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Law and Religion in American Education

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Abstract

This Article analyzes the major United States Supreme Court cases on the role of religion in public schools, the role of government in religious schools, and the place of religious rights of students and parents in all schools. It shows how the Court's religion cases have vacillated between principles of strict separation of church and state and accommodation and equal treatment of religion. It shows how the Court has slowly come to protect and enhance the freedom of parents and students to choose between public and private education. And it shows how the Court has long protected students from being coerced to participate in religion or to abandon their religious practices.

Keywords: First Amendment; establishment clause; free exercise clause; equal access; separation of church and state

Introduction

While American schools are governed by sundry federal, state, and local laws, the most important law on religion and education is the First Amendment guarantee: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Of the United States Supreme Court's 200 plus cases on religious freedom, fully 60 cases have been on issues of religion and education – most of them announced after 1940, the year the Court began to apply the First Amendment to state and local governments alongside "Congress."

These cases address three main questions: (1) What role may religion play in public school education? (2) What role may government play in private

religious education? and (3) What religious rights do parents and students have in public and private schools? The Court has worked out a set of rough answers to these questions, which lower courts have continued to refine and extend. While government has the power to mandate education for all children, parents have the right to choose public, private, or home school education for their minor children, and government may now facilitate that choice through vouchers and tax relief. While the First Amendment forbids most forms of religion in public schools, it protects most forms of religion in private schools. While the First Amendment forbids government from funding the core religious activities of private schools, it permits delivery of general governmental services and subsidies to public and private schools and students alike. While the First Amendment forbids public school teachers and outsiders from religious instruction and expression in classes and formal school functions, it permits public school students to engage in private religious expression and protects these students from coerced religious activities. It further requires that religious students and other private parties get equal access to public school facilities, forums, and even funds that are open to their non-religious peers for non-school functions.

Religion and Public Education

Separation of Church and State. In a forty-year series of cases beginning in the 1940s, the Court developed a general argument about the limited place of religion in public schools. The public school is a government entity, the Court argued, one of the most visible and well-known arms of the government in any community. The public school is furthermore a model of constitutional democracy and designed to communicate core democratic norms and constitutional practices to students. The state mandates that all able students attend schools, at least until the age of sixteen. These students are young and impressionable. Given all these factors, the public school must cling closely to core constitutional and democratic values, including the core value of separation of church and state. Some relaxation of constitutional values is possible in other public contexts, where adults can make informed assessments of the values being transmitted. But no such relaxation can occur in public schools with their impressionable youths who are compelled to be there. In public schools, if nowhere else in public life, strict separation of church and state must be the norm.

The case that opened this series was *McCullum v. Board of Education* (1948). At issue was a “release time” program, adopted by a local public school board for fourth through ninth grade students. Once a week, students were released from their regular classes to be able to participate in a religious class taught at the public school. Three religious classes were on offer -- Protestant, Catholic, or Jewish – reflecting the religious makeup of the local community. These classes were voluntarily taught by qualified outside teachers, approved by the principal. Students whose parents did not consent continued their “secular

studies” during this release time period. A parent challenged the program as a violation of the First Amendment establishment clause. The *McCullum* Court agreed, finding that this program constituted the use of “tax-supported property for religious instruction and the close cooperation between school authorities and the religious council in promoting religious education.”

The operation of the State’s compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects.... This is beyond all question a utilization of the tax-established and tax-supported public school to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment [that] ... erected a wall of separation between Church and State.

In *Engel v. Vitale* (1962), the Court extended this reasoning to outlaw prayer in public schools. The New York State Board of Regents had adopted a nondenominational prayer to be recited by public school teachers and their students at the commencement of each school day: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.” Students who did not wish to pray could remain silent or be excused from the room during its recitation. Parents challenged the practice as a violation of the establishment clause. The *Engel* Court agreed and struck down the practice:

It is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.... Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the Establishment Clause.... When the power, prestige, and financial support of government [are] placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

This prohibition on prayer in public schools has remained good law. In the controversial case of *Wallace v. Jaffree* (1985), the Court struck down a state statute that authorized even a moment of silence at the beginning of each school day for “meditation or voluntary prayer,” because the legislature had betrayed its “intent to return prayer to the public schools.” *Lee v. Weisman* (1992) outlawed a local rabbi’s prayer at a one-time public middle school graduation, arguing that such prayers effectively coerced students to participate in religion. And *Santa Fe*

Independent School District v. Doe (2000) outlawed elected student-led prayers at the start of each public school football game, arguing that this policy not only coerced students but constituted governmental endorsement of religion.

