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The Decline of the Establishment Clause: Effect of Recent Supreme Court Decisions on Church-State Relations

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NOTE

THE DECLINE OF THE
ESTABLISHMENT CLAUSE:

EFFECT OF RECENT SUPREME
COURT DECISIONS ON
CHURCH–STATE RELATIONS

LOUIS H. HEILBRON*

INTRODUCTION

This note relates how a grand constitutional concept set forth in the First Amendment has suffered serious erosion in the last twenty years through decisions of the United States Supreme Court. In particular, two recent decisions have had a profound effect on church-state relations by merging, rather than separating, church and state. Both cases were five-to-four decisions and in the educational field: Zelman v. Simmons-Harris concerning vouchers and Good News Club v. Milford Central School concerning after-class activities in a public elementary school.¹ The combined opinions cover almost 200

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¹ Zelman v. Simmons-Harris, 536 U.S. 639 (2002), Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). Establishment clause cases and comments could fill a small library. For an excellent summary of the opposing social and political forces joined in the conflict over school vouchers see Charles Fried, Five to Four: Reflections on the School Voucher Case, 116 Harv. Law Rev. 163 (analyzing the Zelman case opinions in the context of five-to-four decisions and their effect on Supreme Court jurisprudence).
papers of rationale, argument, and citations. This article attempts to set forth the main points of differences and provides some comment with respect to them. The evidence of the erosion will be found in the opinions.²

ANALYSIS

Zelman involves an Ohio statute that provides scholarship aid to families in any school district under state control pursuant to federal court order.³ The only district to accept the program was Cleveland, however, whose public schools were performing miserably.⁴ In every grade, Cleveland was among the worst in the nation in test evaluations, in the percentage of dropout, and in school attendance.⁵ The most adversely affected children were those from minority families living below the poverty line.⁶

In an attempt to remedy the situation, the Ohio state scholarship project allows parents in low-income families to choose among several tuition programs.⁷ Parents may either receive payments for tutors if they wish their children to remain in public school or select and assign payments up to $2,250.00 for tuition to a secular or religious private school.⁸ The tuition amounts are determined by the level of financial need.⁹ Other existing publicly funded schools are available for parental choice including community or chartered schools and magnet schools.¹⁰

² My interest is simply to highlight certain of the contentions in the Supreme Court opinions that show the vigor of the debates in the two subject cases and to indicate the views of the dissenters with their emphasis on substantive religious content which may yet revive the Establishment Clause in this educational area.
⁴ Id. at 645.
⁵ Id. at 644.
⁶ Id.
⁷ Id.
⁸ Id. at 645-6. Ninety percent of the amount charged for such assistance up to $360.00. For a review of the Establishment Clause Jurisprudence and its inconsistencies, see comment Ashley M. Bell, "God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273 (2001).
¹⁰ Id. at 647. Magnet Schools specialize in teaching methods or subjects like foreign language, computers or the arts.
During this period, eighty-two percent of the available private schools were religious. Ninety-six percent of the low-income parents chose to send their children to religious schools. The participating private schools had to agree not to discriminate on the basis of race, religion, or ethnic background, advocate or foster unlawful behavior or teach hatred of any person or group. Chief Justice Rehnquist, speaking for the court, held that there was no constitutional violation. The question presented was whether the government aid to the religious schools violated the Establishment Clause. The scholarship law had a clear secular basis: to provide educational assistance for poor children failing in public school. Government enhancement or endorsement of religion was not involved, because the government occupied a neutral position. Not only did the parents endorse the government checks to the private schools, but the choice of school was that of the parents in the district; they had the benefit of a variety of options.

The court declared the holding to be in line with decisions supporting indirect public aid to religious institutions. Rehnquist called attention to a number of Supreme Court cases, stressing *Mueller v. Allen*, *Witters v. Washington Department of Services for the Blind*, and *Zobrest v. Catalina Foothills School District*. In these cases, the aid was directed by individual or parental choice where a large class of people were entitled to make the choice.

