individuals and minimizes government's influence over those choices.

[180]454 U.S. 263 (1981).

[181]533 U.S. 98 (2001).

[182]See *Widmar*, 454 U.S. at 275-76; Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384, 394-96 (1993); *Rosenberger*, 515 U.S. at 837-44; Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 778-82 (1995) (O'Connor, J., concurring); *Good News Club*, 533 U.S. at 112-19.

against religious speech.[183]

As a matter of caution, however, this section addresses the state's interests in more detail. While I believe that the arguments for strict scrutiny of a religious-school exclusion are quite strong, the Court has not decided the precise issue; to the extent that something less than strict scrutiny applies, the strength of the state's interests may be relevant. But the asserted reasons for singling out religious schools have serious weaknesses and cannot justify the exclusion if the courts apply any kind of heightened scrutiny. The reasons for excluding religious schools are insufficient to justify the significant penalty that the exclusion imposes on religious educational choices.

a. Avoiding tax-supported aid to religious teaching. The primary interest that states will assert in excluding religious schools from choice programs is to avoid compelling taxpayers to provide assistance to religious teaching. This argument dates back at least to Thomas Jefferson's dictum that "to compel a man to furnish contributions of money for the propagation of of opinions in which he disbelieves and abhors, is sinful and tyrannical."[184] But as a ground for refusing vouchers to parents who choose religious schools, the no-aid argument is extremely weak.

First, the no-aid argument conflicts with *Zelman*'s conclusion that under a true private choice program, the government aids the individual family, and it is the family's choice that sends money to a religious school, much like "the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution."[185] The government, in other words, compels taxpayers to support families, not the religious teaching that may constitute part of the

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[183] *Widmar*, 454 U.S. at 276.

[184] A Bill for Establishing Religious Freedom (1786), reprinted in McConnell, Garvey, and Berg, *supra* note __, at 69, 70.

[185] *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring) (following *Witters I*, 474 U.S. at 486-87).

education a family chooses. Perhaps this characterization of the process as "private choice" for non-establishment purposes is not formally binding on the states for free exercise and free speech purposes; perhaps they should have some room to adopt a broader definition of what constitutes "compelled aid" to religion. But surely *Zelman*'s characterization is constitutionally relevant, and it indicates that the broader concept of compelled aid is indeed an attenuated one.

That attenuated definition is inappropriate for choice programs in today's circumstances. The tax-supported aid that Jefferson opposed in the late 1700s – religious assessments for the support of clergy – went specifically and uniquely to religious teaching and worship. By contrast, vouchers are provided to support education, an activity that the government already supports through public-school subsidies; in that context, the inclusion of religious schools in a choice program is best seen as aid to the child's education rather than to religious teaching. Indeed, if the state excludes religious schools from a voucher program, it then favors the secular competitors to religious schools: public schools and secular private schools. Those secular schools, recall from part I, do not constitute a neutral baseline for education; rather they should be seen as one educational option among others.[186] And yet under a religious-school exclusion, religious citizens who are opposed to the separation of religion from education are forced to pay taxes for secular schools while being denied assistance for their own conscientious educational choice. This is an imposition on their conscience as great as any imposition on the taxpayer opposed to religious schools – greater, perhaps, because the imposition comes through explicit discrimination against religious-school choices.[187]

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[186]See *supra* part I-B, notes __-__ and accompanying text.

[187]I agree with Professor Laura Underkuffler that "religion or freedom of conscience is a uniquely powerful force in human life and law" that "religion ha[s] unique power," and therefore that "compelled taxpayer funding" in this context is a matter of special constitutional concern. Laura S. Underkuffler, *The Price of Vouchers for Religious*

Finally, at the very least, the concern that taxpayers not be forced to fund religious teaching fails to justify the total denial of educational vouchers to families choosing religious schools. As has already been discussed, the total denial disregards the secular educational value that religious schools unquestionably provide. At best, the "no compelled funding of religion" supports incremental co-pays, or reductions in the voucher amount, that account for religious teaching while still supporting families for the secular education that they obtain in a religious school.[188]

b. Divisiveness. The other common themes in the anti-voucher arguments have similar serious flaws. Consider, for the example, warnings about the "divisiveness" that will follow if a state-funded voucher program includes controversial religious schools "that preach religious hatred, racial bigotry, the oppression of women, and other views."[189] In fact, some such schools might be excluded from the program based on constitutionally valid conditions on participation – for example, a condition that participating schools not discriminate on the basis of race in employment or

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Freedom, 78 U. Det. Mercy L. Rev. 463, 477 (2001). But where she is concerned only with "funding of religious activities and religious institutions" (*id.*), in my view the concern extends to compelling religious citizens to support an educational system that on its face discriminates against religious education.

[188]See *supra* part II-B-2, notes __-__ and accompanying text.

[189]Underkuffler, *supra* note 177, at 476; see also Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 Ind. L. J. 167, 188-89 (2000). Similar prophecies resound in all three of the *Zelman* dissents. See 122 S. Ct. at 2485 (Stevens, J., dissenting) (warning of "the impact of religious strife" and citing "the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another"); *id.* at 2501 (Souter, J., dissenting) ("As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord."); *id.* at 2502 ff. (Breyer, J., dissenting) (emphasizing at length "the risk that voucher programs pose in terms of religiously based social conflict").

Note that one sort of discord mentioned in these warnings is virtually ruled out by the structure of a true private choice program: the direct "competition" among religious schools and groups for "appropriations for religious subsidy." A choice program locates the primary decisionmaking authority in individual families rather than the government, and schools compete to attract families' choice rather than to attract allocations of money from legislators and administrators. It is true that a choice program may provoke controversy may arise in other ways – for example, what the conditions will be on participating schools – but this seems less pervasive and ongoing than the "continuing annual appropriations" and allocations that so concerned the Court in early decisions such as Lemon v. Kurtzman, 403 U.S. 602, 623 (1971).

admissions.[190] Moreover, the extreme cases are likely just that – extreme cases – while in contrast, large numbers of religious schools (especially the largest category, Catholic schools) promote ideals of an educated, virtuous citizenry as well as or better than public schools do.[191] But assume that some controversial, "intolerant" schools will be eligible to accept voucher students and that this will anger some taxpayers and therefore foment some divisiveness. The mistake comes in looking only at this side of the ledger, and overlooking the many ways in which allowing religious schools in a choice program will reduce discord that the current system spawns.

Currently, considerable political and social strife stems from the denial of educational choice: from denying families important educational benefits because of the ideology of the schooling they choose. As Rick Duncan notes, "[t]he public schools have become one of the primary battlegrounds in the culture war," because "[p]arents who take religion seriously are not fools."[192] Such parents understand quite well that the exclusion of religion from a school curriculum is not, in practice, simply neutral toward their religious faith, but rather conflicts with their belief that faith pervades all of life. Moreover, while Justice Breyer points out that conflicts over voucher programs and their conditions and restrictions may weigh disproportionately on a few religious groups,[193] so the secular nature of public schools weighs disproportionately on some religious groups, those who conscientiously believe in the necessary integration of religion and education.

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[190]For further discussion of such conditions, see *infra* part III-__.

[191]For summaries of the evidence, see, e.g., Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 Cardozo L. Rev. 1281, 1299-1301 (2002) (quoting and citing studies).

[192]Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 B.Y.U. L. Rev. 569, 580.

[193]*Zelman*, 122 S. Ct. at 2505-06 (Breyer, J., dissenting).

If these families are pushed into public schools by the state's refusal to support the religious alternative, it is only natural that they will fight for the inclusion of religious content in the public schools. The disputes over religion in the public schools – prayers at graduation and other school events, creationism in the classroom – are highly divisive and emotional, and some of the campaigns for religious content threaten a much greater and more direct imposition of religion on dissenters than do school choice programs.[194] And of course, the discord would multiply if the state enacts a choice program encompassing private schools but then excludes those that are religious. But if choice programs are enacted including religious schools, some of the people now agitating for their religious views to be taught in the public schools will be more than happy to take their children, and their religious energy, elsewhere and leave the public schools in peace.[195]

Taking account of the discord from excluding religious schools is necessary as a moral and logical matter – and also as a constitutional matter. In his important concurrence in *McDaniel v. Paty*, Justice Brennan – no supporter of government-sponsored religion – concluded that a state could not exclude members of the clergy from sitting in the legislature, when numerous other occupations that might cause controversy remained eligible. Under the First Amendment, he reasoned, government may not "treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."[196] The principle applies here. A state may not use knee-jerk conclusions about the

[194] For chronicles of such disputes, see Stephen Bates, Battleground: One Mother's Crusade, the Religious Right, and the Struggle for Control of Our Classrooms (1993).

[195] Of course, the extent to which choice programs actually facilitate the movement of religious parents out of public schools depends on how broad the programs are – in particular, whether they extend beyond the limited urban-district pilot programs enacted to date.