In *Abington Township School District v. Schempp* (1963), the Court outlawed the reading of ten Bible verses at the beginning of each public school day. Either a teacher or a volunteer student would read a text of their choice, with no commentary or discussion allowed. Students whose parents did not consent could refuse to listen or leave the room. After *Engel*, the *Schempp* Court found this an easy case. The policy in question was an overtly religious exercise, mandated by the state, for impressionable youths required to be in school, with no realistic opportunity for the average young student to forgo participation. “[I]t is no defense that the religious practices here may be relatively minor encroachments on the First Amendment,” Justice Clark wrote for the Court. “The breach of neutrality that is today a trickling stream may all too soon become a raging torrent.”

In *Stone v. Graham* (1980), the Court further struck down a state statute that allowed private group to donate and hang the Ten Commandments in public high school classrooms. There was no public reading of the commandments or endorsement of them by teachers or school officials. Each plaque described the Ten Commandments “as the fundamental legal code of Western Civilization and the Common Law of the United States.” The *Stone* Court found the Decalogue to be a “clearly religious” text no matter how it was labeled, and that its display improperly commanded students to abide by “religious duties.”

Finally, in *Edwards v. Aguillard* (1987), the Court struck down a state law that required public school teachers to give equal time to “evolution-science” and “creation-science” in their science classrooms. The Court held that the statute evinced a “discriminatory preference for the teaching of creation and against the teaching of evolution.” It aimed “to advance the religious viewpoint that a supernatural being created humankind” and “to restructure the science curriculum to conform with a particular religious viewpoint.” This was not a proper objective teaching of religion but an unconstitutional establishment of religion. Lower courts have used this precedent to outlaw “intelligent design” teachings from public school curricula as well.

Liberty of Conscience. While separation of church and state was the major key played in the Court’s early orchestrations on religion and public schools, liberty of conscience and freedom of religious exercise was a minor key that periodically sounded as well. *West Virginia State Board of Education v. Barnette* (1943) was a case in point. There Jehovah’s Witness children were expelled from a public school because they refused to salute the American flag or recite the pledge of allegiance – important patriotic acts in the middle of World War II. The Witnesses regarded such acts as idolatrous, and viewed their imposition as a violation of liberty of conscience. The *Barnette* Court agreed.

While acknowledging the importance of teaching national loyalty and unity in public schools, the *Barnette* Court held that the Witnesses should be conscientiously exempted from participating:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

In *Zorach v. Clauson* (1952), the Court further allowed students to be released from public school, at their parents' request, to attend important religious functions scheduled during school time. These functions were off school grounds and involved no school officials or expenses. Taxpayers objected that this program violated the establishment clause and its principle of strict separation of church and state. The *Zorach* Court disagreed. "We would have to press the concept of separation of Church and State to ... extremes to condemn the present law on constitutional grounds." But this is neither constitutionally necessary nor desirable. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."

Modern Equal Access Cases. While official prayers and overt forms of religious expression remain prohibited in public schools, private religious expression by public school students and others, outside of formal school hours, has come to be constitutionally protected. The Supreme Court has reached this conclusion in a series of cases that have often pitted the principles of religious equality and non-discrimination against that of separation of church and state.

The opening case in this series was *Widmar v. Vincent* (1981). The state University of Missouri had a policy of opening its facilities to voluntary student groups to use outside of formal instructional time. More than 100 student groups organized themselves in the year at issue. A voluntary student group, organized for private religious devotion and charity, sought access to the university facilities. The group was denied access, in application of the university's written policy that the campus could not be used "for purposes of religious worship or religious teaching." The student group appealed, arguing that this policy violated their First Amendment free exercise and free speech rights as well as their Fourteenth Amendment equal protection rights. The university countered that it had a compelling state interest to maintain a "strict separation of church and state."