In *Mueller*, the subject Minnesota statute permits parents to deduct from state income taxes the costs of tuition, text-

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11 Id.
12 Id.
13 Id. at 645.
14 Id. at 644.
15 Id.
16 Id. at 649. The principal constitutional question on the validity of vouchers has been determined. Many states, however, have constitutional restrictions more restrictive than the Establishment Clause in the Constitution. See *Sands v. Morongo United Sch. Dist.*, 53 Cal. 3d 863, 882 (Cal. 1991). These may be the subject of future litigation.
18 Id. at 646.
19 Id. at 649.
20 Id.
books, and transportation, regardless of whether their children attended public, secular, or religious private schools. All taxpayers were deemed to have the privilege, but the parents of children in public schools did not receive tuition money for regular sessions. Instead, they were given other minor benefits similar to those received by the parents of children enrolled in private schools. Naturally, the state paid the teachers, administrative and miscellaneous expenses of the public schools. Reviewing Minnesota’s program in *Mueller* as a whole, the Court in *Zelman* found that the selection of the religious schools represented numerous private choices available to individual parents of school-age children. No “imprimatur of state approval” was found even though the great majority of the beneficiaries (ninety-six percent) were parents of children in religious schools.

In *Witters*, the court upheld a scholarship program that provided tuition aid, under vocational assistance to the blind, to a student studying at a religious institution to become a pastor. The individual had numerous options to obtain a vocational or professional education at other colleges, but he independently chose a religious institution. Similarly, in *Zobrest*, an individual selected a religious school for his education. He was deaf and required a sign-language interpreter to assist him in the course of instruction. Such interpreters were available at public expense in all public and private schools. This was a neutral service with respect to religion, providing assistance to a broad class of citizens, some of whom directed government aid to religious schools.

The Court’s position in *Zelman* is clearly set forth in the final paragraph of its opinion:

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23 *Id.* at 391.
24 *Id.*
25 *Id.*
27 *Id.* at 658.
29 *Id.* at 487-88.
31 *Id.* at 3.
32 *Id.*
33 *Id.* at 10.
In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

Justice O'Connor in a concurrent opinion emphasizes true private choices and the neutrality of the provisions of the voucher law. She refers to a substantial number of situations involving independent aid where religious schools have shared benefits available to public schools, nonsectarian private schools, and charitable institutions. In particular, she refers to real estate and income tax exemptions available to religious institutions as well as to charitable programs, including reimbursement to parents for transportation costs to and from school, whether sectarian or nonsectarian; Medicare funds available to religious affiliated hospitals; federal tuition dollars spent for tuition at private four year colleges; and federal funding of social and health programs administered by religious affiliated institutions. Compared with these public aid programs, the Ohio program expense represents a drop in the bucket.

Justice O'Connor refers to the three-pronged test to determine whether a statute passes the requirements of the Establishment Clause, namely, that it has a secular legislative purpose, that its principal or primary effect is one that neither advances nor inhibits religion, and it does not foster an excessive entanglement with religion. The second and third prongs, she holds, rest on the same evidence. In the case of indirect aid, the program passes the test if it is administered in a neutral fashion, without differentiation based on religious status of the beneficiary or provider of services, and if beneficiaries have a...
genuine choice among religious and non-religious organizations. Applying the test to the facts in the instant case, she finds no primary effect of advancing religion or excessive entanglement."

Justice Thomas, in his concurring opinion, sets forth the provocative thesis that the Fourteenth Amendment should be less rigidly applied in Establishment Clause cases to state action than in other First Amendment cases."

His position is that the Fourteenth Amendment emphasizes equality of treatment. States should be allowed to experiment in ways to provide equality in public, private, sectarian or non-sectarian schools. In effect, the subject statute provides equal opportunity for quality education to the poor, especially minority poor, and he asserts, has the same objective as Brown v. Board of Education."

The dissenting opinions, to a considerable extent, disregard arguments of the majority as being preoccupied with the formal, procedural effects of the case. The majority opinion stresses the principle of neutrality in the administration of the aid; the idea that choice by the parents makes a substantial difference and provides constitutionality in an otherwise unconstitutional situation. If the effect of indirect aid is the same as of direct aid, and in such case would be in violation of the Establishment Clause, parental choice cannot bridge the breach. The dissents dwell on the nature of the religious education, the claim of religious indoctrination, and the present or potential effect of social division resulting from validating the Ohio statute.