[196] *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment).

unique divisiveness of religious schools as grounds for subjecting them to the unique disability of exclusion from a choice plan – ignoring that the policy of exclusion is likewise divisive. As Douglas Laycock has put it in another context, one must not "disaggregate" the concept of divisiveness by considering only those sorts of divisiveness that vouchers might increase.[197] When both sides of the ledger are considered, it is hardly obvious that vouchers will produce a net increase in social strife. For reasons similar (if not precisely identical) to this, the Supreme Court has discarded its one-time doctrine that aid to religious schools could be invalidated because it caused "political divisiveness."[198] When controversy and division are possible either way, the proper course is to treat religious educational choices the same as other educational choices.

c. Voucher conditions and religious autonomy. Finally, a common theme in the anti-voucher arguments – and in strict church-state separationism over the decades – is that with government aid comes regulation that will interfere with the autonomy of religious organizations and thereby weaken religion as an independent cultural force. The theme appears in the anti-aid decisions of the Supreme Court,[199] in one of the *Zelman* dissents,[200] and in the recent critiques of

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[197]See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

[198]Cf. Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971) (announcing the doctrine, referring to "the divisive political potential" of school aid programs); with Bowen v. Kendrick, 487 U.S. 589, 617 n.14 (1988) (rejecting the doctrine, for all but cases of "direct financial subsidies" to religious schools); Mueller v. Allen, 463 U.S. 388, 404 n.11 (1983) (same). The reasons the Court given for rejecting the doctrine include the fact that on many political issues opinions divide along religious lines, *Kendrick*, 487 U.S. at 617, and the concern that the mere divisiveness caused by the filing of a lawsuit might be used to invalidate the practice that the suit challenges, Lynch v. Donnelly, 465 U.S. 668, 684-85 (1984). While not identical to the argument in my text, these concerns seem to parallel it: the general point is that on a controversial subject, by definition any course pursued is going to cause political division.

[199]See, e.g., Aguilar v. Felton, 473 U.S. 402, 414 (1985) (quoting *Lemon*, 403 U.S. at 620)) (state inspections accompanying provision of aid "surely rais[e] more than an imagined specter of governmental 'secularization of a creed'").

[200]See 122 S. Ct. at 2499-2500 (Souter, J., dissenting).

vouchers by commentators;[201] and of course it has a long history in American thought, going back at least to James Madison's warnings that tax assessments for religious teachers would undermine "purity and efficacy of religion."[202] This is indeed a real concern, and in my view those considering and designing voucher programs would do well to consider the effects of regulation on religious and other private schools. But to rely on this argument to exclude religious schools altogether has several weaknesses.

First, there is a serious question why standing to assert a religious school's autonomy should rest in anyone other than the religious school itself – in the plaintiff who challenges the aid, or in the state (who withholds it), neither of whom has any reason to be seeking the school's best interests. As Professor Laycock has pithily put it: "An atheist plaintiff asserting a church's right to be left alone at the cost of losing government aid is the best possible illustration of why there are rules on standing."[203] This objection applies just as forcefully when the anti-aid plaintiff invokes a state constitutional provision instead of the Establishment Clause.

And yet, a critic might respond, there are surely sensible reasons for the state to act paternalistically, to forbid a religious organization from accepting aid that will damage its vigor and autonomy even if the organization wants the aid. But it is not at all clear that participation in choice

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[201]See, e.g., Melissa Rogers, *Traditions of Church-State Separation: Some Ways They Have Protected Religion and Advanced Religious Freedom and How They Are Threatened Today*, 18 J. & Pol. 277 (2003); Derek H. Davis, Mitchell v. Helms *and the Modern Cultural Assault on the Separation of Church and State*, 43 B.C. L. Rev. 1035 (2002); cf. Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 Cornell L. Rev. 783, 793-800 (2002) (concluding "with some misgiving that although the possible corrupting effects on religion of a voucher system are serious, they are not so clear or pronounced that Madison's warnings about the dangers of dependency should be considered telling against the arrangement").

[202]James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 7, reprinted in McConnell, Garvey, and Berg, *supra* note __, at 63, 65.

[203]Douglas Laycock, *The Right to Church Autonomy as Part of the Free Exercise of Religion*, in 2 Government Intervention in Religious Affairs 28, 38 (1986). See also Steffen N. Johnson, *A Civil Libertarian Case for the Constitutionality of School Choice*, 10 Ge. Mason Civ. Rts. L. J. 1, 38-41 (1999-2000).

programs would a net decrease in religious schools' autonomy. Again, one must consider the question in the aggregate: not only what loss of vigor and autonomy a voucher program might produce, but also what threats to vigor and autonomy it tends to eliminate or reduce. Religious schools, and thus the families who wish to use them, face such threats today from the very existence of subsidized public schools that (to reiterate) are their competitors – that offer a very different vision of education in which explicit religious teaching is absent (and thus, by implication at least, not crucial to sound education). As Vincent Blasi puts it, "Dependency on public resources is a dangerous condition for religion, to be sure, but so is the condition of competing in the educational marketplace with the well-financed institutions – and some would say the religiously subversive orthodoxies – of the modern welfare state. Even in the absence of vouchers, sectarian schools that are supported wholly out of tuition payments and voluntary contributions have financial incentives to recast their offerings to recruit students"[204] – or, one might add, to attract donors – perhaps in ways that compromise the religious message in order to achieve greater popularity and overcome the disincentive to religious schools in current funding schemes. The push for state assistance to religious schools or families choosing them has, ever since the 1850s, been based in the reality that such schools will often find it difficult to survive in the face of state subsidies that attract their congregants toward the free state schools.[205]

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[204]Blasi, *supra* note __, at 798.

[205]See Lloyd Jorgensen, The State and the Non-Public School, 1825-1925, at 100 (1987) (quoting Illinois public school superintendent's report in 1857 that creation of free public schools, together with ban on aid to private schools, had in only two years "nearly swept the entire field of the thousands of Private Schools which then existed"); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loyola U. Chi. L. Rev. 121, 157-58 (2001) (describing how Catholic school closings helped motivate campaigns for equal participation in state aid in the early 1970s).

Whether to participate in a choice program therefore presents a difficult question for many religious schools and families: as voucher opponent Alan Brownstein recognizes, parents are "trying to educate their children according to their religious faith, but [are] worrying about how they can continue to pay their children's tuition bills," and religious school administrators are "thinking about the programs and resources that government support could provide" at the same time as they are "worrying about the controls that inevitably accompany state funding."[206] And these effects from government assistance are far more complex today than in Madison's tussle with assessments – for the assessments clearly constituted favoritism for clergy and religious instructors, while today assistance to religiously grounded education would largely equalize the state's stance concerning educational aid. It is in the context of this more complicated situation – with effects on schools either way – that I see insufficient grounds for the state to overcome the religious school's own judgment whether participation in a choice program will help or harm its mission.[207]

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[206] Brownstein, *supra* note __, at 877.

[207] [TO BE REWRITTEN] A more indirect potential threat to religious autonomy and freedom is that equal participation by religious institutions in aid programs will reinforce the notion that religious activity has no special status under the Constitution – and therefore the notion that accommodation of individuals' religious exercise in the face of generally applicable legal burdens is not required and may even be forbidden (see, e.g., *Smith*, 494 U.S. 872 (equal treatment principle means that religious accommodations are seldom if ever required); Texas Monthly v. Bullock, 489 U.S. 1 (1989) (striking down statutory provision exempting religious publications from sales taxes)). This concern requires more discussion than I can give it here; for a fuller analysis, see Thomas C. Berg, *Why Excluding Religious Schools from Voucher Programs Is Unconstitutional*, 1 N.C. J. First Am. L. ___ (forthcoming 2003). But the equal participation of religious schools in voucher programs is consistent with the special accommodation of religious exercise in the face of some generally applicable regulatory burdens. For now, I make only one point to support that claim. To consider only cases concerning government aid and free exercise accommodations is to overlook a third major category of cases concerning government and religion: the permissibility of religious statements and activities by government in public institutions, most notably the public schools. In that category of cases, it is clear that the government may adopt or promote secular ideals and perspectives, but it may not adopt or promote religious perspectives. A public school, for example, may constitutionally teach that capitalism is true, or pacifism, or a number of other controversial secular positions – but not that theism is true, or any particular form of theism. This is a highly contentious constitutional limitation, and many people believe (with some reason) that the absence of religious statements in such a crucial area of government activity as public schools leaves the impression that religion is an unimportant part of life. Given this "disfavoring" of religion in the area of activity, it is perfectly consistent to maintain special concern for the ability of private individuals and groups to pursue their religious beliefs and practices. As the Court put it in its controversial decision striking down graduation prayer and reaffirming the ban on government-sponsored religious speech in schools: "In religious debate or expression the government is not a prime participant"; "preservation and transmission of religious

d. Summary. The asserted rationales for excluding religious schools from voucher programs all have serious weaknesses – primarily because they overlook that the problems they seek to avoid are already present in a system in which secular (or public) school choices are eligible for assistance while religious-school choices are not. The rationales for excluding religious schools are not wholly irrational. But they are wholly insufficient to justify the substantial penalty on families' choice of a religious education. A state enacting a choice program should treat religious schools as providing full secular value, and make them eligible to receive vouchers on the same terms as other schools up to their full per-pupil costs – or at least it should set no more than a marginal reduction in the voucher, or marginal co-pay, attributable to the religious component of education.