The *Widmar* Court found for the religious student group. The Court held that where a state university creates a limited public forum open to voluntary

student groups, religious groups must be given “equal access” to that forum. Here the university “has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.” Religious speech and association are protected by the First Amendment and can be excluded only if the university can demonstrate that its statute serves a “compelling state interest and that it is narrowly drawn to achieve that end.” In the Court’s view, a general desire to keep a strict separation of church and state was not a sufficiently compelling state interest. The values of “equal treatment and access” outweighed the hypothetical dangers of a religious establishment. Three years later, Congress extended this equal access right to after-school voluntary meetings of public high school students as well. In *Westside Community Schools v. Mergens* (1990), the Court upheld that law against an establishment clause challenge, arguing that Congress had legitimately protected the rights of religious students to “equal treatment” and “equal protection.”

In *Lamb’s Chapel v. Center Moriches Union Free School District* (1993), the Court extended the “equal access” principle to other religious groups besides students. A local school board opened its public school facilities after hours to local private groups for various “social, civic, recreational, and political uses.” A state policy, however, provided that the “school premises shall not be used by any group for religious purposes.” Lamb’s Chapel, an evangelical group, wanted to use the facilities to show a film series that discussed traditional family values from a Christian perspective. When their application was twice denied, they filed suit arguing that such exclusion violated their free speech rights. The *Lamb’s Chapel* Court agreed. Relying on *Widmar*, the Court found that the school had engaged in religious discrimination, and that its concern to avoid an establishment of religion was not a sufficient reason for denying equal access to this religious group.

In *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), the Court extended this equal access logic to hold that a voluntary group of religious students in a state university was entitled to the same funding made available to nonreligious student groups to publish their materials. The University of Virginia had denied funds to a properly-registered religious student group that printed an overtly religious newspaper for circulation on campus. The group appealed, arguing that such discriminatory treatment violated their First Amendment free speech rights. The *Rosenberger* Court agreed. The state university policy, the Court opined, improperly “selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.” This was unconstitutional “viewpoint discrimination.”

In its last case in this series, *Good News Club v. Milford Central School* (2001), the Court extended the equal access logic to the public grade school. Authorized by a state statute, a local school board invited qualified local residents to use public school facilities after school hours for “instruction in any branch of

education, learning, or the arts" and for "social, civic and recreational meetings." The policy, however, prohibited use of the facilities "for religious purposes." Good News Club, a private Christian organization that instructed 6-12 year old students in Christian morality and practice, sought permission to hold the club's weekly after-school meetings in the public school cafeteria for children who attended that school. Their lesson plans involved adult-led prayers, religious songs, and student recitation of Bible verses, among other activities. Denied permission, they appealed, arguing that the policy was discriminatory against religion.

The *Good News* Court agreed, arguing that, even in a public grade school, the state "must not discriminate against speech on the basis of viewpoint." The school district was not obliged to create this "limited public forum," but once it did, any restriction had to be viewpoint-neutral and reasonable in light of the forum's purpose. The Good News Club's program clearly included "instruction in any branch of education, learning, or the arts," and it could not be excluded just because the instruction came "from a religious viewpoint."

The upshot of all these Supreme Court cases is that religious teachers, texts, ceremonies, and symbols are prohibited from the public school classroom during instructional time, and even at one-time official public school gatherings. But private religious expression by students, parents, community members, and even teachers is permissible on public school grounds before and after classes or on days when school is not in session. Students, however, may not be coerced into participation in any religious activities, whether during or after school. Lower courts and regulations have further insisted that students may not, in turn, be coerced to abandon their religious practices, such as wearing religious apparel or ornamentation, abiding by their religious diet, praying before meals, or observing their sabbaths and holy days. Lower courts have also made clear that public schools may teach objective facts about religion in appropriate courses: an ancient literature course can include a few Psalms; an American history course can discuss the beliefs of the Mayflower Pilgrims.

