PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 31 | Issue 4 Article 3

5-15-2004

Faith-Based Initiative Proponents Beware: The Key in Zelman Is Not Just Neutrality, but Private Choice

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I. INTRODUCTION

On January 29, 2001, President George W. Bush created the Office of Faith-Based and Community Initiatives by executive order and called on Congress to pass legislation providing faith-based and other community organizations better access to federal funds earmarked for social programs.[1] Although legislative efforts have stalled, President Bush has forged ahead with subsequent regulations and executive orders in his effort to promote faith-based organizations' access to government money.[2] While these actions have already made millions of dollars available to faith-based organizations over the past two years, Bush's forthcoming efforts will make billions available to such organizations.[3] In the future, the increased use of federal funds by faith-based organizations will undoubtedly trigger tough constitutional challenges.[4]

The funding of religious organizations to administer federal social programs raises important constitutional issues regarding the relationship between church and state.[5] The Establishment Clause of the Constitution governs issues regarding the relationship between church and state.[6] Sadly, however, the Establishment Clause case law laid out by the U. S. Supreme Court has developed into a very complex and seemingly incoherent area of jurisprudence.[7] Fortunately, the recent decision in *Zelman v. Simmons-Harris*[8] not only gives greater clarity to the muddied water stirred up by the Court's prior decisions, but also provides a valuable framework with which to analyze whether faith-based initiative legislation would survive an Establishment Clause challenge.[9]

This Comment will utilize the recent *Zelman* decision as a framework with which to determine the constitutionality of faith-based initiative legislation under the Establishment Clause. Part II will discuss the impending push toward faith-based initiative legislation. Part III will trace the development of the U.S. Supreme Court's Establishment Clause jurisprudence. Part IV will examine the legal analytical framework set out in the *Zelman* decision. Finally, Part V will specifically apply the *Zelman* framework to potential faith-based initiative legislation.

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1. Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001).

2. Rebecca Carr, *Bush Details Faith-Based Plan For Social Services*, ATLANTA J. AND CONST., Jan. 31, 2001, at A3.

3. *See* Andrew Miga, *Bush Boosts Faith-Based Charities*, BOSTON HERALD, Jan. 30, 2001, at A6; *see also infra* note 44-45.

4. While such legislation may also face Free Exercise Clause challenges, this Comment will focus on issues raised by a challenge under the Establishment Clause.

5. *See infra* note 316 and accompanying text.

6. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion.").

7. *See infra* notes 111-312 and accompanying text.

8. 536 U.S. 639 (2002).

9. *See infra* notes 313-45 and accompanying text.

II. FAITH-BASED INITIATIVES

In short, faith-based initiative legislation is designed to allow religious organizations that provide social services to obtain federal funds in order to further the accomplishment of those services.[10] Faith-based initiative advocates have recently offered enticing evidence in support of such a policy.[11] For example, supporters of faith-based initiatives claim that religious groups effect change in individuals' lives not only more successfully than state agencies, but more efficiently as well—saving taxpayers money.[12] Indeed, social scientists are increasingly suggesting that the faith on which such organizations are based makes them more successful.[13]

Although the faith-based initiative legislation advocated by President Bush has been the subject of much controversy and criticism,[14] the proposal is not altogether novel in its purpose and effect.[15] Under the 1996 Welfare Reform Act,[16] in fact, Congress created new legislative authority for government assistance to be directed towards religious organizations for the purpose of aiding welfare beneficiaries.[17] The "Charitable Choice" provision of the 1996 Welfare Reform Act gave states block grants to provide welfare-related services through their own agencies or through contracts with private nonprofit organizations.[18] States using the money to contract with other organizations were prohibited from discriminating against faith-based organizations.[19] The 1996 Welfare Reform Act specified that permissible relationships between states and the organizations with

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10. *See Don't Cross Church-State Wall*, HARFORD COURANT, Feb. 6, 2003, at A10 (criticizing the intermingling of governmental and religious interests in Bush's faith-based initiative programs and suggesting that such "hair splitting" is potentially unconstitutional).

11. *See infra* notes 12-13 and accompanying text.

12. *See* Susanna Dokupil, *A Sunny Dome with Caves of Ice: The Illusion of Charitable Choice*, 5 TEX. REV. L. & POL. 149, 154 n.17 (2000).

13. *Id.* at 153.

14. *See* Mary Leonard, *White House: No 'Deal' with Charity Says Hiring Laws Will Be Protected*, BOSTON GLOBE, July 11, 2001, at A2.

15. *See infra* notes 16-27 and accompanying text.

16. 42 U.S.C. § 604a (2002). The 1996 Welfare Reform Act is also known as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.

17. *See id.*

18. § 604a(a).

19. The statute states:

> [R]eligious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in . . . this section . . . . [N]either the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

§ 604a(c).

which they contracted could take two forms. First, states could contract directly with the organizations to deliver specific services.[20] Second, states could distribute vouchers to beneficiaries to be used at the private organizations, which would subsequently redeem the voucher for value from the states.[21]

Pursuant to the Charitable Choice provision of the 1996 Welfare Reform Act, several states have used faith-based organizations to provide welfare related services. For example, in Florida, state authorities organized a Faith Community Network in order to recruit religious organizations to supplement state social agencies in providing welfare services.[22] In addition, Maryland's incorporation of private organizations into its welfare program actually reduced the cost of welfare by thirty-six percent.[23]

In Texas, none other than Governor George W. Bush issued an executive order calling for the inclusion of private organizations as social service providers.[24] In response, the Texas legislature passed several different laws in an effort to further encourage faith-based organizations to offer a variety of different social services.[25] Considering George W. Bush's endeavor as governor to expand the role of faith-based organizations in the provision of social services in Texas, his subsequent efforts to bring about similar changes nationally as President should come as no surprise.[26]

Despite a few states' effective use of the Charitable Choice provisions of the 1996 Welfare Reform Act, many antiquated laws and procedures limited the participation of faith-based organizations across most of the nation.[27] Consequently, claiming that "when the federal government gives contracts to private groups to provide social services, religious groups should have an equal chance to compete,"[28] President George W. Bush signed an executive order establishing an Office of Faith-Based and Community Initiatives (OFBCI) on January 29, 2001.[29] The purpose of the OFBCI was "to expand opportunities for faith-based and other community

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20. § 604a(a)(1)(A) (allowing states to engage in "contracts with charitable, religious, or private organizations" to "administer and provide services").

21. § 604a(a)(1)(B).

22. *See generally* John Maggs, *In Florida, Government Gets Religion*, 31 NAT'L. J. 2176 (1999) (explaining the Faith Community Network).

23. James D. Standish, *Maryland's Implementation of the Charitable Choice Provision: The Story of One Woman's Success*, 5 GEO. J. ON FIGHTING POVERTY 65, 67 (1997).

24. *See* Dokupil, *supra* note 12, at 156.

25. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 88.001 (Vernon 2004); TEX. HEALTH & SAFETY CODE ANN. § 464.051 (Vernon 2004); TEX. HUM. RES. CODE ANN. § 42.101 (Vernon 2004).

26. *See supra* note 24 and accompanying text.

27. *See* Press Release, George Muckleroy, White House, Office of Faith-Based and Community Initiatives, Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs (Aug. 16, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html.

28. *See* Press Release, President George W. Bush, President Bush Implements Key Elements of Faith-Based Initiative (Dec. 12, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html.

29. Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001).

organizations and to strengthen their capacity to better meet social needs in America's communities."[30]

Additionally, President Bush also issued another executive order[31] which "direct[ed] all federal agencies to follow the principle of equal treatment in rewarding social service grants . . . to ensure a level playing field for faith-based organizations in federal programs."[32] However, President George W. Bush remained unsatisfied.[33]

After his ascendancy to the White House, President Bush lobbied both houses of Congress to pass faith-based initiative legislation.[34] This legislation, he hoped, would loosen restrictive regulations that make it difficult for faith-based organizations to utilize federal resources to help provide social services.[35]

In response to the efforts of the White House,[36] the United States House of Representatives passed the Charitable Choice Act of 2001.[37] However, the Democrat-controlled Senate proved much more resistant to the idea of faith-based initiative legislation.[38] Instead of passing the House's Charitable Choice Act, it focused on a significantly watered down version of faith-based initiative legislation, the Charity Aid, Recovery, and Empowerment Act ("CARE").[39] The differences in the bills,[40] together with the party lines

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30. *Id.*

31. Exec. Order 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002). In the executive order, President George W. Bush claimed that "[t]he Nation's social service capacity will benefit if all eligible organizations, including faith-based and other community organizations, are able to compete on an equal footing for Federal financial assistance used to support social service programs." *Id.* at § 2(b).

32. President Bush Implements Key Elements of Faith-Based Initiative, *supra* note 28.

> [T]oday, I'm announcing a series of actions to stop the unfair treatment of religious charities by the federal government . . . . Faith-based charities work daily miracles because they have idealistic volunteers. They're guided by moral principles. They know the problems of their own communities, and above all, they recognize the dignity of every citizen and the possibilities of every life. These groups and many good charities that are specifically religious have the heart to serve others. Yet many lack the resources they need to meet the needs around them.

Id.

33. *See infra* notes 34-35 and accompanying text.

34. *See* Scott Lindlaw, *Bush Appeals for Aid to Religious Charities*, THE RECORD, Aug. 19, 2001, at A8.

35. *See* Muckleroy, *supra* note 27.

36. Frank Bruni & Laurie Goodstein, *Bush to Focus on a Favorite Project: Helping Religious Groups Help the Needy*, N.Y. TIMES, Jan. 26, 2001, at A17.

37. 147 CONG. REC. H4281 (daily ed. July 19, 2001). The CCA is a part of the Community Solutions Act of 2001, H.R. 7, 107th Cong. § 201 (2001). On July 19, 2001, the U.S. House of Representatives passed the CCA as part of the Community Solutions Act of 2001 by a 233 to 198 margin. H.R. 7, 107th Cong. § 201 (2001), *available at* http//thomas.loc.gov.

38. *See* Richard Benedetto, *Lieberman May Be Bush Faith Initiative's Best Hope*, USA TODAY, Sept. 4, 2001, at A10.

39. Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. § 301 (2002).