6. Less Discriminatory Means of Achieving Strict Separation

If the preceding sections are correct, then the exclusion of the religious schools from voucher programs should demand a compelling justification, or at least a very strong one, and the justifications commonly offered are not strong. That alone would suffice to strike down the religious-school exclusions. But again, out of an abundance of caution, let me add one more argument. Suppose that a court is committed to state's rights and to government's discretion in spending its money, and the court therefore believes that the state ought to be able to pursue the strict, no-aid separationist policies discussed in the previous section, notwithstanding the weaknesses

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belief and worship is a responsibility and choice committed to the private sphere, which itself is promised freedom to pursue that mission." Lee v. Weisman, 505 U.S. 577, 591, 589 (1992). The tradeoff, the balance, is that while the government may not promote religion, the freedom of religious individuals and groups to pursue their faith is a matter of special constitutional concern. Put crudely, then, the provision of government benefits to private religiously affiliated institutions is a third area in which equality is the best course. In more sophisticated terms, where government seeks to promote a secular service such as education, and does so by funding the counterparts to religious entities, giving equal benefits to religious entities providing the service is the course most consistent with the private sphere's "freedom to pursue [the religious] mission." Again, if government withholds benefits for religious choices while aiding the secular alternatives, it is distorting the incentives and impeding that freedom in the private sphere.

in those policies.[208] Even then, however, it is not necessary to flout constitutional principles by singling out religious -school choices for exclusion. Even assuming that the strict separationist policies are worth pursuing, the state may well have a less discriminatory means of achieving them. It could decline to create a private-school voucher program in the first place: no vouchers for secular private schools either. (In other words, the only kind of educational "choice" involved in the system would be a choice between various public schools.[209]) This broader exclusion would achieve the strict separationist goals, and since such a small percentage of private schools are secular,[210] excluding them will do relatively little to harm the state's educational objectives. It would therefore constitute a less discriminatory alternative to singling out religious-school choices for exclusion.

I want to make clear that the policy of declining aid to all private schools cannot be a *required* alternative. The state no-aid provisions cannot force the legislature into such a position (under the reasoning that the state must not aid religious schools, but must not discriminate against them either, and therefore must not aid any private schools). Because the state provisions discriminate against religion on their face, they are facially invalid and should not be given any legal effect that would force the hand of the legislature. Therefore, if a state legislature or city council wishes to enact a private-school voucher program, no state court can legitimately bar it from including religious schools. And if the legislature wishes not to allow the use of vouchers at

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[208]See Lupu and Tuttle, Zelman's *Future*, *supra* note 36, at [draft 63] (objecting that striking down state Blaine Amendments would "be to deny the states any room for their own church-state [separationist] policy").

[209]For arguments in support of such a system, see, e.g., Richard Kahlenberg, All Together Now: Creating Middle-Class Schools Through Public School Choice (2001).

[210]See *Zelman*, 122 S. Ct. at 2469-70 ("Cleveland's [80 percent] preponderance of religiously affiliated private schools . . . is a phenomenon common to many American cities.").

religious schools, it may do so, but only be foregoing the use of private-school vouchers altogether, in order to satisfy constitutional norms.

The premise of this "less discriminatory means" argument is the state may (though it does not have to) reject aid to all private schools as a category. But is the premise correct? Perhaps the state also acts unconstitutionally if it provides aid only to public schools and not to any private schools. There are certainly arguments to this effect. For one, the seminal decision of *Pierce v. Society of Sisters* spoke of a right to send children not just to religious schools, but to private schools in general: "the fundamental theory of liberty . . . excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[211] If the total denial of educational benefits to families imposes a penalty on their choice of schooling, then that holds true for families whose constitutionally protected choice is for a secular private school, as much as for a religious one.[212]

On the other hand, a state's decision not to fund any private schools can rest on an interest in restricting its funding only to those schools that it actually operates. That policy is far more defensible and even-handed than a state policy that some private schools shall be funded but not those that adhere to or teach a religious belief-system. While the challenge to public-school-only funding has something to be said for it, its chances of success are minimal. For the foreseeable future, states will almost certainly have the discretion to refuse private-school aid altogether, and if they have that ability, they need not and should not deny the use of vouchers only at religious private schools. If this underlying premise changes – if states become constitutionally barred from

[211]*Pierce*, 268 U.S. at 535.

[212]For full development of these arguments, see, e.g., Michael W. McConnell, *Government, Families, and Power: A Defense of Educational Choice*, 31 Conn. L. Rev. 847 (1999); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937 (1996).

favoring public over private schools in benefit programs – then that will mean a revolution in the entire world of educational financing, not just as to the issue of vouchers at religious schools.

Some state constitutional provisions in fact bar aid for all private schools, as I noted earlier.[213] The foregoing paragraphs suggest why such a provision, though broader in its restriction than those that exclude religious schools, is for that very reason shielded from an attack on the grounds of facial religious discrimination or viewpoint discrimination. But there is one final constitutional argument against the state provisions, and it might run even against those that, on their face, bar aid to all private schools rather than just religious schools. The argument rests on the history of the state amendments, at least those in the model of the federal Blaine Amendment: a history that is tainted with animus against Roman Catholicism.

7. The State Provisions and Anti-Catholic Animus

Many of the state provisions have historical roots in anti-Catholic prejudice of the nineteenth century, and this provides a further reason not to defer to them. The connection with anti-Catholicism has now been explored in a number of articles and briefs, and this section will merely recap what they have shown.[214]

Before the middle decades of the 1800s, most schools in America were operated by voluntary organizations, many of which were religious, and many of which received aid from states and

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[213]See *supra* notes 70-74 and accompanying text.

[214]See, e.g., Lloyd Jorgensen, The State and the Non-Public School, 1825-1925 (1987); DeForrest, *supra* note 58, at [draft 6-33]; John C. Jeffries, Jr., and James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297-303 (2001); Heytens, Note, *supra* note 58, at 134-40; Richard W. Garnett, *Brown's Promise, Blaine's Legacy*, 17 Const. Comm. 651, 670-74 (2000) (reviewing Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society (1999)); Douglas Laycock, *The Unity of Separation and Neutrality*, 46 Emory L. J. 43, 50-51 (1997); Viteritti, *supra* note 58, at 665-75; Brief of the Becket Fund for Religious Liberty, in Mitchell v. Helms, 530 U.S. 793, at 6-15 (available at 1999 WL 638630) (hereafter "Becket Amicus Brief").

cities.[215] However, in the 1830s waves of immigration, particularly from Ireland and Germany, began to swell the Catholic population; the influx continued throughout the 1800s, raising the percentages of Catholics in the nation from 3.3 percent in 1840 to nearly 13 percent in 1891.[216] The dominant Protestants reacted with fear to the new immigrants' customs and especially to their Catholic religion, which was viewed as superstitious and, because of its hierarchical organization and theology, as anti-democratic. The movement for public schools (or "common schools") arose as an effort to combat the perceived Catholic threat, by educating the children of various Protestant denominations together and by "Americanizing" the immigrants.[217]

The new public schools were not secular in their outlook and teaching; public school pioneer Horace Mann, in his reports as secretary of the Massachusetts board of education, repeatedly emphasized that no one wished for secular schools.[218] Instead the schools were both explicitly and implicitly committed to a Protestantism of the "least common denominator" variety. They mandated regular readings from the Bible, without comment from the teacher; Mann's solution for achieving "non-sectarian" but still religious education was to allow the Bible "to do what it is allowed to do in no other system – *to speak for itself*."[219] This plainly conflicted with Catholic notions that the Bible must be interpreted through and in the context of the Church. In addition, the Bible readings

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[215]See Jorgensen, *supra* note 172, at 1-19.

[216]Heytens, Note, *supra* note 58, at 135 (citations omitted).

[217]As an early advocate of public education put it, schoolchildren should be educated, "not as Baptists, or Methodists, or Episcopalians, or Presbyterians; not as Roman Catholics or Protestants, still less as foreigners in language or spirit, but as Americans, as made of one blood and citizens of the same free country, – educated to be one harmonious people." Quoted in Charles L. Glenn, The Myth of the Common School 223-24 (1988).

[218]See Jorgensen, *supra* note 172, at 60; Becket Amicus brief, *supra* note 172, at 6-7.