Justice Breyer is deeply concerned about the potential effect of general government support of religious schools, direct or indirect. He believes that "The [First Amendment] Clauses

40 Id.
41 Id. at 678-9. This thesis was previously advanced by Justice Harlan. Id. at 679, citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 699 (1970) (concurring).
42 Id.
43 Id.
44 Id. at 667.
45 Id. at 685.
46 Id. at 653.
47 Id. at 664.
48 Id. at 687.
49 Id. at 717.
reflect the Framers' vision of an American nation free of the religious strife that had long plagued the nations of Europe.\textsuperscript{50} Many of the Court's 20th century Establishment Clause cases "focused directly upon social conflict, potentially created when government becomes involved in religious education." \textsuperscript{51} Thus, it was held that the Establishment Clause forbids prayer in public, elementary, or secondary schools, Bible reading in class, and state funding of religious school teachers. \textsuperscript{52} The purpose, in part, was to avoid religious divisiveness.\textsuperscript{53} True, the divisiveness factor was not present "in the early years of the Republic."\textsuperscript{54} Students attending public schools were almost entirely Protestants.\textsuperscript{55} By the mid-19th century, however, immigration changed the religious populations and non-Protestant religions, Catholics in particular, began to resist Protestant domination.\textsuperscript{56} In turn Protestants "terrorized Catholics," and Catholics sought public assistance for their schools.\textsuperscript{57} The courts were confronted with two possible solutions to avoid the restrictions of the Establishment Clause: 1) give government support to all religions on an equal basis or 2) separate them.\textsuperscript{58} Diversity made equal-opportunity funding for all religions impossible without promoting competition and religious strife.\textsuperscript{59} As a result, fairly clear lines of separation between church and state had to be drawn, certainly "where primary religious education is at issue."\textsuperscript{60}

More than fifty-five different religious groups and subgroups now exist in the United States.\textsuperscript{61} Equal treatment of religions in the primary and secondary classrooms would be impossible because of such diversity of beliefs and practices.\textsuperscript{62}

\textsuperscript{50} Id. at 718, citing Freund, \textit{Public Aid to Parochial Sch.s}, 82 HARV. L. REV. 1680, 1692 (1969).
\textsuperscript{51} Zelman, 536 U.S. at 718.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 719
\textsuperscript{54} Id. at 720
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 720-1.
\textsuperscript{58} Id. at 721.
\textsuperscript{59} Id. at 722.
\textsuperscript{60} Id. at 723.
\textsuperscript{62} Zelman, 536 U.S. at 723.
The separation objective is essential. General government support of religious private education would provoke competition for public money; "it will tap sectarian religion's capacity for discord." Moreover, in the attempt to assure fair treatment, government would become unduly involved in rulemaking and intrusion into the religious program concerned.

In this light, Justice Breyer further considers the Ohio statute. He notes that it provides that no participating school "teach hatred of any person or group" on various grounds, including religion. The state is required to revoke registration "if after a hearing," the superintendent finds a violation of the voucher program's rules. "What kind of public hearing will there be in response to claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light?" In addition, when a claim that one religion or another takes a controversial view of a topic of great general interest, such as the conflict in the Middle East, efforts to respond will "seriously entangle church and state" and "promote division among religious groups," particularly "if a religious group fears unfair treatment at the hands of government." The Justice continues: school voucher programs differ from the neutral kind of government assistance given in the form of secular textbooks and computers furnished religious schools. The voucher programs "direct financing to a core function of the church: the teaching of religious truths to young children."