40. The most significant and controversial difference between these two bills is that CARE required all social service providers receiving CARE funds (including religiously affiliated

being drawn between the House and Senate,[41] dampened hopes that the two houses of Congress would be able to agree on a bill to send to the President.[42] Finally, when efforts to pass even the weaker CARE bill in the Senate stalled, the prospects for the enactment of *any* faith-based initiative legislation by Congress seemed very bleak indeed.[43]

Disenchanted with legislative progress, President Bush has used his powers within the executive branch to loosen impediments to the federal funding of faith-based initiatives.[44] While faith-based organizations have already received millions of dollars in federal funding as a result of these actions, they will obtain access to billions in governmental funding if the Bush Administration continues on its current path.[45]

III. TRACING THE DEVELOPMENT OF THE ESTABLISHMENT CLAUSE

A. Intent of the Framers

The Supreme Court Justices have often relied on the original intent of the Framers to provide a foundation for their individual interpretations of the Establishment Clause.[46] However, this intent is not clear from the actual language of the Establishment Clause, which merely reads: "Congress shall make no law respecting an establishment of religion."[47] Unfortunately,

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organizations) to comply with anti-discrimination funds. *See* Mike Allen, *"Faith Based" Initiative to Get Major Push From Bush*, WASH. POST, Sept. 1, 2002, at A8.

41. *See* Mike Allen, *Bush Aims to Get Faith Initiative Back on Track*: Stricter Rules to Be Added for Use of Funds by Groups, WASH. POST, June 25, 2001, at A1.

42. *See id.*

43. *See* Susan Milligan, *Homeland Bill is Put Off for Now: Congress Goes Home To Campaign Long List of Measures Waits After Election*, BOSTON GLOBE, Oct. 18, 2002, at A3.

44. President Bush has acted through both regulations and executive orders. *Bush Pushes "Faith-Based" Programs* (Sept. 22, 2003), *available at* http://www.msnbc.com/news/969989.asp.

45. In 2002, the Compassion Capital Fund awarded $24 million in grants to 21 charity groups, including several faith-based organizations. *Id.* In 2003, the Department of Health and Human Services awarded more than $30 million to eighty-one charity groups, including many faith-based organizations. *Id.* As of September 2003, the Department of Health and Human Services prepared new regulations that would give faith-based organizations the ability to compete for almost $20 billion in social service grants from the Substance Abuse and Mental Health Services Administration. *Id.* Additionally, the Department of Housing and Urban Development had prepared new regulations giving faith-based organizations access to an additional $8 billion in housing grants. *Id.* President Bush has acted through both regulations and executive orders. *Id.*

46. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 711-12 (2002) (Souter, J., dissenting); *id.* at 718 (Breyer, J., dissenting); Mitchell v. Helms, 530 U.S. 793, 870-71 (2000) (Souter, J., dissenting); Rosenberger v. Rector, 515 U.S. 819, 852-58 (1995) (Thomas, J., concurring); *id.* at 868-74, 890-91 (Souter, J., dissenting); Lee v. Weisman, 505 U.S. 577, 591 (1992) (opinion of Kennedy, J.); *id.* at 600-01 (Blackmun, J., concurring); *id.* at 612-18 (Souter, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 80-81 (1985) (O'Connor, J., concurring); Marsh v. Chambers, 463 U.S. 783, 786-92 (1983) (opinion of Burger, C.J.); *id.* at 807-08 (Brennan, J., dissenting); Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 759-61, 770 n.28 (1973) (opinion of Powell, J.); Everson v. Bd. of Educ., 330 U.S. 1, 8-13 (1947) (opinion of Black, J.); *id.* at 31-45, (Rutledge, J., dissenting); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1107 n.2 (1994).

47. U.S. CONST. amend. I.

Congress chose not to adopt a more unequivocal wording.[48] Congress not only declined to adopt the proposed language "Congress shall make no laws touching religion,"[49] which would clearly constitute the strict separationist interpretation, but also rejected proposed language such as "nor shall any national religion be established," which seemingly would have dispelled attempts to construe the Clause in a strict separationist light.[50]

The Justices of the Court have primarily looked to James Madison[51] and Thomas Jefferson[52] in determining the Framers' intent, particularly to support the separationist interpretation.[53] However, the heavy emphasis placed on selected writings of James Madison and Thomas Jefferson has erroneously skewed the interpretation of the Establishment Clause in favor of separationists and caused a general misperception among the public as to the intent of the Framers.[54]

1. Thomas Jefferson

In 1802, Thomas Jefferson wrote in a letter to a group of Baptists in Danbury, Connecticut, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and

48. *See infra* notes 49-50.

49. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 759 (Joseph Gales & W.W. Seaton eds., Washington, 1834-1856) (on file with author); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 403 (2002); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 105-06 (2002).

50. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 75 (1986). Congress also rejected language such as "Congress shall make no law establishing articles of faith or a mode of worship prohibiting the free exercise of religion." Patrick McKinley Brennan, *Free Exercise! Following Conscience, Developing Doctrine, and Opening Politics*, 74 NOTRE DAME L. REV. 933, 947 (1999).

51. *See, e.g.*, *Zelman*, 536 U.S. at 711-12 (Souter, J., dissenting); *Mitchell*, 530 U.S. at 793, 870-71 (Souter, J., dissenting); *Rosenberger*, 515 U.S. at 854-58 (Thomas, J., concurring); *id.* at 868-74, 890-91 (Souter, J., dissenting); *Lee*, 505 U.S. at 612-18 (Souter, J., concurring); *Marsh*, 463 U.S. at 807 (Brennan, J., dissenting); *Everson*, 330 U.S. at 11-12 (opinion of Black, J.); *id.* at 31-45 (Rutledge, J., dissenting).

52. *See, e.g.*, *Mitchell*, 530 U.S. at 870-71 (Souter, J., dissenting); *Lee*, 505 U.S. at 600-01 (Blackmun, J., concurring); *Marsh*, 463 U.S. at 807 (Brennan, J., dissenting); *Everson*, 330 U.S. at 11-13, 16 (opinion of Black, J.); *id.* at 33 n.9, 34-36, 40, 45 (Rutledge, J., dissenting); *see also* David Reiss, *Jefferson and Madison as Icons in* Judicial *History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 95 (2002) (claiming that "[James Madison's] views regarding the meaning of the Religion Clause have . . . taken center stage").

53. *See, e.g.*, *infra* notes 123-24 and accompanying text.

54. *See infra* notes 111-31 and accompanying text.

State."[55] This "wall" metaphor has formed the genesis of the modern separationist interpretation.[56] Using this letter written to the Baptists of Danbury as a foundation, separationists later developed an interpretation of the Establishment Clause as "a wall [that] must be kept high and impregnable" that "could not approve the slightest breach."[57] A more careful historical analysis, however, not only reveals problems in characterizing Jefferson's interpretation of the Establishment Clause, but also impeaches the wisdom in relying on Jefferson as a primary authority on the original intent of the Establishment Clause in the first place.[58]

First, Thomas Jefferson's ability to communicate the original intent of the Framers is highly suspect.[59] Jefferson was neither a signor nor a drafter of the Bill of Rights.[60] In truth, Jefferson was in France during the Congress' debates over the Bill of Rights.[61] Thus, Jefferson was no more than a "detached observer"[62] to the adoption of the Establishment Clause, with no direct influence on the language actually adopted or the meaning contemporaneously attributed by the Framers.[63]

Second, separationist characterizations of the "wall" metaphor may overstate even Jefferson's interpretation of the Establishment Clause.[64] Recently discovered evidence reveals that Jefferson's letter to the Danbury Baptists was not an altruistic effort to shed light on the meaning of the Establishment Clause, but merely part of an attempt to make a political counterattack against his Federalist enemies.[65] Additionally, only days after writing his letter to the Danbury Baptists, Jefferson himself began regularly attending Baptist sermons held in the House of Representatives building, a practice which would have been abhorrent to an advocate of a no-aid separationist interpretation of the Establishment Clause.[66]

Third, if one metaphor could embody the Founding generation's understanding of the government's proper stance toward religion, it was not that of a "wall of separation."[67] While Jefferson's "wall of separation" in effect "languished in relative obscurity" for the nearly one and a half

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55. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *in* THOMAS JEFFERSON, WRITINGS 510 (Merrill D. Peterson ed., Library of America, 1984).

56. Brian P. Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory and the Two-Party System*, 6 TEX. F. ON C.L. & C.R. 303, 317 (2002).

57. *Everson*, 330 U.S. at 18.

58. *See infra* notes 59-80 and accompanying text.

59. *See infra* notes 60-63 and accompanying text.

60. *See* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

61. *See id.*

62. *See id.*

63. *Id.*

64. *See generally* Willaim F. Cox, Jr., *The Original Meaning of the Establishment Clause and Its Application to Education*, 13 REGENT U. L. REV. 111 (2001).

65. *See* James H. Hutson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*, 56 WM. & MARY Q. 775, 776 (1999) (indicating that portions of the letter which had been blotted out have recently been restored, lending new light to the meaning of the letter).

66. Cox, *supra* note 64, at 139 n.205.

67. *See infra* notes 68-77 and accompanying text.

centuries after it was written,[68] the comparison most often used to characterize the relationship between church and State during the time of the Founders was that of governments as "nursing fathers."[69] Consistent with this "nursing fathers" metaphor, the generation that gave us the clause "Congress shall make no law respecting an establishment of religion"[70] did not go on to erect a "wall of separation" between church and State.[71]

As noted by former federal judges Arlin M. Adams and Charles J. Emmerich, it is clear that the Founders "were virtually unanimous in the belief that the republic could not survive without religion's moral influence. Consequently, they did not envision a secular society, but rather one receptive to voluntary religious expression."[72] For example, at the conclusion of its very first session, Congress adopted a joint resolution calling on the President to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness."[73] Furthermore, in the same week that Congress approved the Establishment Clause as part of the Bill of Rights, that same Congress enacted legislation which used public funds to pay for chaplains for the House and Senate.[74]

Also, Article 3 of the Northwest Ordinance of 1787 declared that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[75] Additionally, in his Farewell Address, President George Washington stated:

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68. Kelly J. Coghlan, *Those Dangerous Student Prayers*, 32 ST. MARY'S L.J. 809, 819 n.27 (2001) (quoting James H. Hutson, "Nursing Fathers:" The Model for Church-States Relations in America from James I to Jefferson 1 (May 2001) (unpublished manuscript, available through Manuscript Division, The Library of Congress, in the offices of Dr. James H. Hutson, Chief of the Manuscript Division and Curator of the Library of Congress's exhibit "Religion and the Founding of the American Republic")).

69. *Id.*

70. U.S. CONST. amend. I.

71. *See generally* Coghlan, *supra* note 68, at 819 n.27.

72. ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 31 (1990).

73. 1 ANNALS OF CONG. 914 (Joseph Gales, ed., 1789).

74. Lynch v. Donnelly, 465 U.S. 668, 674 (1984); Eric W. Treene, *Religion, the Public Square, and the Presidency*, 24 HARV. J.L. & PUB. POL'Y 573, 584 (2001).

75. Northwest Ordinance of 1787, Art. 3 in 1 THE FOUNDERS' CONSTITUTION 27, 28 (Philip B. Kurland & Ralph Lerner eds.1987). "An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'" Marsh v. Chambers, 463 U.S. 783, 790 (1983) (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)).