[219]Jorgensen, *supra* note 172, at 60 (quoting Twelfth Annual Report to the Board of Education 117, 124 (emphasis in original quote)).

came from the King James version, rather than the Catholic Douay version; the regular prayers were Protestant in orientation; and textbooks, such as the McGuffey readers, contained anti-Catholic slurs.[220] Catholics objected to being forced to engage in these practices, although they were willing to support different readings for Protestant and Catholic children.[221] But the schools insisted on the Protestant, "nonsectarian" versions, and when Catholic children refused they were whipped and punished in other ways, and nativist riots broke out in Philadelphia and Boston.[222]

Catholics then began to form their own school systems, beginning in the 1840s, and sought public funding for them. The vast majority of Protestants, however, were determined that no funds should go to "sectarian" schools. Horace Bushnell, prominent clergyman and public-school advocate, warned that parochial-school students "will be shut up in schools that do not teach them what, as Americans, they most of all need to know" – such as "the glorious rewards of liberty" – but "will be instructed mainly into the foreign prejudices and superstitions of their fathers, and the state, which proposes to be clear of all sectarian affinities in religion will pay the bills!"[223] By 1844, New York City banned public aid to any school "in which any religious sectarian doctrine or tenet shall be taught," while reaffirming that the Bible readings without comment were mandatory in public schools.[224] In Massachusetts, the anti-Catholic Know-Nothing Party gained majority status in the state legislature in 1854, undertook an investigation of Catholic nunneries, proposed an amendment

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[220]Jorgensen, *supra* note 172, at 61-64; see also Michael D. Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 So. Cal. Interdiscipl. L. J. 219, 259 (2002) (discussing differences in Lord Prayer between King James' "daily bread" and Douay, which includes "supersubstantial bread," referring to Catholic doctrine of transubstantiation).

[221]Jorgensen, *supra* note 172, at 78.

[222]*Id.* at 78-83.

[223]Quoted in Glenn, *supra* note 175, at 227-29.

[224]Jorgensen, *supra* note 172, at 75.

to bar Catholics from public office, and passed the Anti-Aid Amendment of 1855, which stated that school money "shall never be appropriated to any religious sect for the maintenance exclusively of its own schools."[225] Proponents admitted that the anti-aid enactment had "special reference" to Catholics and sought "to break up the Catholic schools."[226] California saw a similar debate in which Protestant newspapers asserted that "the institutions of our Protestant and Republican country are known to be obnoxious to [Catholic] sentiments and tastes"; an 1855 law brought state support for "sectarian or denominational schools" to an end.[227] Similar laws or constitutional amendments passed in midwestern states in the 1850s.[228] Throughout the debates and enactments, the recurring word "sectarian" was understood by all to refer primarily to Catholicism.

The anti-aid movement eventually sought to amend the federal Constitution through the Blaine Amendment of 1875, which in its strongest version would have added to the Fourteenth Amendment a provision barring states from providing any financial support to any "school, educational or other institution, under the control of any religious or ant-religious sect, organization, or denomination, or wherein the particular creeds of any religious or anti-religious sect, organization, or denomination shall be taught."[229] Again, all concerned understood that Catholic

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[225]Mass. Const. Amend. art. 18; see Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *Boyette v. Galkin*, No. 98-CV-10377-GAO (D. Mass.), available at http://www.becketfund.org ; Jorgensen, *supra* note 172, at 88-89.

[226]Becket Amicus Brief, *supra* note 172, at 10; Jorgensen, *supra* note 172, at 89 (quoting Boston Pilot, May 19, 1855).

[227]Jorgensen, *supra* note 172, at 104-06.

[228]*Id.* at 98-104.

[229]Quoted in Michael W. McConnell, John H. Garvey, and Thomas C. Berg, Religion and the Constitution 453 (2002). An earlier, narrower version would have prohibited only such appropriation from funds specifically earmarked for public schools. *Id.* at 452-53.

schools were the target.[230] The chief Senate sponsor began his floor speech by charging that "[t]he liberty of conscience . . . is universal in every Church but one," and went on at length about the anti-republican character of Catholicism, specifically pointing to the 1864 *Syllabus of Errors* in which Pope Pius IX condemned certain features of liberal democratic societies.[231] As the Arizona Supreme Court has recognized, "[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace.'"[232]

The Blaine Amendment failed to pass the Congress. But versions of it were enacted in approximately 30 states by the 1890s,[233] typically on the initiative of the same Republican, nondenominational Protestant coalition that had supported the Amendment itself and the earlier anti-aid laws. Washington state, for example, added two anti-aid provisions that have been at issue in modern cases over aid to students: one prohibiting appropriating or applying public money for "religious worship, exercise, or instruction, or the support of any religious establishment," the other providing that "all schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."[234] Again, the sponsors of these amendments, while

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[230]See Viteritti, *supra* note 58, at 671-72 (quoting contemporary accounts recognizing the motive).

[231]See DeForrest, *supra* note 58, at [draft 25-27]; McConnell et al., *supra* note 187, at 455-56 (both quoting 4 Cong. Rec. 5583-93 (1876) (statements of Sen. Edmunds, chief Senate sponsor, and others). Edmunds referred to the Catholic Church as "universal, ubiquitous, aggressive, restless, and untiring" and claimed that the Amendment was necessary to "preserv[e] public schools from that sort of domination." 4 Cong. Rec. at 5588. See also Heytens, Note, *supra* note 58, at 138 ("The word 'Catholic' [w]as used fifty-nine times during the one-day Senate debate. The Pope was mentioned twenty-three times.").

[232]Kotterman v. Killian, 193 Ariz. 273, 291, 972 P.2d 606, 624 (1999) (concluding, however, that Arizona's state provision was not heavily influenced by the Blaine Amendment).

[233]Viteritti, *supra* note 58, at 673.

[234]Wash. Const. art I, § 11; *id.* art. IX, § 4.

opposing sectarian schools, "spoke out in favor of educating pupils in the basic moral principles of religion, the kind of instruction that was a hallmark of the generic Protestantism of the common schools."[235] By this time, the late 1800s, some state courts were beginning to eliminate the nondenominational Protestant prayers and Bible readings in public schools,[236] but the practice was still the norm as a matter of local school policy if not state law.[237]

What does this history suggests for constitutional challenges to state provisions? At least some justices think that the fact that a law was historically intended to attack a faith is a strong reason to strike down the law under the Free Exercise Clause.[238] More broadly, the Equal Protection Clause forbids laws enacted with an "animus" intent to harm a protected class or a fundamental right,[239] and discrimination against believers in a particular faith, or against their practices, fits within those categories.[240] Nor does the fact that the provision's enactment and its invidious

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[235]De Forrest, *supra* note 58, at [draft 30-31] (citing 20 Cong. Rec. 2100-01 (1889) (statement of Sen. Blair)).

[236]Board of Education v. Minor, 23 Ohio St. 211 (Ohio 1872) (approving rule eliminating Bible readings from Cincinnati public schools).

[237]See, e.g., Newsom, *supra* note 178, at 243, 245 (citing numerous decisions upholding Bible readings and prayers, and concluding that "Bible reading in the public schools was a common event, sanctioned by most of the court cases decided in the Nineteenth Century").

[238]See *Lukumi*, 508 U.S. at 540-42 (Kennedy, J., for four justices) (record surrounding enactment of ordinances showed "object . . . to target animal sacrifices by Santeria worshippers because of its religious motivation"); but cf. *id.* at 558-59 (Scalia, J., joined by Rehnquist, C.J.) (refusing to join this section because of its focus on lawmakers' subject motivations).

[239]See, e.g., Washington v. Davis, 426 U.S. 229 (1976). See also Romer v. Evans, 517 U.S. 620 (1996) (striking down state constitutional amendment that barred laws or rules prohibiting discrimination on the grounds of homosexuality, because the amendment reflected a class-based animus toward homosexuals).

[240]Assessing the question in terms of the language and categories of the famous footnote 4 of United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938), classifications "directed against particular religious . . . minorities" should be suspect because those minorities tend to be "discrete and insular" and because the classifications fall "within [the] specific prohibition" of the First Amendment. Strict equal protection review is also appropriate because religious practice is a fundamental right. See generally Erwin Chemerinsky, Constitutional Law: Principles and Policies 417, 638-39 (1997).

motivation are far in the past immunize it. In *Hunter v. Underwood*,[241] the Court struck down a provision of Alabama's constitution, enacted in 1901, that stripped the right to vote from any person convicted of "a crime involving moral turpitude," a broad phrase that encompassed many misdemeanors including (in that case) writing a bad check. The historical record showed that the provision was part of a design, "rampant" at the 1901 constitutional convention, to disenfranchise blacks and maintain white supremacy; the crimes chosen were those "thought to be more commonly committed by blacks."[242] The Court also rejected the argument that the provision had been "legitimated" by intervening events such as the removal of the most blatantly discriminatory crimes. The provision still violated equal protection because "its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."[243]

This argument is potentially important because, if it is valid, it could apply even to those state provisions that bar aid not just to religious schools or instruction, but to all private schools (the third category set out earlier).[244] Those provisions are religion-neutral on their face, which will likely may preserve them against constitutional challenges based on unconstitutional conditions or viewpoint discrimination. But a law proven to be motivated by bigotry or other invidious purposes can be subjected to strict scrutiny even if it is facially neutral, based on its disproportionate effect[245] – as was the case with the Alabama disenfranchisement provision. In many states, even a provision

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[241]471 U.S. 222 (1985).

[242]*Id.* at 229.

[243]*Id.* at 232-33.