Justice Rehnquist replies to Justice Breyer in a footnote in the majority opinion. He states that "Breyer would raise the invisible specter of 'divisiveness' and 'religious strife' to find the program unconstitutional." The court rejected the claim that some speculative potential for divisiveness bears on the consti-
tutionality of educational aid." Such considerations, once occupied the court, were eliminated by the decision in Aguilar v. Felton. 76 "It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit." 77

Justice Stevens finds that a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths is a "law respecting an establishment of religion" and violates the first amendment. 78 He considers irrelevant the "severe educational crisis" that confronted the Cleveland City School District, the wide ranges of choices that had been made available to students within the public school system and the voluntary character of the private choice to prefer a parochial education over an education in the public school system. 79 He agrees with his fellow dissenters that the Court's decision is "profoundly misguided" and increases the risk of religious strife. 80

Justice Souter traces the history of the relationship of the Establishment Clause to education since Everson v. Board of Education of Ewing. 81 The principle was clearly stated: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 82 He states that the court "has never in so many words overruled Everson." 83

In the Cleveland case, the overwhelming amount of the voucher money was spent for the support of religious schools, paying for students' instruction in secular subjects and in religion as well, "in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension." 84 He then details many of

74 Id.
75 Id.
77 Zelman, 536 U.S. at 684.
78 Id. at 684-85.
79 Id. at 685.
80 Id. at 686.
81 Id. at 687 citing Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947).
82 Zelman, 536 U.S. at 687.
83 Id.
the leading cases in the modern era that have led “to doctrinal bankruptcy.”84 While Everson espoused the basic principle of no tax dollars for religious education, it allowed, with some tension, the right of free transportation for all children to and from schools, including religious schools, as a public service.85 Then followed approval of lending textbooks to religious schools for teaching secular subjects, characterized as a benefit to parents despite dissents that book use may “inevitably tend to the religious views of the favored sect.”86

Lemon v. Kurtzman recognized that supplementing salaries for teachers of secular subjects, in a pervasive religious atmosphere, would require intensive government monitoring resulting in unconstitutional entanglement.87 For a number of years following Lemon, any improper diversion of public aid to religious purpose was found unconstitutional. In Grand Rapids v. Ball, a Michigan school district provided “remedial and enrichment” support to the core curriculum in mathematics, reading, art, and physical education in non-public schools, particularly religious schools.88 The parent handbook of a Catholic school stated the goal as a “God-oriented environment which permeates the total educational program.”89 The policy statement in other schools emphasized that the “word of God must be an all-pervading force in the educational program.”90 The court concluded “that the challenged programs have the effect of promoting religion.”91

Beginning with Mueller v. Allen, the court paid less attention to the prospect of division.92 Minnesota tax deductions for tuition and other expenses of parents of children attending religious school were upheld on the basis that the deductions were available to all parents.93 The court reasoned that parents were making private choices when they sent their children to parochial schools instead of to public or private secular

84 Id. at 688.
85 Id. at 689.
86 Id. at 690.
89 Id. at 379.
90 Id.
91 Id. at 397.
93 Id. at 397.
schools. The opposite result was reached in Committee for Public Education and Religious Liberty v. Nyquist. This court struck down a New York program of tuition grants for poor parents and tax deductions for more affluent ones who sent their children to private schools. Although only fifteen percent of religious school budgets was furnished by government, the aid supported religious uses. Though the aid was provided through parents, the program did not evade the Establishment Clause restriction.

Between 1985 and 1997, a series of cases emphasized neutrality and private choice. The aid was isolated from the religious program. Money for a sign-language interpreter in a religious school, aid to disabled children as the main beneficiaries of a religious social association, and use of neutrally available public funds to pay for an evangelical magazine, along with other student magazines printed by the University of Virginia, were approved. Grand Rapids was overruled in Agostini v. Felton, which held that remedial education was simply supplemental education to eligible students and devoid of religious influence. With respect to the use of vouchers, Justice Souter contends that neutrality is more than evenhandedness.

The appropriate question is, "Does the scheme follow a religious direction?" Choice in Cleveland, with respect to the use of vouchers, was narrow. Only ninety percent of $360 in a public school or up to $2,250 in private schools, secular and religious, most of it being directed to religious schools, was spent. The private secular schools were not in a position to accommodate many voucher children because of a lack of capacity.