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labour [*sic*] to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens . . . . And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[76]

Clearly, the Founders' generation did not understand the Establishment Clause as a "wall between church and state," which "must be kept high and impregnable[,] . . . not approv[ing] the slightest breach."[77]

In light of the preceding revelations, it is not surprising that the "wall" metaphor has virtually disappeared from more recent Establishment Clause decisions of the Supreme Court.[78] Nevertheless, this "mischievous metaphor"[79] has already had a significant, if unwarranted, impact on Establishment Clause jurisprudence and will likely be a source of misapprehension for the American public for the foreseeable future.[80]

2. James Madison

In 1784, James Madison published the Memorial and Remonstrance against Religious Assessments[81] in response to a proposed assessment bill[82] in Virginia, which would have appropriated state money to pay for the salaries of Christian ministers.[83] Separationists have taken statements from the Memorial and Remonstrance as evidence to support the contention that the Framers intended a separationist philosophy for the Establishment

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76. Farewell Address, September 1796, *in* GEORGE WASHINGTON: A COLLECTION 512, 521 (W. B. Allen ed. 1988).

77. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 18 (1947).

78. Martha M. McCarthy, Zelman v. Harris: *A Victory for School Vouchers*, 171 WEST'S EDUC. L. REP. 1 (2003). "Although the Court had initially embraced the 'wall' metaphor in *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947), it has since backed away from such an extreme view." Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 490 n.364 (2002); *see also* McCollum v. Bd. of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech."); *Lynch*, 465 U.S. at 673 ("No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government.").

79. David L. Weddle, *Patrolling the Wall or Drawing the Line?*, 27 OKLA. CITY U. L. REV. 275, 275 (2002).

80. *See supra* notes 46-80 and accompanying text.

81. Madison's Memorial and Remonstrance is included as an appendix to Justice Rutledge's dissent in *Everson v. Board of Education*, 330 U.S. 1, 63-72 (1947) (Rutledge, J., dissenting).

82. A Bill Establishing a Provision for Teachers of the Christian Religion (1784). The text of this Assessment Bill is reprinted as a Supplemental Appendix to Justice Rutledge's dissent in *Everson*, 330 U.S. at 72-74 (Rutledge, J., dissenting).

83. *Id.*

Clause.[84] Madison argued against any "authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment."[85] Madison also expressed concerns "that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."[86] Even among members of the Supreme Court, Madison's Memorial and Remonstrance became a popular and determinative source of the original intent of the Establishment Clause.[87] However, singular focus on James Madison, especially on his Memorial and Remonstrance, fails to encompass a representation of the Framers' true original intent.[88]

First, the most apparent problem in applying Madison's Memorial and Remonstrance to the Establishment Clause is that the Memorial and Remonstrance was published in regards to an entirely different controversy.[89] Indeed, the Establishment Clause did not even exist at the time of the Memorial and Remonstrance.[90] Moreover, Madison's work addresses an issue of Virginia *state* law,[91] rather than the drafting of federal legislation applying to the entire nation.[92] Thus, focusing too narrowly on Madison's Memorial and Remonstrance, "treat[s] the history of the United States as if it were the history of Virginia."[93]

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84. *See, e.g.*, Rosenberger v. Rector, 515 U.S. 819, 868-73 (1995) (Souter, J., dissenting); Arlen Specter, *Defending the Wall: Maintaining Church/State Separation in America*, 18 HARV. J.L. & PUB. POL'Y 575, 578-80 (1995); Lash, *supra* note 46, at 1107 n.2.

85. *Everson*, 330 U.S. at 65-66 (Rutledge, J., dissenting).

86. *Id.* at 67 (Rutledge, J., dissenting). Madison argued that the establishment of religion caused "pride and indolence in the Clergy; ignorance and servility in the laity; [and] in both, superstition, bigotry and persecution." *Id.*

87. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 711-12 (2002) (Souter, J., dissenting); Mitchell v. Helms, 530 U.S. 793, 870-72 (2000) (Souter, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 605-06 (1987) (Powell, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 53 n.38 (1985) (opinion of Stevens, J.); Marsh v. Chambers, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting); Valley Ford Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 502-03 (1982) (Brennan, J., dissenting); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760-61, 770 n.28 (1973) (opinion of Powell, J.); Lemon v. Kurtzman, 411 U.S. 192, 209 n.1 (Douglas, J., dissenting); Flast v. Cohen, 392 U.S. 83, 103-04 (1968) (opinion of Warren, C.J.); (McGowan v. Maryland, 366 U.S. 420, 577 (1961) (Douglas, J., dissenting); *Everson*, 330 U.S. at 11-13 (opinion of Black, J.).

88. *See infra* notes 90-107 and accompanying text.

89. *See infra* notes 90-93 and accompanying text.

90. James Madison published his Memorial and Remonstrance in 1784, while Congress did not submit the Bill of Rights to the states until 1789, five years later. *See* Feldman, *supra* note 49, at 118.

91. Madison's Memorial and Remonstrance was published in response to a Virginia Assessment Bill, which would have provided state funding for Christian ministers. Both the Assessment Bill and the Memorial and Remonstrance are included as appendices to Justice Rutledge's dissent in *Everson*, 330 U.S. at 63-74 (Rutledge, J., dissenting).

92. *Id.*

93. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 286 (2001).

Even more compelling are the statements actually made by Madison before the representatives of Congress who actually adopted the language of the Establishment Clause.[94] For example, during the great debates as to the language of the Establishment Clause, Representative Sylvester expressed a concern that the clause "might be thought to have a tendency to abolish religion altogether."[95] James Madison reassured him that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[96] Afterwards, Representative Huntington raised fears that the proposed amendment "might be taken in such latitude as to be extremely hurtful to the cause of religion."[97]

Again, Madison responded that the proposed amendment merely sought to allay the fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[98] Clearly, in addressing the concerns of Congressional representatives who feared a broad and overly restrictive interpretation of the Establishment Clause, Madison described a rather narrow interpretation, which would prevent the government from compelling its citizens to worship in accordance with a particular sect.[99] Considering the relatively innocuous statements before Congress made by Madison regarding the Establishment Clause, the legitimacy of clinging to language from the Memorial and Remonstrance must be questioned.[100]

Finally, generalizing the intent of the entire Congress from the intent of just one Framer (albeit an important one) presents obvious and significant risks.[101] Dismissing the fact that the Framers often disagreed[102] and concentrating entirely on the meaning attributed by one individual marginalizes both the democratic process and the many representatives from the several states.[103] However, given "the brevity of Congressional debate

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94. *See infra* notes 95-100 and accompanying text.

95. 1 ANNALS OF CONG. 729 (Joseph Gales, ed., 1789).

96. *Id.* at 730. Because different editions of the Annals of Congress have different paginations, the easiest way to find particular passages is often by date.

97. *Id.*

98. *Id.* at 731.

99. Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 892 (1985/1986) (Special Issue).

100. *Id.*

101. Bruce P. Merenstein, Comment, *Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings: The Conflicting Jurisprudence of* Marsh v. Chambers, 145 U. PA. L. REV. 1035, 1071 n.180 (1997).

102. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 118 (1999) ("[T]he original architects of our democratic experiment were not entirely in accord.").

103. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996) (recognizing that "[b]oth the framing of the Constitution in 1787 and its ratification by the states involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree").

and the lack of writings on the question by the [F]ramers,"[104] "[t]he intent of even one of the [F]ramers . . . is extremely difficult to pinpoint."[105] Thus, even if the intent of one particular Framer could be deduced for certain, determining the original intent of the majority of Congress would remain virtually impossible.[106] Consequently, many scholars have pronounced that "it is impossible to give a dogmatic interpretation of the First Amendment, and to state with any accuracy the intention of the men who framed it."[107]

The preceding discussion does not constitute a completely comprehensive analysis on the issue of the Framers' intent.[108] However, it clearly introduces doubt as to the wisdom of reducing the original intent of the Framers to the "wall" metaphor in a letter to the Baptists of Danbury many years after the drafting of the Bill of Rights.[109]

To fully grasp the significance of the *Zelman* decision, it is necessary to trace the winding trail blazed by development of the Supreme Court's interpretation and application of the Establishment Clause.[110]

B. The "No Aid" Principle

Scholars widely regard the Supreme Court's *Everson v. Board of Education*[111] decision in 1947 as the beginning of modern Establishment Clause jurisprudence.[112] In addition, *Everson* also marks the birthplace of the "no-aid" separationist interpretation of the Establishment Clause by the Supreme Court.[113] Although it has evolved over the years, the "no-aid"

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104. LOREN P. BETH, THE AMERICAN THEORY OF CHURCH AND STATE 88 (1958).

105. Zellmer, *supra* note 78, at 489.

106. *See infra* note 107 and accompanying text.

107. C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 142 (1964); *see also* Sch. Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 237 (Brennan, J., concurring) ("A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected . . . [as] the historical record is at best ambiguous, and statements can readily be found to support either side. . . ."); BETH, *supra* note 104 at 88 (concluding that "any historical argument [would be] inconclusive and open to serious question").

108. *See supra* notes 55-107 and accompanying text.

109. *Id.*

110. *See infra* notes 111-312 and accompanying text.

111. 330 U.S. 1 (1947).

112. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 680 (2002).

113. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 661 n.15 (1998). Prior to *Everson v. Board of Education*, there were relatively few Supreme Court cases dealing with the Establishment Clause. G. ALAN TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS 13 (1977). Primarily, this occurred because the Establishment Clause only applied to federal legislation until the adoption of the Fourteenth Amendment. *Id.*

principle articulated in *Everson* represents the separationist interpretation in its purest and most basic form.[114]

In *Everson*, a taxpayer challenged the constitutionality of a New Jersey statute which reimbursed parents for the cost of bus transportation for their children to and from school.[115] Because part of this money was reimbursed to the parents of children who attended Catholic parochial school,[116] the taxpayer contended that the statute violated the Establishment Clause.[117] Although the Supreme Court upheld the constitutionality of the statute,[118] the Court's dicta laid out an "archetypal separationist opinion."[119]

Although the court initially made the rather apparent observation that "[n]either a state nor the Federal Government can set up a church,"[120] it continued on with the less evident assertion that the Establishment Clause also precludes government from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another."[121] Additionally, Justice Black expounded that "[n]o 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."[122] Finally, the Court invoked Thomas Jefferson's now famous "wall between church and state," which it pronounced "must be kept high and impregnable[,] . . . not approv[ing] the slightest breach."[123] This "ringing separationist language" epitomizes the strict separationist idea of absolute segregation of government from any religious activity or institution so.[124]

No-aid separationists would undoubtedly prefer to simply concentrate on the Court's dicta rather than acknowledge the actual holding of the case. However, the Court in *Everson* actually upheld the constitutionality of a statute that enabled children to use public tax dollars to obtain transportation to religious schools.[125] Demonstrating the inherent difficulties in no-aid separationists' "wall of separation," even the *Everson* Court acknowledged that "we must be careful, in protecting the citizens . . . against state-established churches, to be sure that we do not inadvertently prohibit [the

114. Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1118-19 (2002); *see also* Rosenberger v. Rector, 515 U.S. 819, 848 (1995) (O'Connor, J., concurring).