[244]See *supra* notes 75-76 and accompanying text.

[245]See, e.g., *Davis*, 426 U.S. 229.

that excludes private schools across the board will disproportionately affect Catholic families, since Catholicism remains the faith with the most extensive system of schools.[246]

In view of the background of the 19th century anti-aid campaigns, there is substantial truth to the verdict of four justices in *Mitchell v. Helms* that "hostility to aid to pervasively sectarian schools has a shameful pedigree . . . born of bigotry."[247] To be sure, attacking any individual state's provision requires examining its particular context and showing particular evidence about its purpose (something I do not attempt here). But that examination should be colored by the general nature of the anti-aid campaigns, which were pervaded by anti-Catholicism. Since state debates may not be recorded in detail, it may be hard to produce smoking gun evidence; challengers in a particular state should be able to rely to some degree on the pattern of anti-Catholicism throughout the nation.

The original motivations of the 19th-century anti-aid campaigns were indeed tainted. The rhetoric often included rank attacks such as Horace Bushnell's on Catholic "superstitions" – that is, on purely theological matters with no relevance to the distribution of public benefits. Even on questions of legitimate public concern, the Protestant response was often paranoid: denying aid to Catholic school was hardly necessary to "preserve public schools from [Catholic] domination," as Blaine's chief sponsor suggested it was, and Protestants refused Catholic proposals for accommodations such as using both Bible versions in the schools.[248] Most importantly, the mid-

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[246]As of the mid-1990s, even with the rise of private schools among various evangelical Protestant groups, Catholic schools still count for 30 percent of private schools. Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 375, 387-88 (1999) (citing Stephen P. Brougham and Lenore A. Colaciello, National Center for Education Statistics, Private School Universe Survey, 1995-96, at 5 tbl. 1 (1998)).

[247]530 U.S. 793, 831-32 (2000) (plurality opinion of Thomas, J.).

[248]See *supra* note 189 (quoting Sen. Edmunds); notes 178-79 and accompanying text.

19th-century public school arrangement could not claim to be religiously neutral, or to separate church and state consistently. Repeatedly the authorities chose to promote Protestant practices at the expense of Catholic conscience. Those choices reflected, at best, cavalier assumptions that Protestant practices were the only ones consistent with civic virtue, and gross insensitivity to the possibility that Catholics could adhere to their faith and still be good citizens.

This attack may not apply to all of the state provisions. Some predate the Protestant-Catholic struggles of the 1800s. These date back to the founding generation and generally reflect the move to end formal establishments by ending compulsory taxes for the support of clergy and houses of worship – the fight that James Madison and others won in Virginia in the 1780s. The Vermont Supreme Court, in striking down the payment of tuition to rural students choosing a nearby religious school, traced this history concerning its state's provision against "compell[ed] support [of] any place of worship," first adopted in 1777.[249] The court drew the parallel to Madison's attack on the Virginia religious assessment (holding, correctly or not, that the prohibition on funding religious worship and clergy also extended to the religious components of elementary and secondary education).[250] It also noted that the provision was independent from other states' 19th-century enactments that specifically prohibited school aid in response to attempts to obtain funds for Roman Catholic [s]chools."[251]

In defense of the late 19th-century state Blaine Amendments, it might be argued that though the anti-aid position originated in anti-Catholicism, it eventually developed into a more consistent principle of separation of church and state. The blatant practices of generic Protestantism – King

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[249] *Chittenden*, 169 Vt. at 328-37, 738 A.2d at 552-59 (discussing Vt. Const. ch. I, art. 3).

[250] *Id.* at 331, 738 A.2d at 555-56.

[251] *Id.* at 337, 738 A.2d at 558.

James Bible readings, the Lord's Prayer and other exercises – began to be removed from the public schools, with decisions such as the 1872 Ohio Supreme Court ruling ending Bible readings in Cincinnati's schools.[252] But as I have already noted, that process had not advanced very far by the late 1890s. Public school religious exercises were still widespread, courts still widely approved them, and the drafters of at least some state no-aid provisions still embraced the schools' "common religion."[253]

What about later, when church-state separationism did indeed become consistently strict? The generic religious practices of Bible readings and prayer were indeed removed from the public schools, as a matter of constitutional law, by the 1970s.[254] Did this produce a more consistent, principled separationism that should be held to legitimate the denial of aid to religious educational choices by resting it on values not tainted with anti-Catholicism? There are two reasons to think not. First, even in recent times the no-aid position has given off airs of rank anti-Catholicism. As the four-justice plurality in *Mitchell* noted, even in the modern no-aid opinions, the tag "sectarian" continued to be affixed primarily to Catholic schools: they remained the classic example, even in the 1970s cases, of the "pervasively sectarian" school, barred from receiving aid because it is committed to "indoctrination."[255] (As others have pointed out, such language, with its overtones of "thought control," was a highly unsympathetic interpretation of the role that faith actually played

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[252]*Minor*, 23 Ohio St. 210.

[253]See *supra* notes 192-94 and accompanying text.

[254]See Abington School Dist. v. Schempp. 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[255]*Mitchell*, 530 U.S. at 831-32 (plurality opinion of Thomas, J.); see, e.g., Tilton v. Richardson, 403 U.S. 672, 686 (1971) (contrasting education in Catholic colleges to the "religious indoctrination" of the parochial elementary and secondary schools); *Lemon*, 403 U.S. at 630-31 (Douglas, J., concurring) (parochial schools "give the church the opportunity to indoctrinate its creed").

in Catholic schools.[256]) In a dissent in the late 1960s, Justice Black warned that the loaning of public-school textbooks to students in New York parochial schools was the work of "powerful sectarian religious propagandists . . . looking toward complete domination and supremacy of their particular brand of religion."[257] As this quote exemplifies, significant elements of the no-aid coalition in modern times have sounded the same themes as did the mid-19th-century nativist Protestants. First, they wrongly accused Americans Catholics of wanting dominance rather than just equal treatment; second, they ignored the commitment of the vast majority of Catholics to basic principles of democracy and religious liberty; and third, they often attacked the Church's theological and internal practices, matters that should have no bearing on its members' civil rights.[258]

Second, even if the no-aid position today rests on more solid moral and intellectual foundations, it nevertheless became entrenched in law on the basis of the less attractive sentiments of the 1800s. Once a rule is enacted – especially a constitutional policy – it benefits from inertia, becomes even more widely accepted because of its familiarity, and for that reason begins to attract new theories justifying it. Some of the most important modern no-aid decisions and opinions of the Supreme Court rested in part on the argument that aid to religious schools and families had long been disfavored in the states.[259] A policy with doubtful origins thereby rose by bootstraps to become a presumptively valid tradition. Concern about such bootstrapping, in another context, may have

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[256]See Brief Amicus Curiae for the Catholic League for Religious and Civil Rights at 11-28, *Mitchell v. Helms*, 530 U.S. 793 (2000).

[257]Board of Education v. Allen, 392 U.S. 236, 251 (1968) (Black, J., dissenting).

[258]For a catalog of these elements in the modern debate, see Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loyola U. Chi. L. Rev. 121, 139-47 (2001). See also John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, J. Am. Hist., June 1997. at 97.

[259]See, e.g., *Nyquist*, 413 U.S. at 792 (relying on fact that tax benefits for religious-school families "are a recent innovation"); *Lemon*, 403 U.S. at 648-49 (Brennan, J.) (relying on fact that no-aid position has been, "for more than a century, the consensus, enforced by legislatures and courts with substantial consistency").

been why the Court in *Hunter v. Underwood* refused to allow a policy enacted out of racial bigotry to be legitimated over time. Like the disenfranchisement rule that continued to affect blacks disproportionately, the exclusion of religious-school choices, at least in many instances, "was motivated by a desire to discriminate [and] continues to this day to have that effect" against those choosing Catholic schools."[260]

Finally, rendering church-state separation more consistent by eliminating religious exercises in the public schools does not necessarily cure the problem. It may merely shift the disability from Catholics to all those persons families who want a religious component integrated into their children's education. One can draw two possible lessons about the flaw of the early public schools with their Protestant-oriented practices. One is that they were not "nonsectarian" enough, and the elimination of those practices was necessary to be consistent. The other is that a nonsectarian or neutral education is not really possible – that what seems "common" to the majority is in fact only shared by the majority, just as the practices that seemed "common" to the early public school advocates had in fact a consensus only among most Protestants, and were unacceptable to Catholics and others. Under this view, "equality [cannot] be achieved unless all families ha[ve] an equal right to choose education in accordance with their own beliefs."[261] The latter of these two interpretations, I have already suggested, is the one to which *Zelman* points in upholding school vouchers. The Court treats the public schools not as the neutral baseline, but as one of the secular alternatives to religious schools. Again, *Zelman*'s specific holding is that including religious schools in a voucher program is permissible; but its premises suggest that such an inclusion is mandatory when other

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[260] *Hunter*, 471 U.S. at 233.

[261] McConnell et al., *supra* note 187, at 457.

private schools are included, if the government is to treat the conscientious beliefs and practices of its citizens fairly.