Souter does not consider the existing public schools, including charter and magnet schools, as part of the voucher system of choice. The evidence is that "almost two out of three families using vouchers to send their children to religious

94 Id. at 399.
96 Id. at 798.
97 Id. at 787-88.
98 Id. at 798.
100 Id. at 253.
102 Id. at 646.
103 Id. at 647.
schools did not embrace the religion of those schools.” They sent their children because of the educational opportunity, not because they wished their children to be proselytized. Thus, he claims almost ninety-seven percent of voucher money going to the religious school simply does not reflect a genuine freedom of choice.

With respect to educational content, he points out that most of the aid supports the whole religious enterprise, not just the secular part. A tax to support a religion is against the freedom of conscience. Madison thought the Establishment Clause was violated by any “authority which can force a citizen to contribute three pence ... of his property for the support of any ... establishment.”

Finally, he contends “an objective of the Establishment Clause is to save religion from its own corruption and to prevent efforts to shape beliefs in order to gain political advantage, particularly to compete for public funds.” The door of government religious regulation is opened. Efforts already are underway to raise the value of vouchers. If aid goes up, independence will come down; perhaps government will hold a veto on curriculum. So, we end with “doctrinal bankruptcy.” Justice Souter’s last two lines express a hope that a future court will reconsider.

The Good News Club v. Milford Central School involved school children, but under entirely different circumstances. This case dealt with activities after school on premises made

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104 Id. at 704.
105 Id.
106 Id. at 707.
107 Id. at 708.
108 Id. at 711.
109 Id.
110 Id.
111 Id. at 706.
112 Id. at 715.
113 Id. at 688.
114 Id. at 716.
115 The Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). It has been asserted that the Good News decision can be applied in a manner that maintains the separation of church and state by opening the after class sessions hours later rather than immediately after the close of the regular sessions, thus arguably removing any sense of public school endorsement of the religious program. James L. Underwood, Applying the Good News Club Decision In a Manner That Maintains the separation of Church and State in Our Sch.s, 47 VILL. L. REV. 281 (2002).
available by the school district.\textsuperscript{116} The same differences in perceptions of what is government neutrality and improper government endorsement mark the majority and dissenting opinions.

Milford Elementary School, under New York law, was authorized to adopt policies allowing it to open its building to public use.\textsuperscript{117} In 1992, the school enacted a policy adopting purposes for which its building could be used after school, including "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."\textsuperscript{118} The parties agreed that the policy provided for a limited public forum.\textsuperscript{119}

The Good News Club is a private organization for children ages six to twelve supported by an evangelical religious society.\textsuperscript{120} The Club sought permission to hold immediate after-school meetings in the school building.\textsuperscript{121} With respect to these meetings, the Club advised:

The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next, Club members engage in games that involve, inter alia, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with a prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.\textsuperscript{122}

The Milford School determined that activities so described "were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of reli-

\textsuperscript{116} Good News, 533 U.S. at 102.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 106.
\textsuperscript{120} Id. at 103.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
gious instruction itself. The Milford Board of Education rejected the Club’s request for use of the school facilities.

The Club filed an action in the United States District Court for the Northern District of New York alleging that Milford’s denial violated its free speech rights and its right to equal protection under the Fourteenth Amendment. The district court gave summary judgment in favor of the Milford School, determining that the subject matter “is decidedly religious in nature.” Upon appeal to the Supreme Court, the district court’s holding was reversed.

The majority opinion, written by Justice Thomas, held that the Club was entitled to use the school premises for its program. The court declared that the state’s restrictions on speech are subject to stricter scrutiny in a traditional or open forum than in a limited public forum. In this context of a limited forum, the State must not discriminate against speech on the basis of viewpoint. To exclude the Club program amounted to “viewpoint discrimination.” Milford was simply engaging in discussion of subjects such as child rearing and “the teaching of morals and character from a religious standpoint.” One could use Aesop’s Fables to teach children moral values or the Boy Scouts could meet “to influence a boy’s character, development and spiritual growth.” Any group that “promotes the moral and character development of children” would be eligible to use the school building and that must include The Good News Club.