115. *Everson*, 330 U.S. at 3.

116. *Id.*

117. *Id.* at 8.

118. *Id.* at 17. "[This] legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18.

119. Green, *supra* note 114, at 1113.

120. *Everson*, 330 U.S. at 15.

121. *Id.*

122. *Id.* at 16.

123. *Id.* at 18.

124. Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 U. PA. J. CONST. L. 451, 455 (2002).

125. *Everson*, 330 U.S. at 3.

government] from extending its general . . . benefits to all its citizens without regard to their religious belief."[126]

Echoing this acknowledgement, scholars have concluded that "[t]he inevitability of some form of interaction between church and state compels the strictest of separationists to acknowledge that some form of qualification of the principle of separationism is necessary."[127] In accord, the Supreme Court has made a hasty retreat from the harsh no-aid separationist language laid out in *Everson*.[128]

Nevertheless, despite the fact that "the inevitability of some form of state support for religion, if nothing more than police, fire, and military protection, has relegated th[e] paradigm [of the no-aid separationist interpretation] to the theoretical, rather than the real," some scholars and Justices of the Court have been quick to rely on the rhetoric of *Everson* to advance a no-aid separationist viewpoint.[129] Thus, because members of the Supreme Court occasionally still cling to the view that the "Court has never in so many words repudiated [the no-aid separationist language], let alone, in so many words, overruled *Everson*,"[130] the interpretation has persisted (though typically limited to dissenting opinions in recent times).[131]

C. The Lemon *Test*

Appreciating the difficulty of "reconciling the rhetoric of the wall-of-separation metaphor with the reality that a more complex relationship necessarily exists,"[132] the Supreme Court recognized that "total separation is not possible in an absolute sense . . . [and that] [s]ome relationship between

126. *Id.* at 16.

127. R. Collin Mangrum, *State Aid to Students in Religiously Affiliated Schools:* Agostini v. Felton, 31 CREIGHTON L. REV. 1155, 1172-73 (1998).

128. *See* Maureen E. Cusack, *The Unconstitutionality of School Voucher Programs: The United States Supreme Court's Chance to Revive or Revise Establishment Clause Jurisprudence*, 33 COLUM. J.L. & SOC. PROBS. 85, 91 (1999) ("[T]he clear trend for later U.S. Supreme Court decisions has been to beat an unsteady retreat from . . . *Everson*'s initial bold declarations of an impenetrable wall between church and state."); Mark H. Parsons, *Minnesota Post-Secondary Enrollment Options Act Triggers Constitutional Challenge*, 68 EDUC. L. REP. 201, 208 (1991) ("[T]he Supreme Court had begun its retreat from Justice Black's 'impregnable wall' concept of church-state relations enunciated in Everson."); Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 96 (1990).

129. Mangrum, *supra* note 127, at 1172.

130. Zelman v. Simmons-Harris, 536 U.S. 639, 687 (2002) (Souter, J., dissenting).

131. *See, e.g., id.*; Lynch v. Donnelly, 465 U.S. 668, 698 (1984) (Brennan, J., dissenting); Mueller v. Allen, 463 U.S. 388, 417 (1983) (Marshall, J., dissenting); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973) (opinion of Powell, J.); Lemon v. Kurtzman, 411 U.S. 192, 209-10 (1973) (Douglas, J., dissenting).

132. Mangrum, *supra* note 127, at 1172-73.

government and religious organizations is inevitable."[133] The Court concluded that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[134] The 1971 decision of *Lemon v. Kurtzman* was an attempt to define the "dimly perceive[d] . . . lines of demarcation in this extraordinarily sensitive area of constitutional law."[135]

Lemon was an action brought to challenge the constitutionality of two Rhode Island statutes.[136] Under these statutes, the state paid teachers in nonpublic schools a supplement not more than fifteen percent of their annual salary and reimbursed them the cost of certain school supplies used in secular subjects.[137] Plaintiffs alleged that the statutes violated the Establishment Clause because state aid was given to religious schools pursuant to the statutes' administration.[138] The Court held both statutes to be unconstitutional.[139]

In determining the constitutionality of the Rhode Island statutes, the Supreme Court examined the Establishment Clause opinions arising in the wake of *Everson* and noted three principle concerns: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[140] To adequately address these concerns, the Court formed the three-prong *Lemon* test.[141] To prevent a violation of the Establishment Clause, the Court held that a law (1) "must have a secular legislative purpose,"[142] (2) "its principal or primary effect must be one that neither advances nor inhibits religion,"[143] and (3) "must not foster 'an excessive government entanglement with religion.'"[144]

Notably, the Supreme Court modified the *Lemon* test in *Agostini v. Felton*.[145] The Court recast the third prong, the entanglement prong, as one

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133. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (citing Zorach v. Clauson, 343 U.S. 306, 312 (1952)); Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting).

134. *Lemon*, 403 U.S. at 614.

135. *Id.* at 612.

136. *Id.* at 606.

137. *Id.* at 606-07.

138. *Id.*

139. *Id.* at 607.

140. *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

141. *See infra* notes 142-47 and accompanying text.

142. *Lemon*, 403 U.S. at 612. The first prong, the secular purpose prong, focuses on the legislative intent behind the contested law. "Accord[ing] appropriate deference" to the "stated legislative intent," the Court's secular purpose prong only holds the contested law unconstitutional if there is no secular purpose. *Id.* at 613; *see also* Edwards v. Aguillard, 482 U.S. 578 (1987) (holding a law unconstitutional which required creationism to be taught in schools where evolution was taught). In practice however, few contested laws failed the secular purpose prong because the Court maintained a "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." Mueller v. Allen, 463 U.S. 388, 394-395 (1983).

143. *Lemon*, 403 U.S. at 612; *see also* Wolman v. Walter, 433 U.S. 229 (1977); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Widmar v. Vincent, 454 U.S. 263 (1981).

144. *Lemon*, 403 U.S. at 613; *see also* Meek v. Pittenger, 421 U.S. 349 (1975).

145. 521 U.S. 203 (1997).

of three criteria to establish the second prong, the effects prong.[146] Thus, as altered after *Agostini*, the *Lemon* test comprised of merely two prongs: the secular purpose prong and the effects prong. Furthermore, the Court modified the criteria examined under the effects prong. Whether the contested law has the impermissible effect of advancing or inhibiting religion depends upon if the government aid (1) "result[s] in governmental indoctrination"; (2) "define[s] its recipients by reference to religion"; or (3) "create[s] an excessive entanglement."[147]

After *Lemon*, the Court began applying the *Lemon* test to cases involving the Establishment Clause with some consistency.[148] However, the *Lemon* test has been subject to an increasing amount of criticism and even neglect from the Justices of the Supreme Court.[149] Most importantly, the number of Justices currently on the Supreme Court who have expressed dissatisfaction with the *Lemon* test comprises a majority.[150] Nevertheless, "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . ."[151]

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146. *Id.* at 232-33.

147. *Id.* at 234.

148. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989); Bowen v. Kendrick, 487 U.S. 589, 602 (1988); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 485 (1986); Aguilar v. Felton, 473 U.S. 402, 410 (1985); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382-383 (1985); Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980); Hunt v. McNair, 413 U.S. 734, 741 (1973); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 481-82 (1973).

149. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-399 (1993) (Scalia, J., concurring in judgment) (collecting opinions criticizing *Lemon*); Lee v. Weisman, 505 U.S. 577 (1992) (noting but not applying the *Lemon* test); Wallace v. Jaffree, 472 U.S. 38, 108-114 (1985) (Rehnquist, J., dissenting) (stating that *Lemon's* "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service"); Lynch v. Donnelly, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area . . . . In two cases, the Court did not even apply the *Lemon* 'test' [citing Marsh v. Chambers, 463 U.S. 783 (1983), and Larson v. Valente, 456 U.S. 228 (1982)]"); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (deriding "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*"); Hunt v. McNair, 413 U.S. 734, 741 (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

150. *See, e.g.*, Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting) (remarking that "in many applications [the *Lemon* test] has been utterly meaningless"); County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that the *Lemon* test should not be the Court's "primary guide" in its Establishment Clause jurisprudence); *id.* at 625-26 (O'Connor, J., concurring) (preferring the endorsement test over the *Lemon* test); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (implying that *Lemon* "has no basis in the history of the amendment it seeks to interpret").

151. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

D. The Divertibility Principle

Another tool used by the Court to determine compliance with the Establishment Clause is the divertibility principle.[152] This principle reflects the concern that "government aid [given to] religious [organizations is] susceptible to religious uses."[153] Where there is a "greater . . . risk of diversion to [religious functions]," the divertibility principle makes the constitutionality of the law less secure under the Establishment Clause.[154] As a practical matter, "when the aid recipients were not so 'pervasively sectarian' that their secular and religious functions were inextricably intertwined, the Court generally [held the distribution constitutional]."[155]

The Supreme Court relied heavily on the divertibility principle during the 1970s;[156] however, support for the divertibility principle waned in 1980s.[157] In numerous important Establishment Clause cases, the Court completely turned its back on the divertibility principle, ignoring both the principle and the "pervasively sectarian" nature of the aid recipients.[158]

E. The Endorsement Test

Yet another measure the Supreme Court has used in its Establishment Clause analysis is the endorsement test.[159] The endorsement test holds contested laws unconstitutional if a "reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief."[160] As the primary promoter of the endorsement test, Justice O'Connor reasoned that "[e]ndorsement sends a message to nonadherents [sic] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[161] However, the endorsement test is really the darling of Justice O'Connor alone, not a majority of the Supreme Court.[162] Nevertheless, as Justice O'Connor is

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152. *See* Wolman v. Walter, 433 U.S. 229, 255 (1977); Roemer v. Bd. of Pub. Works, 426 U.S. 672, 761-65 (1976); Meek v. Pittenger, 421 U.S. 349, 367-72 (1975); *Hunt*, 413 U.S. at 745-49; Tilton v. Richardson, 403 U.S. 672, 684-887 (1971); Lemon v. Kurtzman, 403 U.S. 602, 614-22 (1971).