III. OTHER CONDITIONS ON PARTICIPATION IN VOUCHER PROGRAMS

If religious schools are (or must be) included in a school choice program on the same terms as other schools, there will remain a third round of constitutional questions. Voucher programs may impose a wide range of other conditions on schools' eligibility to receive families' voucher checks. For example, the Cleveland plan in *Zelman* forbade participating schools to discriminate on the basis of race, ethnicity, or religion, or to teach unlawful behavior or "hatred of any person or group" based on race, ethnicity, or religion.[262] Justice Souter's dissent argued that these limits on participating religious schools' autonomy were a reason to invalidate the program,[263] but the majority ignored the point – which suggests, without explicitly holding, that taxpayers challenging voucher programs will not be able to use the regulations imposed on schools as a basis for their challenge, as they did in the 1970s and 1980s.[264] But suppose that the challenge comes not from someone wanting to invalidate the program, but from a private school wanting to join the program but excluded from eligibility because of one these conditions. What claims might such a school have?

A wide range of possible conditions on schools' eligibility could implicate a religious school's constitutional rights. A program might, like Cleveland's, forbid an eligible school from discriminating based on race, ethnicity, or religion, or on other characteristics such as sex or sexual orientation. The nondiscrimination rule might apply to the admission of students, or the hiring of

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[262]Ohio Rev. Code. Ann. § 3313.976(A)(6) (quoted in *Zelman*, 122 S. Ct. at 2463).

[263]*Zelman*, 122 S. Ct. at 2499 (Souter, J., dissenting).

[264]See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); Aguilar v. Felton, 473 U.S. 402, 409-14 (1985).

employees – administrators, teachers, maintenance staff – and each situation may raise slightly different constitutional considerations. Or a program might require that an eligible school teach certain things or refrain from teaching others – from the Cleveland prohibition on teaching unlawful behavior or "hatred based on race [or] religion," to a requirement that schools teach evolution in science classes, or patriotism in social studies classes.

Part II argued that there is a strong case that excluding schools from eligibility simply because they are religious is unconstitutional. But exclusions based on other grounds raise a more complicated set of questions, and this part explains why. Most of these conditions apply to all private schools, religious and secular; the analysis is most complicated for these, and I begin with it. Then at the end, I turn to a few conditions that are easier to criticize because they single out religious schools for special favor or disfavor.

A. Conditions Generally Applicable to Private Schools

Part II presented a number of arguments why singling out religious schools for exclusion from voucher programs is unconstitutional. But other eligibility conditions that apply to all voucher schools, religious and secular, raise more complicated questions. Using the categories of analysis from part II, this section discusses what might make these other conditions constitutionally troublesome, but also what makes some of them different from, and more constitutionally defensible than, the exclusion of religious schools.

1. The Validity of Direct Regulation

One key difference is that unlike the singling out of religious schools, some of the generally applicable conditions on voucher eligibility could actually be imposed as direct regulations on private schools, including religious schools. If certain conduct can be directly prohibited or

regulated by the state, then surely that conduct can be regulated as a condition on eligibility to receive voucher students: a necessary premise of any "unconstitutional conditions" argument is that there is a constitutional right in the first place. Religious schools unquestionably cannot be singled out for direct regulation – the Free Exercise Clause as interpreted in *Church of the Lukumi* forbids it[265] – and so the state had to argue that it enjoyed greater power to impose the rule as a condition of voucher eligibility. But some other conditions on vouchers might be upheld because they are constitutional even as direct regulations.

Consider, for example, restrictions on discrimination by private schools. The state certainly can impose an outright ban on racial discrimination in a private school's admissions and hiring, under a generally applicable civil rights law, whether the school is secular or religious: previous decisions state that the government's interest there is compelling.[266] The same might be true, if lower court decisions are correct, for a sex discrimination in employment.[267] If these acts can be prohibited, they can be the basis for excluding a school from a choice program. The reason why much of this activity can be directly regulated is that it involves conduct, and *Employment Division v. Smith* permits the state in many cases to subject religious conduct to neutral, generally applicable laws.[268] To be sure, a fair amount of this conduct might be constitutionally protected from direct

[265]508 U.S. 520.

[266]Runyon v. McCrary, 427 U.S. 160 (1976) (no First Amendment exception for secular private school's hiring); Bob Jones University v. United States, 461 U.S. 574, 604 (1983) (no exemption for religious school's discriminatory student policy). *Bob Jones* actually involved the denial of tax exemption, but the Court characterized the compelling interest there as "eradicating racial discrimination in education" (*id.*), which would support an outright prohibition as well.

[267]See, e.g., Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990) (upholding minimum wage laws as applied to female teachers in religious schools); EEOC v. Tree of Life Christian Schools, 751 F. Supp. 700, 705-07, 709-16 (S.D. Ohio 1985) (same regarding equal pay laws).

[268]*Smith*, 494 U.S. at 879.

regulation even under *Smith* because the regulation contains exceptions that render it less than generally applicable.[269] But conditions on voucher eligibility are less likely to include exceptions, so the non-general-applicability argument is less likely to be available.

Religious schools retain a constitutional right to discriminate in some cases, including an essentially absolute right to do so with respect to "ministerial" positions – which may encompass some teachers at religious schools.[270] The ministerial exception also stands as an example of a special right of "church autonomy" – broader in scope than just ministerial positions, but with uncertain boundaries – a right that the Court enforced in employment cases before *Employment Division v. Smith* and then reaffirmed in *Smith* itself.[271] And all private schools, including religious ones, have a First Amendment right of association, under *Boy Scouts v. Dale*,[272] to discriminate in hiring against persons whose presence would "impair the ability of the [school] to express those views, and only those views, that it intends to express."[273] In *Dale* the Scouts won the right to refuse an openly gay scoutmaster even though the organization's declared opposition to homosexual

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[269]See, e.g., Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999); Richard Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi*, and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850 (2001).

[270]See, e.g., Combs v. Central Texas Annual Conf., 173 F.3d 343 (5th Cir. 1999) (holding that mandatory exception to Title VII for ministerial positions survives *Employment Division v. Smith*); Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994) (barring age discrimination suit by former lay theology teacher at religious high school); EEOC v. Catholic University, 83 F.3d 1455 (D.C. Cir. 1996) (barring sex discrimination suit by nun denied tenure in canon law department).

[271]See, e.g., NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (exempting religious school from requirements of collective bargaining with teachers); *Smith*, 494 U.S. at 877 (reaffirming that government may not "lend its power to one or the other side in controversies over religious authority or dogma").

[272]530 U.S. 640 (2000) (Boy Scouts had constitutional right to dismiss openly gay assistant scoutmaster notwithstanding state law prohibiting discrimination based on sexual orientation).

[273]*Id.* at 648.

behavior was hardly resounding.[274] Even more, then, a religious school whose doctrines straightforwardly treat homosexual behavior as immoral should be able to refuse an openly gay teacher. The Court has repeatedly recognized "the critical and unique role of the teacher in fulfilling the mission of a church-operated school,"[275] and the teacher's importance lies largely in what he or she communicates to students, which will inevitably be taken as representing the school. But this expressive rationale will not apply, or will not apply as strongly, to other positions.

States may also impose a degree of direct regulation on the curriculum and teacher qualifications of private, including religious, schools: they may require that certain courses be taught and that teachers have a college degree.[276] But these powers too have limits: the state may not essentially dictate the whole curriculum of private schools,[277] nor may it prohibit a school from teaching a required subject from a particular viewpoint.[278]

In short, some rules on voucher eligibility are valid simply because they would be valid even as direct regulation – but that it is by no means true for all such conditions.

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[274]*Id.* at 653-56.

[275]NLRB v. Catholic Bishop, 440 U.S. 490, 501 (1979) (citing Lemon v. Kurtzman, 403 U.S. 602, 617-18 (1971)).

[276]For reviews of the case law, see Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise*, 60 Geo. Wash. L. Rev. 818 (1992); Thomas C. Berg, *Religiously Affiliated Education*, in The Structure of American Churches (James A. Serritella et al. eds., forthcoming 2003).

[277]See State v. Whisner, 47 Ohio St. 2d 181, 211-12, 351 N.E.2d 750, 768 (1976) (invalidating curriculum regulations that were "so pervasive and all-encompassing that total compliance . . . would effectively eradicate the distinction between public and non-public education").

[278]See, e.g., Fellowship Baptist Church v. Benton, 815 F.2d 485, 493 (8th Cir. 1987) (upholding requirement of teaching "human relations" course on ground that it "d[id] not prevent teachers in plaintiff schools from teaching from a Biblical perspective").

2. Unconstitutional Conditions Analysis

Part II argued that prohibiting families from using vouchers at religious schools imposes an unconstitutional condition on religious exercise and activity: it goes beyond refusing to fund religious teaching and imposes a significant penalty on families who choose a religiously affiliated school, by denying them aid they would otherwise receive for the secular education their school provides. This argument, if valid, might apply as well for a wide range of other conditions on vouchers. After all, in many cases the entity that is denied government funds because it violates some condition on the funds still provides some of the benefits that the funding is supposed to support.