123 Id. at 103-4.
124 Id. at 104.
125 Id.
126 Id. at 104-5.
127 Id. at 120.
128 Id. at 102.
129 Id. at 106.
130 Id. at 106-7.
131 Id. at 109.
132 Id. at 108.
133 Id.
134 Full discussions of the Milford case are contained in Leading Cases, 115 Harvard L. Rev. 396, 397 (2001) and in an essay in James L. Underwood, Applying the Good News Club Decision In a Manner That Maintains the separation of Church and State in Our Schools, 47 Vill. L. Rev. 281 (2002). Both articles point out that under the limited forum doctrine, the right of religious groups to access public facilities for extra-curricular meetings has now been recognized in state universities, public secondary schools and now in grade schools, the elementary schools requiring parental consent. As for content, the Harvard article contends that worship often contains moral
The opinion cited *Lamb's Chapel v. Center Moriches Union Free School District.* The school district in that case had opened its forum to "social, civic, or recreational use." The school district was found to have engaged in viewpoint discrimination when it excluded showing films in the evening on school premises that sought to teach moral lessons from a Christian perspective. The opinion also cited *Rosenberger v. Rector and Visitors of University of Virginia,* in which the Supreme Court overturned the United States Court of Appeals for the Fourth Circuit decision that denied university funding for printing expenses of a student publication that presented a Christian viewpoint. Other student organizations, however, were entitled to the subsidy for their publications. The publication challenged Christians "to live, in word and deed, according to their faith." The Court in *Good News* said "We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.

The opinion in *Good News* held that there was no Establishment Clause violation. "As in *Lamb's Chapel,* the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members." The situation demonstrated "neutrality towards religion." The Club had sought "nothing more values and, in a relationship between speech and character development, should be on the same basis as Bible clubs. It advocates that the Establishment Clause should be used as the test for religious speech, particularly that government should not send a message that makes either religious adherents or non adherents feel isolated from the larger political community and the message is what it is perceived to be by a hypothetical reasonable observer of the community (in the Milford-type case, a child observer in the elementary school.).

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137 *Id.* The forum was open mainly to adults
138 *Id.* at 110, citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).
139 Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S at 826.
140 Good News, 533 U.S. at 110.
141 *Id.* at 111.
142 *Id.* at 112.
143 *Id.* at 113.
144 *Id.* at 114.
than to be treated neutrally and given access to speak about the same topics as other groups.\textsuperscript{145}

Justice Scalia concurred wholly.\textsuperscript{146} Regarding free speech, he said that the main purpose of the Club is to urge children to moral conduct; the fact that additional religious speech, "to trust the Lord Jesus to be their Savior from sin," does not transform the Club's meetings into something different from other non-religious activities that teach moral and character development.\textsuperscript{147} It is error to require sterility of speech that is not demanded of other groups.\textsuperscript{148} The Boy Scouts are urged "to keep morally straight" and give reasons for doing so.\textsuperscript{149} The Club should be allowed to urge good moral behavior because it emulates Jesus Christ.\textsuperscript{150}

On the establishment issue, Justice Scalia found no invalid endorsement where religious expression is purely private and "occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."\textsuperscript{151} Regarding proselytizing he said: "A priest has as much right to proselytize as a patriot."\textsuperscript{152}

Justice Breyer joined the decision in part, but considered the record was insufficient for a ruling on the Establishment Clause.\textsuperscript{153} Any evidence showing how a reasonable child would understand the school's role, as endorsing or not endorsing a religion, was lacking.\textsuperscript{154}

Justice Stevens dissented, pointing out that religious speech is divided into three categories; 1) moral issues from a religious perspective, 2) worship, and 3) proselytizing.\textsuperscript{155} He contends that a limited forum can be declared by a school district giving access to public facilities.\textsuperscript{156} The schools may prop-

\begin{quote}
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 120.
\textsuperscript{147} Id. at 123.
\textsuperscript{148} Id. at 124.
\textsuperscript{149} Id. Boy Scouts are asked to emulate past Boy Scout President Gerald Ford
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 121.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 129.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 130.
\textsuperscript{156} Id. at 129.
\end{quote}
erly exclude worship and proselytizing. In this case, the third, proselytizing was properly excluded.