153. Zelman v. Simmons-Harris, 536 U.S. 639, 692 (2002) (Souter, J., dissenting).

154. *Id.*

155. *Id.*

156. *See, e.g.*, Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); *Tilton*, 403 U.S. at 684-887.

157. In the 1980s, the analysis of the Court turned on the principles of neutrality and free choice, rather than the principle of divertibility. *See infra* notes 176-209 and accompanying text.

158. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

159. *See infra* notes 160-163 and accompanying text.

160. *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment) (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

161. *Lynch*, 465 U.S. at 688.

162. John E. Dunsford, *A Closer Look at* Good News v. Milford*: What Are the Implications? (Stay Tuned)*, 25 SEATTLE U. L. REV. 577, 603 (2002); Stephen S. Kao, *The President's Guidelines*

often the crucial swing vote in Establishment Clause decisions, this test cannot be completely dismissed.[163]

F. The Coercion Test

In the 1992 decision of *Lee v. Weisman*,[164] the Supreme Court developed another Establishment Clause test, the coercion test. According to the coercion test, a law violates the Establishment Clause if the government directs a formal religious activity that requires the participation of objectors.[165] Given the social ramifications of the coercion test, the precise threshold has proved difficult to determine.[166] However, only surfacing in relatively few Establishment Clause cases, the coercion test does not appear to be of substantial significance.[167] But of course, the coercion test should not be completely overlooked lest it resurface again.

G. The Rise of the Neutrality Principle and Private Choice

1. *Everson v. Board of Education*[168]

Although the 1947 *Everson* decision is most remembered for the no-aid separationist language it introduced into Supreme Court jurisprudence, *Everson* also lurked the foundation from which the neutrality theory would emerge.[169]

Despite its harsh rhetoric, *Everson* did, in fact, uphold the constitutionality of a statute that allowed public tax dollars to reimburse parents for the transportation costs incurred by sending their children to religious schools.[170] The Court reasoned that "we must be careful, in

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on Religious Exercise and Religious Expression in the Federal Workplace: A Restatement or Reinterpretation of Law?, 8 B.U. PUB. INT. L.J. 251, 258 n.31 (1999).

163. *See* Julie Jones, *Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075, 1087 (2002); Ronna Greff Schneider, *Getting Help With Their Homework: Schools, Lower Courts, and the Supreme Court Justices Look for Answers Under the Establishment Clause*, 53 ADMIN. L. REV. 943, 975 (2001).

164. 505 U.S. 577 (1992).

165. *Id.* at 632 (Scalia, J., dissenting).

166. *See* Paul E. Salamanca, *The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous*, 65 U. CIN. L. REV. 1093, 1143 (1997) (noting the differences between Justice Kennedy's and Justice O'Connor's applications of the coercion test).

167. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301-14 (2000); Lee v. Weisman, 505 U.S. 577 (1992); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

168. 330 U.S. 1 (1947).

169. *See* Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1087-88 (2002); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 94 (1986).

170. *Everson*, 330 U.S. at 17.

protecting the citizens . . . against state-established churches, to be sure that we do not inadvertently prohibit [the government] from extending its general . . . benefits to *all* its citizens *without regard to their religious belief*."[171]

Later in the *Everson* opinion, the Court laid out the language that came to define the neutrality theorist position: "[The Establishment Clause] requires the state to be a *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[172] Finally, the Court added, "State power is no more to be used so as to handicap religions than it is to favor them."[173]

Despite this unmistakable articulation of the neutrality theory, the approach would largely languish after *Everson* until the 1980s. While the neutrality position still received attention during this time,[174] the Supreme Court was principally preoccupied with a more separationist application of the *Lemon* test.[175] For neutrality theorists, patience would pay off.

2. *Mueller v. Allen*[176]

In the Supreme Court's 1983 *Mueller v. Allen* decision, taxpayers challenged a Minnesota statute that provided a tax deduction for "expenses incurred for the 'tuition, textbooks, and transportation' of dependents attending elementary or secondary schools."[177] The taxpayers claimed that the statute violated the Establishment Clause because the allowance of a tax deduction for tuition paid to attend religious schools amounted to financial assistance for religious institutions.[178] Nevertheless, the Supreme Court agreed with the Court of the Appeals and upheld the statute as constitutional.[179]

In *Mueller*, the Supreme Court initiated the transition to the neutrality approach by deemphasizing the *Lemon* test as "'no more than [a] helpful signpos[t]'"[180] while "focusing on neutrality."[181] To rationalize this shift in emphasis, the Court drew on the factual contexts of prior cases: "[W]e explicitly distinguished both *Allen* and *Everson* on the grounds that '[i]n both cases the class of beneficiaries included *all* schoolchildren, those in

171. *Id.* at 16 (emphasis added).

172. *Id.* at 18 (emphasis added).

173. *Id.*

174. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973); Gillette v. United States, 401 U.S. 437, 449 (1971) ("[T]he central purpose of the Establishment Clause [is to] . . . ensur[e] governmental neutrality in matters of religion.").

175. *See infra* notes 180-81.

176. 463. U.S. 388 (1983).

177. *Id.* at 391.

178. *Id.* at 392.

179. *Id.*

180. *Id.* at 394 (citing Hunt v. McNair, 413 U.S. 734, 741 (1973)).

181. Suzanne H. Bauknight, *The Search for Constitutional School Choice*, 27 J.L. & EDUC. 525, 533 (1998).

public as well as those in private schools.'"[182] Not relying solely on factual distinctions from prior case law, the Court said "a program . . . that *neutrally* provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."[183] Moreover, the Court stressed that "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend . . . non-sectarian private schools or sectarian private schools."[184]

The Court also noted that "public funds become available only as a result of numerous, *private choices* of individual parents of school-age children."[185] Though it may have seemed insignificant at the time, this observation signaled the arrival of the principle of private choice, which would receive increasingly greater attention in the Establishment Clause jurisprudence of the Supreme Court.[186]

Far from cementing the principles of neutrality and private choice as the Court's supreme tests in Establishment Clause jurisprudence, the Court in *Mueller* still utilized the *Lemon* test and its criteria as the primary framework for its analysis.[187] Though the Court did not expressly state the neutrality theory as expressed originally in *Everson*, these statements marked the beginning of the shift to neutrality in Establishment Clause jurisprudence.[188]

3. *Witters v. Washington Department of Services for the Blind*[189]

In the 1986 *Witters* decision, a blind student sued the state of Washington because he was denied vocational rehabilitation assistance for which he was otherwise eligible because he pursued a Bible studies degree at a Christian college.[190] While the Washington Supreme Court held that the Establishment Clause made the state's funding of the student's religious education unconstitutional,[191] the United States Supreme Court disagreed and held that the contested distribution of public funds to the student did not violate the Establishment Clause.[192]

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182. Mueller v. Allen, 463 U.S. 388, 398 (1983) (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973)).

183. *Id.* at 398-99 (emphasis added); *see also id.* at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially *neutral* law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.") (emphasis added).

184. *Id.* at 397.

185. *Id.* at 399 (emphasis added).

186. *See* Ralph D. Mawdsley, *Religious Issues and Public School Instruction: The Search for Neutrality*, 167 WEST'S EDUC. L. REP. 573, 573 (2002).

187. *Mueller*, 463 U.S. at 394-403.

188. *See* Mawdsley, *supra* note 186, at 573.

189. 474 U.S. 481, 483 (1986).

190. *Id.* at 483.

191. *Id.* at 484.

192. *Id.* at 483-85.

The Court began its analysis by acknowledging that "[i]t is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution."[193] Notably, *Witters* did not merely reiterate the principles in *Mueller*, but expounded upon them. Continuing down the road set out on in *Mueller*, the Court again emphasized the importance of neutrality: "[C]entral to our inquiry [is that] . . . Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited' . . . and is in no way skewed towards religion."[194] Moreover, the Court in *Witters* went to considerably greater lengths to express the significance of private choice.[195] The Supreme Court emphasized that also "central to our inquiry [is that] . . . [a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the *genuinely independent and private choices of aid recipients*."[196] The Court analogized that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary."[197]

However, the Court also relied on the aid to the religious organizations being of an indirect nature rather than a "direct subsidy," stating "that the State may not grant aid to a religious school, whether cash or inkind [sic], where the effect of the aid is 'that of a direct subsidy to the religious school' from the State."[198] Thus, like *Mueller*, *Witters* did not symbolize the conclusive triumph of neutrality and private choice.

4. *Zobrest v. Catalina Foothills School District*[199]

In *Zobrest,* a deaf student requested the local school district to provide a sign-language interpreter for him under the Individuals with Disabilities Act ('IDEA') when he transferred to a Catholic high school.[200] The school refused to provide the interpreter on the grounds that it violated the Establishment Clause.[201]

Reversing the Ninth Circuit, the Supreme Court held that providing the interpreter would not violate the Establishment Clause.[202] The Court reasoned that "[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child

193. *Id.* at 486.

194. *Id.* at 488 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782, n.38 (1973)).

195. *See infra* notes 196-97 and accompanying text.

196. *Witters*, 474 U.S. at 488 (emphasis added).

197. *Id.* at 486-87.

198. *Id.* at 487.

199. 509 U.S. 1 (1993).

200. *Id.* at 3.