The difficulty with withhold state funding for the teaching of religion was that it was extremely costly for many religious schools to separate their religious teaching from the rest of their curriculum. The cost in that case was ideological, because such schools believe in the integration of faith into all subjects;[279] but one can imagine cases where separating activities imposes costs that are severe in financial though not ideological terms. Then the same question can be asked with respect to conditions affecting other activities by a school. Consider several other such conditions.

First, the easiest conditions to uphold are those that limit a school only with respect to voucher students: for example, a rule requiring that the school accept voucher students without regard to their disabilities or other characteristics that the school might otherwise consider. As Professors Lupu and Tuttle have pointed out, such conditions merely cover "the students for whom the state is paying"; their effect on the rest of the school's operations is only indirect, and the school

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[279] See *supra* notes 119-21 and accompanying text.

can limit the effect by taking fewer voucher students.[280] Even here, though, the analysis must be careful, because what is at stake is not only the school's right to operate, but the student's right (and her family's) to use the educational benefit in line with their conscience. A rule that voucher students may not be taught religion at the school might not impose on the school's other operations, but it certainly would undermine some families' constitutionally protected choice of a religious education.[281]

Other conditions requiring separation of activities might impose costs on the school without actually forcing it to violate its beliefs. For example, if the state forbids the teaching of "scientific creationism" within a voucher-supported program, the school (or its sponsoring congregation) might be able to satisfy this condition by operating a separate program after school hours, with teachers and materials supported entirely by private funds. The key would be that the school did not conscientiously believe that creationism must be integrated throughout the curriculum; unless the costs of creating a separate science program are excessive, the school is suffering no real penalty for teaching creationism.

On the other hand, some activities cannot be separated without contravening the school's beliefs or imposing insurmountable costs. If a school becomes ineligible for vouchers because it refuses to hire or retain teachers whose public conduct conflicts with its views, it is no answer to tell the school to go and set up those standards for teachers in a separate entity. If a school becomes ineligible for vouchers because it teaches pacifism as a matter of conscience, it quite likely is an inadequate answer to tell the school to set up a separate pacifism program after hours; pacifist

[280] Lupu and Tuttle, *supra* note 35, at [draft 73].

[281] By contrast, the state could legitimately require schools to allow voucher students to opt out of any religious exercises to which they object. The Milwaukee program contained such a provision. See *Jackson*, 218 Wis. 2d at 883, 578 N.W.2d at 623.

teaching, like religious doctrine per se, is quite likely to pervade the school's understanding of how to teach history, social studies, and other subjects in the core, voucher-eligible program. Whether the school has a constitutional to speak or act in these ways in the first place will depend on the activity;[282] but if it does have such a right, the state should not be able to deny the use of a voucher altogether because of the activity.

3. Viewpoint Discrimination Analysis

Part II also argued that the exclusion of religious schools from a school choice program discriminates against religious viewpoints in violation of the Free Speech Clause.[283] How does that conclusion apply to other conditions that exclude a school from eligibility? Note that the viewpoint discrimination argument will only be available when the condition can plausibly be said to be based on the school's speech. For example, if a school is ineligible because it engages in employment discrimination with respect to employees who are not in a capacity to speak for the school, it is hard to see how the school or the families using it could challenge the condition on free speech grounds: the activity is pure conduct rather than speech.

Recall that Part II offered two reasons why excluding the religious-school choice was unconstitutional. The first was that most voucher programs promote a diverse range of private expression rather than a closely-defined government message or policy;[284] the second was that an exclusion on the basis of religious viewpoint is particularly unrelated to any legitimate goals of a

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[282]See *supra* part III-A-1.

[283]See *supra* part II-B-3.

[284]See *supra* notes 138-52 and accompanying text.

voucher program.[285] If the first of these rationales is correct and sufficient, it suggests that a range of other conditions on voucher eligibility would be invalid as well. For example, a school could not be excluded from the voucher program just because it taught from a pacifist viewpoint, or a Marxist one. Even then, of course, the school could be excluded if it refused to teach a certain mandated subject at all; if such a rule can be imposed directly, because it does not dictate the viewpoint from which the school teaches the subject, then surely the rule can serve as a condition on voucher eligibility.

On the other hand, if the nature of voucher programs (the first rationale) is insufficient alone, then the crucial point from above would be the second rationale: that excluding a school based on its religious affiliation is particularly arbitrary and unrelated to the legitimate educational goals of most voucher programs. Under this rationale, one can imagine courts upholding other conditions on schools' speech because those conditions (unlike the religious exclusion) do relate to the legitimate educational goals of the choice program. Some such rules might be acceptable as voucher conditions even though they are not acceptable as direct regulations. For example, the state might conclude that "creationism" is bad science and refuse to fund it (although as I argued above, it would have to permit the school to separate the creationist teaching into a different program and continue to receive vouchers for the remainder of the program). Likewise, although the state could not directly prohibit schools from teaching "hatred based on race, ethnicity, or religion," it might be able to conclude that the teaching of hate sufficiently undermines a school's educational contribution that the school should not be funded (or again, that the objectionable teaching must be moved to a separate program).

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[285]See *supra* notes 153-65 and accompanying text.

B. Conditions That Disfavor or Favor Religious Schools

Most of the conditions on voucher eligibility in this Part apply equally to religious and secular private schools, and I have just argued that their constitutionality presents complicated questions. But what if the conditions treat religious and secular schools differently, either by giving distinctive protection to religious schools or by imposing distinctive or distinctively burdensome conditions on them?

The analysis of this question may vary according to whether one sees the formally equal treatment of religious and secular schools as the sole, dominant norm governing voucher cases. If formally equal treatment -- the facial neutrality of terms between religious and secular schools -- is the sole norm for all questions in voucher cases, then any different treatment of religious schools , whether better or worse, is unconstitutional under the Religion Clauses (or strongly presumed so). And indeed, a program's neutrality of terms is one of the three key factors in *Zelman*'s assessment of whether including religious-school choices in the program is permitted by the Establishment Clause.[286] But as I earlier argued, the equal participation of religious schools in a voucher program may ultimately rest not on formal equality of terms, but on religious choice: the goal of minimizing government's influence on the religious choices of private individuals and groups.[287] If that is so, then some difference in conditions applicable to religious and secular schools may be appropriate and even necessary.

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[286]*Zelman*, 122 S. Ct. at 2467-68; see *supra* notes 17-19 and accompanying text.

[287]See *supra* part II-B-4, notes 170-79 and accompanying text.

1. Conditions that Disfavor Religious Schools

Begin with conditions that disfavor religious schools. Part II already presented a bevy of reasons why states may not flatly exclude religious schools from a voucher program. But in addition, there are some conditions that, while not facially targeting religious schools as a class, nevertheless impose a far greater burden on them than on secular schools. The most common is the condition that a school not discriminate on the basis of religion in employment. As applied to secular schools, such a rule is unobjectionable; it serves the goal of ensuring that people of all religious faiths can have access to employment. But applying the condition to religious schools is different. When the job in question is religious in nature, at least – for example, a school administrator charged with maintaining the schools's mission – applying the no-religious-discrimination condition puts a significant burden on a religious school that does not exist for secular schools. To exclude religious schools because of such a condition is unconstitutional under either the equality or the choice-based approach.

Under the equality approach, preventing a religious school from considering religion in employment is invalid because it denies the religious school the right that other schools enjoy: the right to demand that employees express commitment to whatever ideological goals the school has. Discrimination in employment on the basis of secular ideology is almost never prohibited by law, and is not likely ever to be prohibited for schools participating in voucher programs. A school committed to the Montessori philosophy of education, or to a pacifist or multiculturalist approach, is legally free to require that its staff adhere to that ideology. But for a religious school, religious faith is its ideology, and so for it to "discriminate" on that basis is to seek the same right that secular

schools enjoy.[288]

The Supreme Court did not rely on this rationale in *Corporation of Presiding Bishop v. Amos*[289] when it upheld the statutory exemption in Title VII permitting religious discrimination by religious organizations; the Court treated the exemption as giving religious organizations distinctive rather than simply equal treatment.[290] But *Amos* was considering whether the government had discretion to free religious exercise from a direct regulatory burden; in that context, the distinctive constitutional value of free exercise of religion justifies special accommodation in some cases.[291] The issue here is whether the government is mandated to free religious schools from a condition on government benefits, not from direct regulation. Protecting religion-based hiring by religious organizations is certainly defensible as a distinctive legislative accommodation, but it is also defensible as an equal constitutional right. A number of courts and commentators have now defended religious-hiring exemptions on the basis that they are necessary to give religious organizations the same rights as their secular counterparts.[292]

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[288]As a federal district court recently put it, "[P]rohibitions on hiring or firing on the basis of religion ha[ve] a much greater negative impact on the purpose and mission of a religious organization in comparison to the effect of the prohibitions on a secular institution. When a religious organization cannot organize itself on the basis of religion, such a limitation runs counter to the requirements of the Free Exercise Clause." Madison v. Riter, 2003 WL 179990, at *9 n.9 (W.D.Va. 2003).