Government and Religious Education

In another long series of cases, this one beginning already in the 1920s, the Supreme Court developed a general argument about the role of government in private religious schools. Private schools of all sorts, the Court repeatedly held, are viable and valuable alternatives to public schools. Private religious schools in particular allow parents to educate their students in their own religious tradition, a right which they must enjoy without discrimination or prejudice. Given that public education must be secular under the establishment clause, private education may be religious under the free exercise clause. To be accredited, all private schools must meet minimum educational standards. They must teach reading, writing, and arithmetic, history, geography, social studies, and the like so that their graduates are not culturally or intellectually handicapped. But these private schools may teach these subjects from a religious perspective and add

religious instruction and activities beyond them. They may discriminate in favor of hiring teachers that share their faith, and must be free from some of the usual requirements of teachers' unions. And these religious schools are presumptively entitled to the same government services that are made available to their counterparts in public schools -- so long as those services are not used for core religious activities. The Supreme Court followed this accommodationist logic from 1925 to 1971, abruptly reversed course in favor of strict separationism from 1971 to 1986, and since then has returned to a new variant of accommodationism, framed in "equal access" terms.

Accommodation of Religious Education. The most important early religious school case was *Pierce v. Society of Sisters* (1925). Oregon had passed a law mandating that all eligible students must attend public schools. The law sought to eliminate Catholic and other private religious schools and to give new impetus to the development of the state's public schools. Local private Catholic schools challenged this as a violation of the educational rights of the parents, children, schools, and school teachers alike. The *Pierce* Court agreed and struck down the Oregon law. "The fundamental theory of liberty," the Court opined, "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." It also forecloses "unwarranted compulsion" of "present and future patrons" of the religious schools. Extending *Pierce*, *Farrington v. Tokushige* (1927) held that states could not impose unduly intrusive and stringent accreditation and regulatory requirements on religious and other private schools. And *Cochran v. Board of Education* (1930) upheld a state policy of supplying textbooks to all students, including religious school students.

This accommodation of religious schools and students continued into the early 1970s. *Everson v. Board of Education* (1947), though peppered with sweeping dicta on the wall of separation between church and state, still held that states could provide school bus transportation to religious and public school children alike and reimburse the parents of religious and public school children alike for the costs of using school bus transportation. "[C]utting off church schools [and their students] from these services, so separate and indisputably marked off from the religious function, would make it far more difficult for the schools to operate," the Court opined. "But such obviously is not the purpose of the First Amendment. The Amendment requires the State to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."

The Court struck a similar tone in *Board of Education v. Allen* (1968). The State of New York had a policy of lending prescribed textbooks in science, mathematics, and other "secular subjects" to all students in the state, whether attending public or private schools. Many of the private school recipients of the textbooks were religious schools. A taxpayer challenged the policy as a violation of the establishment clause. Citing *Cochran*, the *Allen* Court rejected this claim,

emphasizing that it was the students and parents, not the religious schools, who directly benefited. “Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson*, and does not alone demonstrate an unconstitutional degree of support for a religious institution.”

The Court opined similarly in *Tilton v. Richardson* (1971), which upheld the use of federal funds for the construction of library, science, and arts buildings at church-related colleges among many other secular colleges and universities. Since these “federally-subsidized facilities would be devoted to the secular and not the religious functions of the recipient institution,” and since both religious and secular schools are equally eligible for these funds, there was no violation of the establishment clause, the *Tilton* Court concluded.