Justice Souter gave a vigorous dissent referring to details that were not set forth in the other opinions, in part as follows:

While Good News's program utilizes songs and games, the heart of the meeting is the "challenge" and "invitation," which are repeated at various times throughout the lesson. During the challenge, "saved" children who "already believe in the Lord Jesus as their Savior" are challenged to "stop and ask God for the strength and the "want" ... to obey Him." "They are instructed that "[i]f you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will – we will pray with you separately, individually.... And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey Him."

On the basis of the foregoing, Souter concluded "it is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion." Souter did not believe that there was an adequate record for the court to make a ruling on the Establishment Clause. Since, however, the majority acted on the matter, he observed "that the Establishment Clause cases have consistently recognized the particular impressionability of school children ... and the speech protection required for those in elementary grades in the school forum." There isn't the same opportunity that university students and adults have for

157 Id. at 132.
158 Id. at 133.
159 Id. at 137. Justice Ginsberg joined in the dissent. "During the invitation, the teacher "invites" the "unsaved" children" to "trust the Lord Jesus to be your Savior from sin," and "receive[es]him" as your Savior from sin." The children are then instructed that "[i]f you believe what God's Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God's Word how you can receive His everlasting life."
160 Id. at 138.
161 Id. at 144-45.
162 Id. at 142-23.
intellectual exchange.\textsuperscript{163} He further pointed out that the "timing and format" of the Good News gatherings may well suggest that there is school endorsement of the Club’s activities in the minds of the young children.\textsuperscript{164}

**COMMENT**

The founding fathers labored hard to produce the Constitution, but they adjourned without providing for any bill of rights. They felt that the basic individual rights of citizens were so well understood and exercised by the people of their states that it was not necessary to enumerate them by a series of negative statements. The states, however, during the ratification process, did not agree. They insisted that the new federal government expressly recognize certain clear prohibitions on its authority in order to guarantee the fundamental rights of its citizens. It is indicative of the importance of the matter that the very First Amendment begins with the protection of religious rights, first by prohibiting any law respecting the establishment of religion, then assuring the right of the free exercise of religion. At the same time, the Amendment guarantees the general right of freedom of speech and, as a result, there are times when the Establishment Clause and the free speech clause have been held in tension.

Regarding Justice Rehnquist’s criticism that Justice Breyer’s comments are speculation, the prohibition set forth in the Establishment Clause may well be characterized as "speculative."\textsuperscript{165} There were no diverse religious problems at the time of its adoption. When speculation is based on the experience of history, it merits special attention and respect. By the mid-19th century, people in the United States were engaged in religious controversy in the area of education. Indeed, the history of religious mistrust has been brought forward to the present in Northern Ireland, the Middle East, and Bosnia. Contrary to Justice Rehnquist’s criticism, Justice Breyer’s dissent is consistent with the speculative concerns of the Establishment Clause itself.

\textsuperscript{163} Id. at 143.
\textsuperscript{164} Id. at 144.
\textsuperscript{165} Zelman v. Simmons-Harris, 536 U.S. 639, 662 at n7 (2002).
The struggle between form and substance is clearly evident in the clash between majority and minority opinions in both the *Zelman* and *Good News* cases. The majority relies on procedural neutrality, as supported in recent cases, to validate government aid to religious activity. The parents choose, the individual chooses, the government funds or assists, but there is no government endorsement of religion. The substantive effect of religious content, however, is disregarded. Teaching an entire curriculum in the context of a religious mission in *Zelman* seems clearly to advance religion. The pervasive religious ritual and content in *Good News* is substantially more than an expression of a point of view.

In *Bowen v. Kendrick*, the court held that government aid could be given to a religious organization providing care services to pregnant adolescents irrespective of performing the services in an environment of religious symbols or of the religious affiliation of teachers or caregivers. A spate of federal statutes followed, authorizing aid to sectarian along with secular organizations. The prevailing sectarian implementation in the states is by church-sponsored, affiliated agencies such as hospitals, health services, and psychiatric care. The statutes, however, carry the restriction that the rendering of the service must not violate the Establishment Clause. The intent appears to be that sponsorship may be by a religious institution, but the service must not be accompanied by religious pressure or proselytization.