[289]483 U.S. 327 (1987).

[290]See *id.* at 338 ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.").

[291]See *id.*; for general discussion of the issues surrounding constitutionally mandated and permitted accommodations, see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 782 (1992).

[292]See, e.g., *Madison*, 2003 WL 179990, at *9 & n.9; Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right – Reflections on* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 793, 809 (1998).

This rationale for constitutional challenge plainly applies to positions of leadership at a religious school, and these should include teachers. As I noted earlier, the Court has repeatedly recognized "the critical and unique role of the teacher in fulfilling the mission of a church-operated school."[293] A religious school should not have to surrender control over this crucial component of its mission as the price of being eligible to accept voucher students. But the rationale likely applies as well to other jobs that are less obviously "religious." Secular schools can legally demand an ideological commitment from all of their staff, not just those in leadership positions; if religious schools must enjoy the same right, it should likewise extend to all staff.

Barring participating religious schools from considering religious allegiance in hiring is also invalid under a choice-oriented theory, at least for positions that have religious significance. It is hard to imagine a greater burden on a school than preventing it from seeking to ensure that its employees in positions of religious significance are committed to the faith. Exempting religious schools from such a condition removes a serious impediment to their participation in a voucher program; and because it does little to make religious schools more attractive than comparable secular schools, it does not create any incentive for voucher-eligible families to choose religious schools.

The courts might well draw a distinction between religious and nonreligious positions and hold that a state may impose a nondiscrimination condition in the latter category. They might argue that when a job less obviously has religious significance, the school's interest in ensuring the employee's religious commitment is outweighed by the state's interest in ensuring that people of varying faiths can participate in the workplace. But the line between religious and nonreligious positions is an unclear one; that was the very premise for the Court's approval of the broad

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[293] *Catholic Bishop*, 440 U.S. at 501 (citing *Lemon,* 403 U.S. at 617-18).

exemption in *Amos*. To paraphrase that decision, a religious school "might understandably be concerned that [state administrators judging eligibility for vouchers] would not understand its religious tenets and sense of mission."[294]

The difficulty with drawing the line according to a position's "religious significance" is exemplified in Alan Brownstein's argument that "there may be little if any religious dimension to some of the publicly funded job functions that are subject to discriminatory employment criteria."[295] But although some employees of a school are not specifically assigned to teach, counsel, or witness to the students, this does not exhaust the religious significance of a job. An employee may still have informal contacts with students, or behind-the-scenes contacts with the actual teachers and counselors – say, for example, in employee prayer sessions. A religious school might regard these other contacts as important both to the training of students and to the morale and inspiration of employees, and might therefore want employees in all jobs to be committed to its faith.

2. Exemptions Uniquely for Religious Schools

Finally, what about special protections for religious exercise in voucher conditions? What if a religious school seeks exemption from a voucher condition applicable to nonreligious private schools, such as a condition that the school not teach a certain ideology or not discriminate on a certain ground in hiring or admissions. Such an exemption might be granted by the legislature in the voucher legislation, or by a court in response to a constitutional claim by the religious school.

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[294] *Amos*, 483 U.S. at 336.

[295] Brownstein, *supra* note 36, at 910; see also Alan Brownstein, *Constitutional Questions About Charitable Choice*, in Welfare Reform & Faith-Based Organizations 219, 231 (Derek H. Davis & Barry Hankins eds. 1999).

If formal equality of terms is the sole governing norm for religious participation in voucher programs, then exempting religious schools from generally applicable conditions on participation is not required and indeed is presumptively invalid. Recall again the principle of *Zelman* that a program's formal neutrality toward religion is one of the three key factors in upholding the inclusion of religious schools against Establishment Clause challenge.[296] It is not clear whether facial neutrality in all terms is an essential criterion for upholding a voucher program, but it is at least a major factor. Exemptions uniquely for religious schools raise questions even under the choice-oriented approach. They pose a danger of "'skew[ing]' the program toward religious schools" – which *Zelman* warned against[297] – by making eligibility easier for those schools than for their secular counterparts.

However, there are several considerations on the other side. First, it should be emphasized that some provisions that appear on their face to favor religion actually do no more than preserve equal treatment for religion in the face of rules that are facially neutral but that actually effect religion much more severely. That is what I just argued with respect to religious discrimination in employment; religious schools must (and certainly may) be exempt from a no-religious-discrimination condition, at least as to religious positions and perhaps as to secular positions as well.[298] Second, the Constitution still guarantees some special freedoms for religious institutions

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[296]122 S. Ct. at 2467-68.

[297]*Id.* at 2468 (quotation omitted).

[298]See *supra* part III-B-1. The "charitable choice" statutes, which permit religious social services to receive federal aid or vouchers, contain a provision allowing religion-based hiring. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-93, 42 U.S.C. § 604A(f). They also specifically allow religious recipients to continue to display religious symbols on their premises, which likewise merely protects religious organizations from a rule that affects them disproportionately (a rule of "no religious symbols," often found in federal grant documents). Finally, the statutes allow religious organizations to maintain their "form of internal governance" – an exemption that should have extended to all recipients, since secular organizations have such an interest in freedom of internal governance as well.

even after *Employment Division v. Smith*, including the right to hire and fire clergy and the broader right of church autonomy (whatever its boundaries).[299] Where the Constitution guarantees religious institutions special freedom from direct regulation, it can be argued that the legislature should at least be able to preserve that freedom through a statutory exemption in a voucher program.

Third, if choice rather than formal equality is the ultimate value, then exempting religious schools from some conditions is permissible because the exemption will not make religious schools more attractive to voucher recipients and will not give religious schools an unfair advantage over others in their capacity to participate in the program. Suppose, for example, that a religious group analogous to Christian Science operates an elementary school that would qualify for participation in a choice program, except for a condition that requires participating schools to teach students the basic principles of modern medicine, to which the group objects. Exempting the school from the condition on participation is most unlikely to affect voucher recipients' choice; few if any families will find the absence of teaching about basic medicine attractive unless they are already members of the group in question. This analysis is consistent with the holding of the Eighth Circuit in a different context in *Children's Healthcare Is a Legal Duty v. Min de Parle*.[300] The case involved a statutory provision that allows Medicare and Medicaid payments for ordinary nursing services (bathing, dressing, assistance in walking) to patients in Christian Science sanitoria and other "religious nonmedical health care institutions," which in turn are exempted from various requirements applicable to medical providers.[301] The provisions are designed to make it possible

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[299]See *supra* notes 260-61 and accompanying text.

[300]212 F.3d 1084 (8th Cir. 2000), cert. denied, 532 U.S. 957 (2001).

[301]Balanced Budget Act of 1997, Act of Aug. 5, 1997, Pub. L. No. 105-33, § 4454 (amending various sections of 42 U.S.C. §§ 1320c, 1395i, 1395x, 1396a, and 1396e).

for Christian Scientists and others who choose spiritual treatment over medical care to receive benefits for the secular nursing care that accompanies their spiritual treatment. The Eighth Circuit correctly held that the provisions create no improper incentive to choose spiritual treatment.[302] People who forego mainstream medicine in favor of spiritual treatment do so because they have already decided that way as a matter of religious conscience, not because the government makes reimbursements available for nursing services.

The general principle behind the *CHILD* decision is that special protection for a religious choice in a benefits program is acceptable if it is offset because the religious option is less attractive in other respects, so that overall there is no "skewing" toward religious choices. Not only is spiritual treatment unattractive to those outside the faith, but the statute authorizes payment only for the subset of nursing services, leaving the patient to pay for the costs of the spiritual treatment (while the government would pay for the cost of medical services).[303] This argument might apply by analogy to certain conditions on a voucher program, at least if religious schools receive significantly lower voucher payments than many of their secular counterparts, as was the case with the Cleveland program.

There are good reasons for a legislature enacting a choice program to try to preserve flexibility and autonomy for the participating schools; and for the reasons above, exempting religious schools from conditions on participation may be acceptable to courts in some cases. But these waters are largely uncharted. It would be safer for a legislature seeking flexibility for participating schools to do so for all such schools, religious and secular.

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[302]212 F.3d at 1096-98.

[303]See Children's Healthcare Is a Legal Duty v. Min de Parle, 212 F.3d 1084, 1096-98 (8th Cir. 2000), cert. denied, 532 U.S. 957 (2001).

Conclusion

The questions concerning school choice programs that remain after *Zelman* are complicated, and many of them are not strictly dictated by precedent. But the cumulative arguments make a strong case that once vouchers are made available for use at private schools, they must be available for use at religious schools as well. As applied to other conditions on voucher eligibility, these arguments produce more complex results, validating an number of these conditions but invalidating others. The general principle is that enunciated in *Zelman*. If the state provides educational benefits, at least those that encompass private schools at all, then families – especially low-income families, who depend highly on those benefits for an adequate education for their children – should be able to use them at schools that meet educational standards, without regard to whether those schools are religious.