The Court went even further in accommodating religious education in the 1972 case of *Wisconsin v. Yoder*. Wisconsin, like all states, mandated that able children attend school until the age of sixteen. A community of Old Order Amish, who were dedicated to a simple agrarian life style based on biblical principles, conceded the need to send their children to grade school – to teach them the basic fundamentals of reading, writing, and arithmetic that they would need. But the community leaders and parents refused to send their children to higher schools, lest they be tempted by worldly concerns and distracted from learning the values and skills they would need to maintain the Amish lifestyle. After they were fined for disobeying school attendance laws, the parents and community leaders filed suit, arguing that the State had violated their free exercise and parental rights. The *Yoder* Court agreed, and ordered that they be exempted from full compliance with these laws. The Court was impressed that the Amish “lifestyle” was centuries-old and “not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.” In the Court’s view, compliance with the compulsory school attendance law would pose “a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.” To exempt them was not to “establish the Amish religion” but to “accommodate their free exercise rights.” This case would later become a *locus classicus* for the home schooling options, which lower federal and state courts have upheld in a number of states.

Separation of Church and State. In *Lemon v. Kurtzman* (1971), the Supreme Court abruptly reversed course. Drawing on the strict separationist logic of its earlier public school cases, the *Lemon* Court crafted a three-part test to be used in all future cases arising under the First Amendment establishment clause, including those dealing with religious schools. To meet constitutional objections, the Court held, any challenged government law must: 1) have a secular purpose; 2) have a primary effect that neither advances nor inhibits religion; and (3) not foster an excessive entanglement between church and state.

The *Lemon* Court used this three-part test to strike down a state policy that reimbursed Catholic and religious schools for some of the costs of teaching secular subjects that the state prescribed. The state policy was restricted to religious schools that served students from lower-income families and the reimbursements were limited to 15 percent of the costs. The *Lemon* Court held that this policy fostered an “excessive entanglement between church and state.” The Catholic schools, in question, were notably religious, the Court held—closely allied with nearby parish churches, filled with religious symbols, and staffed primarily by nuns who were under “religious control and discipline.” “[A] dedicated religious person, teaching at a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.” She will be tempted to teach secular subjects with a religious orientation in violation of state policy. “A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise obeyed.” This is precisely the kind of excessive entanglement between church and state that the First Amendment establishment clause outlaws.

Lemon left open the question whether the state could give aid directly to religious students or to their parents—as the Court had allowed in earlier cases. Two years later, the Court closed this door tightly. In *Committee for Public Education v. Nyquist* (1973) and *Sloan v. Lemon* (1973), the Court struck down state policies that allowed low-income parents to seek reimbursements from the state for some of the costs of religious school tuition. *Nyquist* further struck down a state policy that allowed low-income parents to take tax deductions for the costs of sending their children to private schools. In *Nyquist*, Justice Powell characterized such policies as just another “of the ingenious plans of channeling state aid to sectarian schools.” Responding to the state argument that “grants to parents, unlike grants to [religious] institutions, respect the ‘wall of separation’ required by the Constitution,” the Court declared that “the [primary] effect of the aid is unmistakably to provide desired financial support for non-public, sectarian institutions.”

Lemon also left open the question of whether the state could give textbooks, educational materials, or other aid to religious schools for the teaching of mandatory secular subjects, or the administration of state-mandated tests and other programs. The Court struck down most such policies in a long series of cases from 1973 to 1985. These cases, and their ample extension by lower courts, created a high wall of separation between public and private school facilities, funds, teachers, students, and programs. *Aguilar v. Felton* (1985) is a good example of how strict the separation had become. *Aguilar* concerned the remedial educational services that were authorized and funded by Congress in the Elementary and Secondary Education Act (1965), known as the Title I program. The act set detailed standards both for student eligibility and for the nature of the education to be offered eligible students. More than 20,000 religious school students in the city annually availed themselves of these Title I services,

alongside tens of thousands of public school students. Lacking sufficient space in existing public buildings, and lacking sufficient land to build new public buildings adjacent to religious schools, the city offered the remedial services on site to eligible religious school students. State-funded public school teachers with materials were sent into the religious schools to teach the eligible religious school students. Field supervisors were sent out monthly to ensure that the Title I funds were directed to remedial, not religious, education in these schools. The program had been in place for nineteen years without challenge.