The majority opinions in the *Zelman* and *Good News* cases are not concerned with any threat to society and religious institutions posed by the prospects of entanglement. The risks of entanglement, when government interferes to protect the public purpose, are stated in Justice Douglas's concurring opinion in *Lemon*:

> The surveillance or supervision of the States needed to police grants involved in these cases, as aforementioned, puts a public investigator into each classroom and entails a pervasive monitoring of these church agencies by the secular authori-

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168 See *supra* note 166.
ties. Yet, if every day surveillance or supervision does not occur, the zeal of religious proselytizers promises to carry the day and make a shambles of the Establishment Clause. Moreover, when people of many faiths are required to contribute money for the propaganda of one faith, the free exercise clause is infringed.\textsuperscript{169}

The most recent cases have required little, if any, monitoring. If the religious mission and government support become excessively intertwined by reason of school policy and mission, the program should be declared unconstitutional. The mission itself excludes monitoring.

Under prevailing law, if proselyzing or a particular religious emphasis invests the administration of a charitable service, will the government monitor, or hearing officers intervene and affect the religious practice itself? Does faith-based service mean more religious content than faith-sponsored service? Leaders of some religious institutions have expressed their concern over the pending faith-based legislation. The proposed laws may authorize government departments to promulgate rules for the funding of charitable agencies that would adversely affect religious practice or the religion itself. The sectarian concern is that expanded government funding of religious institutions providing social services will result in the unhappy joining of politics and religion. Inevitably a divisive competition for public funds and influence will result.

Still untouched by the view of neutrality are several Establishment limitations affecting the public schools such as the prohibition of school prayers, the reading of Biblical verses before the start of classes, moments of silence or prayer in the classroom, student-led prayer at football games, benedictions by clergymen at graduation ceremonies,\textsuperscript{170} or the posting of the Ten Commandments in the classroom or athletic arena. The reason for the prohibitions is the divisive effect of such programs and the embarrassment of children who do not accept the prayer. While school prayer is still targeted for legislation by some religious groups, it appears to be a long way from passage or ultimate reconsideration by the Supreme Court.


\textsuperscript{170} Notwithstanding administrative efforts to require non-secular content or to invite pastors of different faiths to perform the service.
Also untouched are practices justified as complying with the Establishment Clause by long historic custom such as invocations and benedictions at congressional and state legislative sessions. The incoming President swearing on the Bible, "so help me God," and "In God We Trust" on the coinage are all phenomena that, in effect, have become secularized.

Embodying in American culture are high moral values derived from religious sources. Religious content, however, covers much more than strictures for moral behavior. Religions differ regarding content, including views on the relations of the individual to a Supreme Being or Authority; divine revelation and judgment during life and after life; the origin of the world and of man; ritual; prayer; and social practices. When government funds provide total tuition for a student attending a religious school whose religious mission is declared to permeate the curriculum, the government is supporting and advancing whatever aspects of religious content are being taught. This may be contrary to the government's general educational position. The Supreme Court, for example, held that a state law requiring public schools to teach "Creation Science," if the theory of evolution is taught, violated the Establishment Clause as impermissibly endorsing and advancing religion. The implication in Zelman, however, is that public funding of such teaching, or of Creation alone, would be supported in a voucher system shielded by parental consent.

The First Amendment provides guarantees protective of religion. Free exercise of speech and religion with varying theologies, rituals, and practices has flourished thereunder. The United States is the most church-affiliated society in the western world. The First Amendment, however, begins with the prohibition stated in the Establishment Clause. The Supreme Court developed a three-pronged test to assure compliance with this limitation. This test is becoming less and less difficult to meet and the authority of the Establishment Clause is declining.

171 Edwards v. Aquillard, 482 U.S. 578, 579 (1987); Ashley M. Bell, "God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273 (2001) (arguing how current Establishment Clause jurisprudence can be reconciled with the secularization of historical religious expressions).
Many share Justice Souter’s hope that the Court will reconsider. Reconsideration by a future court will bring the Establishment Clause out of “doctrinal bankruptcy” to its proper level of effectiveness. This will result, in part, from paying appropriate attention to the nature and extent of religious content when evaluating the constitutionality of government grants to religious institutions.