201. *Id.*

202. *Id.*

qualifying as 'disabled' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends."[203] Additionally, the Court stated that it "never said that 'religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.'"[204] "For if the Establishment Clause did bar religious groups from receiving general government benefits, then 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'"[205]

Again applying the principles of neutrality and private choice to the Establishment Clause, the Court emphasized, "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' . . . it follows under our prior decisions that provision of that service does not offend the Establishment Clause."[206] The Court then retraced and reaffirmed the applications of neutrality and private choice in both *Mueller* and *Witters*.[207]

Nevertheless, the Court qualified its application of neutrality and private choice by stating that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an *attenuated* financial benefit."[208] Thus, *Zobrest* still did not represent a clear cut victory for neutrality and private choice because the Court also relied on the "attenuated" nature of the benefit given to the religious schools.[209]

5. *Rosenberger v. Rector & Visitors of University of Virginia*[210]

In *Rosenberger*, a student organization that published a Christian editorial newspaper sued the University for denying it funds designated to make payments for the printing costs of a variety of student publications.[211] The University contended that the support of the magazine's Christian perspective violated the Establishment Clause.[212] The Supreme Court

203. *Id.* at 10.
204. *Id.* at 8 (quoting Bowen v. Kendrick, 487 U.S. 589, 609 (1988)).
205. *Id.* at 8 (quoting Widmar v. Vincent, 454 U.S. 263, 274-75 (1981)).
206. *Id.* at 10.
207. *See id.* at 8-11.
208. *Id.* at 8 (emphasis added).
209. The Court repeatedly qualified the benefit in *Zobrest*. *See, e.g., id.* at 11-12 (distinguishing the "attenuated financial benefit that parochial schools do ultimately receive" with the "massive aid" struck down in *Meek v. Pittenger*, 421 U.S. 349, 364-65 (1975)).
210. 515 U.S. 819 (1995).
211. *Id.* at 822-27.
212. *Id.* at 827.

disagreed, holding that the support of the Christian publication (along with all the other publications) did not violate the Establishment Clause.[213]

In its 5-4 majority opinion, the Court held that "[t]he governmental program . . . [was] neutral toward religion."[214] Tracing the neutrality approach all the way back to *Everson*, the Court noted, "we must 'be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief.'"[215] The Court also noted and approved of the application of the neutrality approach in prior cases such as *Witters* and *Mueller*.[216] In order to garner a majority, however, the Court was precluded from using *Rosenberger* to establish the neutrality approach as the definitive Establishment Clause.[217] Instead, though the neutrality approach clearly dominated the analysis of the majority opinion, the Court was limited to stressing the importance of neutrality as a "significant factor."[218]

The views of Justice O'Connor, for which the majority tempered its pro-neutrality stance, were revealed in her concurring opinion in *Rosenberger*.[219] In her opinion, Justice O'Connor expressed support for the neutrality approach to the Establishment Clause, stating that "[n]eutrality, in both form and effect, is one hallmark of the Establishment Clause."[220] Nevertheless, Justice O'Connor straightforwardly pronounced "[t]he Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence."[221] She reasoned that "[e]xperience proves that the Establishment Clause . . . cannot easily be reduced to a single test."[222]

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213. *Id.* at 846.

214. *Id.* at 840.

215. *Id.* at 839 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 67 (1947)).

216. *See id.* "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* (citing Bd. of Educ. v. Grumet, 512 U.S. 687, 704 (1994) (opinion of Souter, J.) ("[T]he principle is well grounded in our case law [and] we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.")); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487-99 (1986); Mueller v. Allen, 463 U.S. 388, 398-99 (1983); Widmar v. Vincent, 454 U.S. 263, 274-75 (1981).

217. The Court needed the support of Justice O'Connor in order to constitute a five Justice majority. Without her, their opinion would have only been endorsed by four Justices: Chief Justice Rehnquist, Justice Kennedy, Justice Scalia, and Justice Thomas. *See Rosenberger*, 515 U.S. at 822.

218. *Id.* at 839 ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.").

219. *Id.* at 846 (O'Connor, J., concurring).

220. *Id.* "We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Id.* (quoting Bd. of Educ. v. Grumet, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring in part and concurring in judgment)). "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion." *Id.* (quoting *Grumet*, 512 U.S. at 717) (O'Connor, J., concurring in part and concurring in judgment)).

221. *Id.* at 852 (O'Connor, J., concurring).

222. *Id.* (quoting *Grumet*, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in judgment)).

Accordingly, Justice O'Connor clung to the virtues of contextualism, claiming that "[r]eliance on categorical platitudes is unavailing . . . [and that] . . . [r]esolution instead depends on the hard task of judging-sifting through details and determining whether the challenged program offends the Establishment Clause."[223] Finally, Justice O'Connor also framed much of the analysis of her concurring opinion around the endorsement test, stating that "the program at issue lead[s] me to conclude that by providing the same assistance to [the religious viewpoint publication] that it does to other publications, the University would not be endorsing the magazine's religious perspective."[224] Thus, Justice O'Connor's reluctance to give up the endorsement test and the art of contextualism prohibited the Court from establishing the neutrality approach as the defining test in Establishment Clause jurisprudence.

6. *Mitchell v. Helms*[225]

In the recent *Mitchell* decision, a federal statute gave federal money to government agencies that lent educational and instructional materials and equipment to public and private schools on a per-capita basis.[226] This statute was challenged as violating the Establishment Clause.[227] In a plurality decision, the Supreme Court upheld the constitutionality of the statute.[228]

a. The Plurality Opinion

In *Mitchell*, a plurality of the Court held that the government aid program did not violate the Establishment Clause because "it determined eligibility for aid neutrally, [and] allocates that aid based on the private choices of the parents of schoolchildren."[229] In doing so, the plurality made one of the strongest assertions of neutrality theretofore expressed by the

223. *Id.* at 847.

224. *Id.* at 849 (O'Connor, J., concurring). Justice O'Connor based her endorsement test analysis on three principle factors. *Id.* at 849-51. First, she noted that the student organizations were "strictly independent of the University." *Id.* at 849. Second, she remarked that the money was "paid directly to the third-party vendor and [did] not pass through the organization's coffers." *Id.* at 850. Third, she observed that the religious viewpoint publication "compete[d] with 15 other magazines and newspapers for advertising and readership." *Id.* at 850.

225. 530 U.S. 793 (2000).

226. This included library books, computers, computer software, movie projectors, filmstrips, slides, overhead projectors, projection screens, television sets, VCR's, tape recorders, cassette recordings, lab equipment, maps, and globes. *Id.* at 803.

227. *Id.* at 801 (plurality opinion).

228. *Id.* (plurality opinion).

229. *Id.* at 829 (plurality opinion). The Court also noted that the program did "not provide aid that has an impermissible content," and the program did not "define its recipients by reference to religion." *Id.* (plurality opinion).

Supreme Court:[230]

> [W]e have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligous are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government . . . . If the government is offering assistance to recipients who provide . . . a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.[231]

However, the plurality also gave the principle of private choice greater attention than in any previous case, stating that "[a]s a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'"[232] The plurality continued, noting that:

> For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference.[233]

In part, the attention on private choice may have been motivated by an attempt to assuage Justice O'Connor's concerns regarding endorsement, and her corresponding focus on the endorsement test.[234] However, these efforts proved unsuccessful in this case.

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230. *See id.* at 837 (O'Connor, J., concurring in judgment).

231. *Id.* at 809-10 (plurality opinion) (citations omitted); *see also id.* at 827 ("[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose.").

232. *Id.* at 810 (plurality opinion) (quoting Agostini v. Felton, 521 U.S. 203, 226 (1997)).

233. *Id.* (plurality opinion).

234. *See, e.g., id.* at 811 (plurality opinion) (claiming that *Zobrest*, *Witters*, and *Mueller* demonstrated that "the private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government").

b. Justice O'Connor's Concurring Opinion

Justice O'Connor concurred with the plurality that the government aid program did not violate the Establishment Clause.[235] However, echoing her concerns expressed in *Rosenberger*,[236] she did not join in the plurality opinion primarily because she felt "troubled" by and uncomfortable with "the plurality's treatment of neutrality [which could] assign that factor singular importance in the future adjudication of Establishment Clause challenges."[237] Though she did "not quarrel with the plurality's recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges,"[238] she believed that "neutrality [was] not alone sufficient to qualify the aid as constitutional."[239] In fact, Justice O'Connor went to great lengths throughout her opinion to express dissatisfaction with the notion of using neutrality alone to define the Establishment Clause.[240]

Additionally, Justice O'Connor professed an unwillingness to treat per capita aid programs as an example of private choice.[241] The distinction Justice O'Connor drew between per capita aid programs and "true private choice" stemmed primarily from her fondness for the endorsement test.[242]

In *Mitchell*, Justice O'Connor remained on the fence by concurring in the judgment, but not in the plurality opinion. Consequently, *Mitchell* constituted a high water mark of confusion in Establishment Clause jurisprudence. On the one hand, four Justices of the Court advocated an interpretation of the Establishment Clause that relied on the principles of

235. *Id.* at 837 (O'Connor, J., concurring in judgment).

236. *See supra* notes 219-24 and accompanying text.

237. *Mitchell*, 530 U.S. at 837 (O'Connor, J., concurring in judgment). "[T]he plurality, by taking such a stance, 'appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test . . . .'" *Id.* at 838 (O'Connor, J., concurring in judgment) (quoting *id.* at 900 (Souter, J., dissenting)).

238. *Id.* at 838 (O'Connor, J., concurring in judgment).

239. *Id.* at 840 (O'Connor, J., concurring in judgment).

240. *See, e.g.*, *id.* at 839 (O'Connor, J., concurring in judgment) ("[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."); *id.* at 842 (O'Connor, J., concurring in judgment) ("I do not believe that we should treat a per-capita-aid program the same as the true private-choice programs considered in *Witters* and *Zobrest*.").

241. *Id.* at 842 (O'Connor, J., concurring in judgment). *See also id.* at 843 (O'Connor, J., concurring in judgment) ("[T]he distinction between a per-capita-aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies. This Court has 'recognized special Establishment Clause dangers where the government makes direct money payment to sectarian institutions.'") (quoting Rosenberger v. Rector, 515 U.S. 819, 842 (1995)).

242. *Id.* at 842-43 (O'Connor, J., concurring in judgment) ("I believe the distinction between a per capita school aid program and a true private-choice program is significant for purposes of endorsement.") (citing Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)).

neutrality and private choice.[243] On the other hand, another group of Justices urged a separationist interpretation which much more often held programs unconstitutional on the grounds that they advanced religion, caused excessive entanglement between government and religion, or both.[244] Hanging in the balance, Justice O'Connor chose to concur in the judgment which holding the program constitutional.[245] However, she also decided not to join in the *opinion* of the plurality, but to instead write a separate opinion.[246] Thus, the lack of an authoritative majority created even more confusion as to the proper application of the Establishment Clause.[247]

IV. *ZELMAN V. SIMMONS-HARRIS*[248]

A. The Factual Background

In *Zelman v. Simmons-Harris*, the Supreme Court faced a constitutional challenge to an Ohio voucher program "designed to provide educational choices to families with children who reside in the Cleveland City School District."[249] In 1995, failing to meet any of the eighteen state minimum acceptable performance standards, this school district was declared a "crisis of magnitude" and placed under state control.[250] Because they came from low income families, most of the children did not have the means to exercise any educational option other than a failing, inner-city, public school.[251] In response to this educational disaster, Ohio enacted the Pilot Project Scholarship Program, a voucher program that provided tuition assistance for students to attend any participating school of the parents' choosing,[252] whether public or private (including religiously affiliated schools).[253] In all, state tuition assistance for each student in the program amounted to $2,250 at a private school,[254] $4,167 at a traditional public school,[255] $4,518 at a

243. Derek H. Davis, Mitchell v. Helms *and the Modern Cultural Assault on the Separation of Church and State*, 43 B.C. L. REV. 1035, 1043 (2002).

244. Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139, 1149 (2002).

245. *Mitchell*, 530 U.S. at 836 (O, Connor, J., concurring in judgment).

246. *Id.* at 837 (O'Connor, J., concurring in judgment).