Local taxpayers, however, then challenged the program as a violation of the establishment clause. The *Aguilar* Court agreed. Though “well-intentioned,” the Court opined, the program fosters an excessive entanglement of church and state. The religious schools receiving the Title I instructors are “pervasively sectarian,” having as a “substantial purpose, the inculcation of religious values.” Because of this, “ongoing inspection is required to ensure the absence of a religious message. In short, the scope and duration of New York’s Title I program would require a permanent and pervasive State presence in the sectarian schools receiving aid.” This is precisely the kind of excessive entanglement between church and state that the disestablishment clause outlaws.

Equal Treatment and Freedom of Choice. This strict separation between public and private schools, however alluring and simple in theory, ultimately proved unworkable in practice, with *Aguilar* an unpopular case in point. Accordingly, in the mid-1980s forward, the Supreme Court moved back toward greater accommodation and government support of religious education, and eventually reversed *Aguilar* and two other strict separationist cases from the 1970s.

The first case in this new series was *Mueller v. Allen* (1983). There the Court upheld a Minnesota law that allowed parents of private school children to claim tax deductions from state income tax for the costs of “tuition, transportation, and textbooks.” Ninety-five percent of the private school children in the state attended religious schools. Most of their parents availed themselves of this tax deduction. A taxpayer in the state challenged the law as an establishment of religion. The *Mueller* Court disagreed. The tax deduction policy had a secular purpose of fostering quality education, fostered no entanglement between church and state, and had the primary effect of enhancing the educational choices of parents and students. The state aid to sectarian schools “becomes available only as a result of numerous, private choices of individual parents of school-age children.” This saves it from constitutional infirmity. Several later cases, most recently, *Arizona Christian School Tuition Organization v. Winn* (2011), have upheld such state tax deduction, exemption, and credit programs that help parents pay for religious schools, even while they are taxed to support public schools.

In *Witters v. Washington Department of Services for the Blind* (1986), the Court upheld a state program that furnished aid to a student attending a Christian college. The program provided funds “for special education and/or training in the professions, business or trades” for the visually impaired. Money was to be paid directly to eligible recipients, who were entitled to pursue education in the professional schools of their choice. Mr. Witters’s condition qualified him for the funds. His profession of choice was the Christian ministry. He sought funds to attend a Christian college in preparation for the same. The state agency denied funding on grounds that this was direct funding of religious education. The *Witters* Court disagreed. The policy served a secular purpose of fostering educational and professional choice for all, including the handicapped. It involved no entanglement of church and state. Its primary effect was to facilitate this student’s professional education, which happened to be religious. This “is not one of ‘the ingenious plans for channeling state aid to sectarian schools,’” the Court opined. “It creates no financial incentive for students to undertake sectarian education. It does not provide greater or broader benefits for recipients who apply their aid to religious education.... In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual not by the State.”

In *Zobrest v. Catalina Foothills School District* (1993), the Court extended this logic from a college student to a high school student. Both federal and state disability acts required that a hearing-impaired student be furnished with a sign-language interpreter to accompany him or her to classes. The state paid for the interpreter. Mr. Zobrest’s hearing impairment qualified him for an interpreter’s services. But after going to a public grade school, he enrolled at a Catholic high school. The state refused to furnish him with an interpreter, on grounds that this would violate the *Lemon* rule that the state could give no direct aid to a religious school; moreover, the presence of a state-employed interpreter in a Catholic high school would foster an excessive entanglement between church and state. Following *Mueller* and *Witters*, the *Zobrest* Court upheld the act as “a neutral government program dispensing aid not to schools but to handicapped children.”

In *Agostini v. Felton* (1997), the Court extended this logic from the high school to the grade school. It reversed *Aguilar v. Felton* and reinstated the Title I services to public and private elementary and high school students alike. Children in religious schools, the Court held, are just as entitled to Title I benefits as children in public schools. They cannot be denied these benefits simply for the sake of upholding “the abstract principle” of separation of church and state.