247. *See, e.g.*, Philip Manns, *Charting the Spectrum of Prohibited and Permitted Aid to Religion*, 2001 UTAH L. REV. 319, 322-23 (2001) (characterizing the lack of an authoritative majority opinion as "unsettling").

248. 536 U.S. 639 (2002).

249. *Id.* at 643-44.

250. *Id.* at 644-45. In addition, only ten percent of all ninth grade students could pass a basic proficiency examination, two out of every three students failed to graduate, and few graduating students possessed reading and writing abilities comparable to graduating high school students from other cities. *Id.* at 644.

251. *Id.* at 644.

252. The program also provided aid in the form of tutoring for students of parents who desired that their child remain in a public school. *Id.* at 645.

253. *Id.* at 644-45.

254. *Id.* at 646.

255. *Id.* at 647-48.

publicly funded community school,[256] and $7,746 at a publicly funded magnet school.[257] Though no nearby traditional public schools had yet participated in the program,[258] schools that did participate included fifty-six private schools (of which forty-six were religiously affiliated),[259] ten start-up community schools,[260] and twenty-three magnet schools.[261] When the Court heard the case, over 3,700 students had participated in the Ohio voucher program.[262] Of these, ninety-six percent of the students' parents elected to use the assistance to send their children to private schools that were religiously affiliated.[263]

In July 1999, Ohio taxpayers sought to enjoin the Pilot Project Scholarship Program and challenged the constitutionality of the voucher program in federal district court, contending that the program violated the Establishment Clause.[264] The District Court granted summary judgment against the voucher program in December 1999.[265] A year later, a divided panel of the United States Court of Appeals for the Sixth Circuit affirmed the summary judgment.[266] On June 27, 2002, the United States Supreme Court reversed the Court of Appeals in a deeply divided five to four decision, holding that the Ohio voucher program did not violate the Establishment Clause.[267]

B. Interpreting and Applying the Establishment Clause

1. The Opinion of the Court[268]

Beginning its legal analysis, the Court acknowledged that Establishment Clause jurisprudence had "changed significantly" over the preceding two decades.[269] Immediately following that observation, the Court boldly pronounced:

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256. *Id.* at 647.
257. *Id.*
258. *Id.* at 647.
259. *Id.*
260. *Id.*
261. *Id.* at 648.
262. *Id.* at 647.
263. *Id.*
264. *Id.* at 648.
265. *Id.*
266. *Id.*
267. *Id.* at 648-49.
268. *Id.* at 643.
269. *Id.* at 649. The past two decades to which the Court refers are the decades during which the principles of neutrality and private choice developed within Establishment Clause jurisprudence. *See supra* notes 180-247 and accompanying text.

> [O]ur jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.[270]

The Court then recounted the application and development of the principles of neutrality and private choice from *Mueller*, to *Witters*, and on through *Zobrest*.[271] Summing up, the Court stated,

> *Mueller*, *Witters*, and *Zobrest* thus make [it] clear that 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.[272]

Having sufficiently recognized the authority of the principles of neutrality and private choice in a general sense, the Court then proceeded to address each individually.[273]

The Court discussed the particular importance of private choice and its application in the Ohio voucher program.[274] Maintaining that it "[has] never found a program of true private choice to offend the Establishment Clause,"[275] the Court reasoned that "'[i]f numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot . . . grant special favors that might lead to a religious establishment.'"[276] Later, the Court even dealt with endorsement by wrapping it up into private choice analysis, stating that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement."[277] Applying the principle of

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270. *Zelman*, 536 U.S. at 649.

271. *Id.* at 649-52.

272. *Id.* at 652.

273. *Id.* at 653-60.

274. *Id.* at 655-60.

275. *Id.* at 653.

276. *Id.* at 652-53 (quoting Mitchell v. Helms, 530 U.S. 793, 810 (2000)). The Court also noted that "when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, 'no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.'" *Id.* at 653 (quoting *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring in judgment) (quoting Witters v. Wash. Dept. of Servs. for Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in judgment))).

277. *Zelman*, 536 U.S. at 655 (citing Mueller v. Allen, 463 U.S. 388, 399 (1983); *Witters*, 474 U.S. at 488-89; Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10-11 (1993); *Mitchell*, 530 U.S. at 842-43 (O'Connor, J., concurring in judgment) ("'In terms of public perception, a government program of direct aid to religious schools . . . differs meaningfully from the government distributing

private choice to the voucher program, the Court concluded that "the program challenged here [was] a program of true private choice . . . and thus constitutional."[278] The Court reasoned that the students maintained a broad range of educational options, including remaining in a traditional public school, or using the voucher for tuition to enroll in a religious private school, a nonreligious private school, a community school, or in a magnet school.[279]

After discussing the particular importance of the principle of private choice, the Court moved on to the principle of neutrality and its application to the voucher program.[280] The Court concluded that "the Ohio program [was] neutral in all respects toward religion."[281] The Court reasoned that the voucher program "benefits [were] available to participating families on neutral terms, with no reference to religion."[282] If anything, the Court stated, there was a financial disincentive for families to choose a religious school because only parents "enroll[ing] their children in a private school (religious or nonreligious) must co-pay a portion of the school's tuition."[283] In addition, the program "permit[ted] the participation of *all* schools within the district, religious or nonreligious."[284] Here too, the Court concluded that the Ohio voucher program "create[d] financial *dis*incentives for religious schools [because] private schools receiv[e] only half the government assistance given to community schools and one-third the assistance given to magnet schools."[285]

As previously discussed, the lack of a clear majority opinion in *Mitchell* was "unsettling"[286] to those trying to discern the proper method for determining Establishment Clause challenges.[287] Despite her criticism in

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aid directly to individual students who, in turn, decide to use the aid at the same religious schools.'") (emphasis omitted)). The Court also contends that as a result of private choice, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipient, not the government, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652.

278. *Id.* at 653.

279. *Id.* at 655-56. The Court also noted that it did not matter that there were more religious schools than nonreligious schools. *Id.* at 656-57.

280. *Id.* at 653-55. The Court chose not to expound upon the particular importance of the neutrality principle, as it had done with the principle of private choice. Instead, the Court relied on the discussion of both neutrality and private choice together from earlier in the opinion as sufficient for its purposes. *See id.* at 649-55.

281. *Id.* at 653.

282. *Id.*

283. *Id.* at 654. If the students attended a traditional public school, community school, or magnet school, then the parents did not have to pay anything. *Id.*

284. *Id.* at 653.

285. *Id.* at 654. However, the Court also stated that this financial disincentive arrangement was not necessary to meet constitutional muster. *Id.*

286. *See, e.g.*, Manns, *supra* note 247, at 323 (characterizing the lack of an authoritative majority opinion as "unsettling").

287. *Id.*

Mitchell of the plurality's "rule of unprecedented breadth,"[288] Justice O'Connor joined in the substantially similar majority opinion of *Zelman*, giving the *Zelman* opinion binding authority as a majority opinion (averting the non-binding plurality opinion that resulted in *Mitchell*).[289] Nevertheless, although the *Zelman* opinion covers much the same ground as the plurality opinion in *Mitchell*, the two opinions are not identical.[290] One feature which distinguishes the two opinions is the relative attention paid to the principles of neutrality and private choice.[291] In *Mitchell*, the plurality focused primarily on neutrality, with private choice playing more of an accompanying role.[292] In contrast, while the *Zelman* majority began with a discussion of both neutrality and private choice together,[293] it then continued with an exposition on the particular importance of private choice,[294] but did not do so independently with neutrality.[295] Moreover, throughout the *Zelman* opinion, the Court most often characterized the voucher program in terms of private choice alone.[296] It also sometimes characterized the program in terms of both neutrality and private choice,[297] but seldom in terms of only neutrality.[298] The distinction is subtle, yet illustrative. An analysis of Justice of O'Connor's concurring opinion reveals that these distinctions, though subtle, were key in garnering Justice O'Connor's support, and thus a majority.

2. Justice O'Connor's Concurring Opinion[299]

In her concurring opinion, Justice O'Connor reaffirms the majority's declaration of the supremacy of the principles of neutrality and private choice.[300] Putting any doubt to rest, she clearly states, "*Based on the reasoning in the Court's opinion* . . . I am persuaded that the Cleveland voucher program . . . is consistent with the Establishment Clause."[301]

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288. *Mitchell*, 530 U.S. at 837 (O'Connor, J., concurring in judgment).

289. *See Zelman*, 536 U.S. at 663-76 (O'Connor, J., concurring).

290. *See generally id.* at 639; *Mitchell*, 530 U.S. at 793.

291. *Compare Zelman*, 536 U.S. at 649-56, *with Mitchell* 530 U.S. at 801-36.

292. *See Mitchell*, 530 U.S. at 801-36.

293. *See Zelman*, 536 U.S. at 649-55.

294. *See id.* at 652-56.

295. *See id.*

296. *See, e.g., Zelman*, 536 U.S. at 649 ("[O]ur jurisprudence with respect to true *private choice programs* has remained consistent and unbroken.") (emphasis added); *id.* at 653 ("We believe that the program challenged here is a *program of true private choice* . . . and thus constitutional.") (emphasis added); *id.* at 657 ("[l]ikewise, an identical *private choice program*") (emphasis added); *id.* at 662 ("The program is therefore a *program of true private choice.*") (emphasis added).

297. *See, e.g., id.* at 655 ("a *neutral* program of *private choice*") (emphasis added); *id.* at 641 ("*neutral* school-*choice* program") (emphasis added); *id.* at 658 n.4 ("*neutral choice* program") (emphasis added).

298. *See, e.g., id.* at 653 ("the Ohio program is *neutral* in all respects toward religion") (emphasis added).

299. *Id.* at 663 (O'Connor, J., concurring).

300. *See id.* at 670 (O'Connor, J., concurring).

301. *Id.* at 676 (O'Connor, J., concurring) (emphasis added).

Justice O'Connor also exposes the motive for the majority's shift in primary emphasis from neutrality to private choice since *Mitchell*, stating that "in [her] view, the *more significant finding* in these cases is that Cleveland parents who use vouchers to send their children to religious private schools do so as a result of *true private choice*."[302] In fact, Justice O'Connor clearly states the vital importance of private choice several times in her opinion:

> Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and *more importantly*, whether beneficiaries of indirect aid have a *genuine choice* among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down under the Establishment Clause.[303]

Thus, it seems, the majority opinion focused more heavily on private choice than on neutrality in order to entice Justice O'Connor from her position in *Mitchell* and garner a majority.[304]

Having recognized the primacy of neutrality and, in particular, private choice, Justice O'Connor then attempted to alleviate "alarmist claims about implications of . . . the Court's decision"[305] by demonstrating that "the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs"[306] and "pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions."[307] Justice O'Connor observed that "[f]ederal dollars also reach religiously affiliated organizations . . . such as Medicare . . . and Medicaid, . . . through educational programs such as the Pell Grant program . . . and the G.I. Bill of Rights, . . . and through child care programs such as the Child Care and

302. *Id.* at 672 (O'Connor, J., concurring) (emphasis added).
303. *Id.* at 669 (O'Connor, J., concurring) (emphasis added).
304. *See generally id.* at 639.
305. *Id.* at 668 (O'Connor, J., concurring).
306. *Id.* (O'Connor, J., concurring).
307. *Id.* at 665 (O'Connor, J., concurring). Justice O'Connor also noted that "the amount spent on religious private schools is minor compared to the $114.8 million the State spent on students in the Cleveland magnet schools." *Id.* at 664 (O'Connor, J., concurring).