In *Mitchell v. Helms* (2000), the Court upheld the constitutionality of direct government aid to the secular functions of religious schools. The federal Education Consolidation and Improvement Act (1981) channeled federal funds to state and local education agencies for the purchase of various educational materials and equipment. The Act permitted states to loan such materials directly to public and private elementary and secondary schools, provided that

the state retained title in those materials and that the recipient schools used them only for programs that are "secular, neutral, and nonideological." The amount of material aid for each participating school depended on the number of students it matriculated. Using the statutory formula, Louisiana distributed materials and equipment to public and private schools in the state. In one county, some 30 percent of the federal aid was allocated to private schools, most of which were Catholic. The aid was distributed properly and the materials and equipment were used only for "secular, neutral, and nonideological" programs in each religious school. Local taxpayers brought suit, however, arguing that such "direct aid" to such "pervasively sectarian" schools constituted an establishment of religion.

The *Mitchell* Court disagreed, and held the program constitutional both on its face and as applied in this case. The federal act did not advance religion, nor did it define its recipients by reference to religion; all accredited public and private schools and students were eligible. And there was no excessive entanglement between religious and governmental officials in the administration of the program. Accordingly, the Court upheld the law, and overruled two earlier cases – *Meek v. Pittenger* (1975) and *Wolman v. Walter* (1977) – that had struck down similar aid programs distributing materials directly to religious schools. The separationist principles at work in these two decisions had become unworkably rigid, the *Mitchell* Court concluded.

In *Zelman v. Simmons-Harris* (2002), the Court further upheld a school voucher program that Ohio had adopted to address a "crisis of magnitude" in its Cleveland public school system. The program gave parents a choice to leave their children in the local Cleveland public school district or to enroll them in another public or private school that participated in the school voucher program. For those parents who chose to send their children to a participating private school, the program provided them with a voucher to help defray tuition costs, though parents had to make copayments according to their means. Some 82% of the private schools participating in the voucher program were religiously affiliated; 96% of the students who used vouchers enrolled in these private religious schools. Taxpayers challenged the program as a violation of the establishment clause. The *Zelman* Court disagreed. For the Court, there was no dispute that the program was enacted for a "valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system." The primary effect of the program was not to advance religion but to enhance educational choice for poor students and parents. "Where a government aid program is *neutral* with respect to religion, and provides assistance directly to a *broad class of citizens*, who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent *private choice*, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message is

reasonably attributable to the individual, not the government, whose role ends with the disbursement of the funds.” Several lower courts have used *Zelman* to uphold school voucher programs in other states.

Conclusions

These First Amendment cases on religion and education have not always followed clean logical lines. The Supreme Court has sometimes digressed and occasionally reversed itself. Several of the Court’s religion and education cases have featured brilliant rhetorical and judicial fireworks in majority and dissenting opinions as the Court has occasionally shifted into a new understanding of the demands of the First Amendment. Part of this back-and-forth is typical of any constitutional law in action. “Constitutions work like clocks,” American founder John Adams once put it. To function properly, their pendulums must swing back and forth, and their mechanisms and operators must get “wound up from time to time.”

The Court’s cases on religion and public education swung from logics of strict separationism to equal access. The controversial 1985 *Wallace v. Jaffree* case, outlawing even private moments of silence in public schools, was the likely tipping point. The 2001 *Good News Club* case, authorizing a public grade school extracurricular program heavy on religion, might well become the stopping point to this equal access logic. The Court’s cases on government in religious education cases, in turn, swung from accommodation to separation to equal treatment. The controversial 1985 *Aguilar* case that cut 20,000 religious students from remedial education helped catalyze the emergence of equal treatment cases. The controversial 2002 *Zelman* voucher case that allowed state money to be used even for “sectarian education” might well become the stopping point for this new accommodation. Given the centrality of both religion and education in American life, it is inevitable that constitutional litigation will continue apace.

One trend to watch, however, is the current Supreme Court’s growing appetite for federalism, and its growing deference to state and local law-making on many fronts, including on education. It is unlikely that this Court will follow the call of some originalists to apply the First Amendment religion clauses literally only to “Congress” rather than to all levels of government. But it is likely that the Court will continue to soften the standards of scrutiny in establishment and free exercise cases, leaving local and state governments with more latitude to construct new religion and educational policies without interference from the federal courts.

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