Development Block Grant Program."[308] Also, stating that "tax exemptions, which have 'much the same effect as [cash grants] . . . of the amount of tax [avoided],'"[309] Justice O'Connor wrote that religious organizations receive exemptions from the federal corporate income tax, exemptions from income tax in many states, property tax exemptions in all states; while clergy enjoy favorable federal tax treatment on income used for housing expenses, and federal and many state governments give tax credits for educational expenses (including those spent at religious schools).[310]

Finally, Justice O'Connor addressed the dissent's claim that the Ohio voucher program did not constitute true private choice. After a careful factual inquiry,[311] Justice O'Connor concluded, "I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause."[312]

V. APPLYING THE ESTABLISHMENT CLAUSE TO FAITH-BASED INITIATIVES

As one of the leading and most vocal proponents of faith-based initiative legislation, President George W. Bush has made many public statements in support of achieving this aim. At the inception of his administration, he began arguing that "[w]hen decisions are made on public funding, we should not focus on the religion you practice; we should focus on the results you deliver."[313] Later, while he acknowledged that "government has no business endorsing a religious creed, or directly funding religious worship or religious teaching,"[314] he asserted that the "government can and should support social services provided by religious people, as long as those services go to anyone in need, regardless of their faith."[315] While President Bush's statements are certainly not incompatible with constitutional faith-based initiative legislation, alone they dangerously oversimplify the necessary complexity of

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308. *Id.* at 666-67 (O'Connor, J., concurring) (internal citations omitted). "A significant portion of the funds appropriated for these programs reach religiously affiliated institutions . . . ." *Id.* at 667 (noting that religious hospitals represent eighteen percent of all hospital beds and receive thirty-six percent of their revenues from Medicare, and that religious hospitals received almost $45 billion from the federal government in 1998 (citing Merger Watch, *New Study Details Public Funding of Religious Hospitals* (Jan. 2002), *available at* http://www.mergerwatch.org/inthenews/publicfunding.html).

309. *Id.* at 666 (O'Connor, J., concurring) (quoting Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983)).

310. *Id.* at 665-66 (O'Connor, J., concurring). The Parsonage exemption alone costs the federal government $500 million per year. *Id.* at 666.

311. *Id.* at 670-76 (O'Connor, J., concurring).

312. *Id.* at 676 (O'Connor, J., concurring). "I find the Court's answer to the question whether parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools persuasive." *Id.* at 672.

313. Press Release, President George W. Bush, *President* Bush Implements Key Elements of his Faith-Based Initiative (Dec. 12, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html.

314. *Id.*

315. *Id.*

a government-funding program that would be compatible with the Establishment Clause.

Faith-based initiative legislation "creates a particularly difficult conundrum" regarding the relationship between government and religion.[316] The constitutionality of the resulting governmental funding of faith-based organizations will hinge on the United States Supreme Court's interpretation of the Establishment Clause. Accordingly, legislators and agency authorities should pay careful attention to the ruling set forth by the Court in *Zelman v. Simmons-Harris*.[317]

Zelman stands for the proposition that government funding of religious schools does not violate the Establishment Clause when the funding program meets the criteria of neutrality and private choice.[318] Applying this lesson to faith-based initiatives, governmental authorities must thoroughly grasp these concepts and accordingly structure funding programs that build upon a foundation of both neutrality and private choice.

A. Neutrality

The principle of neutrality is vital to constitutional analysis under the Establishment Clause. In evaluating the neutrality of a funding program, the *Zelman* analysis indicates that attention must be paid to four important aspects.[319]

First, government programs that fund religious organizations must have a neutral purpose.[320] This is essentially the secular purpose prong under the *Lemon* test.[321] Basically, this criterion merely requires that the government funding program have some secular purpose that is neutral to religion.[322] In *Zelman*, for example, the Ohio voucher program's neutral purpose was to provide educational assistance to children attending failing schools.[323]

Second, government funding programs that include religious organizations must confer benefits to a neutrally determined class of beneficiaries.[324] In effect, the program must not confer benefits to individuals on a religious basis.[325] Thus, by ensuring that beneficiaries

316. Susanna Dokupil, *A Sunny Dome with Caves of Ice: The Illusion of Charitable Choice*, 5 TEX. REV. L. & POL. 149, 168 (2000).

317. 536 U.S. 639 (2002).

318. *See generally id.*

319. *See infra* notes 320-34 and accompanying text.

320. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

321. *Id.*; *see also supra* note 142 and accompanying text.

322. *See Zelman*, 536 U.S. at 649.

323. *See id.*

324. *Id.* at 653.

325. *See id.* This does not mean that more religiously affiliated beneficiaries cannot benefit under the funding program than non-religiously affiliated beneficiaries. *Id.* at 650 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the

represent a "broad class of individuals"[326] and are not defined by "reference to religion,"[327] government funding programs can fulfill this second criterion. In *Zelman*, a sufficiently neutral class of beneficiaries was "any parent of a school-age child who resides in the Cleveland City School District."[328]

Third, government programs that fund religious organizations should not create financial incentives for beneficiaries to choose religious organizations over non-religious organizations.[329] In essence, this means that the government funding program should not make obtaining services from a religious organization less expensive than obtaining comparable services from a non-religious service provider.[330] In *Zelman*, for example, the Court approvingly observed that families sending children to religious schools still had to co-pay part of the tuition cost, while families who sent children to public schools paid no additional out of pocket expenses.[331]

Fourth, government funding programs that include religious organizations should neutrally allocate funding between religious and non-religious organizations.[332] This does not imply that the sum of government funding received by religious organizations must be less than or even equal to the funding received by non-religious organizations pursuant to the program.[333] Rather, this purports that religious organizations should not receive an amount greater than non-religious organizations receive on a *per beneficiary assisted* basis. In *Zelman*, the Court noted that religious schools received far less assistance per student than community schools, magnet schools, or traditional public schools.[334]

B. Private Choice

In order to survive a constitutional challenge under the Establishment Clause, private choice is also critical for a government funding program that includes religious organizations.[335] If such a program neglects to incorporate appropriate private choice into the allocation of funding, it jeopardizes the support of Justice O'Connor and, thus, bears a significant chance of running afoul of the Establishment Clause.[336]

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extent to which various classes of private citizens claimed benefits under the law.") (quoting Mueller v. Allen, 463 U.S. 388, 401 (1983)).

326. *Id.* at 649.

327. *Id.* at 651 (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993)).

328. *Id.* at 653.

329. *Id.* at 653-54.

330. *Id.*

331. *Id.* at 654.

332. *See id.* at 650.

333. *See id.* ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.") (quoting Mueller v. Allen, 463 U.S. 388, 401 (1983)).

334. *Id.* at 654.

335. *See supra* notes 293-94 and accompanying text.

336. *Id.*

Additionally, government funding programs which include religious organizations should make certain that beneficiaries have an array of options available to them.[337] In particular, a program should ensure the presence of reasonable, nonreligious alternatives to religious service providers for beneficiaries.[338] Moreover, such a program should also ensure that the nonreligious alternatives have sufficient capacity to absorb all beneficiaries who would prefer a nonreligious option.[339] In *Zelman*, for example, the Ohio voucher program presented reasonable, nonreligious options because parents could also send their children to community or magnet schools, and no voucher-eligible student was denied admission to a nonreligious private school.[340]

Although a government funding program allocating aid on a per capita basis may be constitutional, using a voucher reimbursement system would help to ensure its survival in the face of an Establishment Clause challenge. Repeatedly, the *Zelman* Court defined private choice in terms of a two-step process: first, aid must be provided "directly" to beneficiaries; and second, the beneficiaries must "in turn" direct that aid to organizations of their own choosing.[341] This careful use of language flags the inherent tension between the Justices of the Supreme Court regarding the definition of private choice. Believing that distinctions as to whether aid is directly or indirectly provided to religious organizations are unnecessary, four Justices on the Court have stated that government programs that allocate funding to organizations (religious or non-religious) on a per capita basis properly incorporate private choice.[342] However, Justice O'Connor has said that per capita funding programs do not constitute private choice,[343] instead requiring that actual money or vouchers be given to beneficiaries, which are then tendered to organizations for services (religious or non-religious).[344] Although it does not appear absolutely necessary for a government funding program to allocate funds by voucher reimbursement instead of a per capita basis,[345]

337. *See Zelman*, 536 U.S. at 672-76 (O'Connor, J., concurring).

338. *See id.* at 670 (O'Connor, J., concurring) (noting that Cleveland parents have "reasonable alternatives to religious schools").

339. *See id.* at 673 (O'Connor, J., concurring).

340. *See id.* (O'Connor, J., concurring).

341. *See, e.g., id.* at 649 ("programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing"); *id.* at 640 ("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").

342. *Mitchell*, 530 U.S. at 815-20 (plurality opinion).

343. *Id.* at 842-44 (O'Connor, J., concurring in judgment).

344. *Zelman*, 536 U.S. at 669 (O'Connor, J., concurring).

345. The Court (including Justice O'Connor, though she did not join the plurality opinion) upheld the constitutionality of a program which gave aid based on a per capita basis in *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion). Moreover, the importance of the distinction between per capita and voucher programs may fade if neutrality and private choice continue to solidify their preeminence over other tests, such as the endorsement test, which drives Justice O'Connor's focus

using vouchers maximizes the chance that the program would survive an Establishment Clause challenge.

VI. CONCLUSION

Although the focus on faith-based initiatives has faded since the stalling of legislative efforts in Congress, attention on this controversial issue is again likely to intensify as a result of President George W. Bush's renewed efforts within the executive branch. Nevertheless, the federal funding of faith-based organizations must still survive constitutional challenges brought under the Establishment Clause. Although the Establishment Clause jurisprudence traces a relatively short history, its winding development has confused both scholars and courts.[346] Until recently, constitutional case law created a morass of uncertainty surrounding the constitutionality of faith-based initiatives. Fortunately, however, the Supreme Court has laid out something of a safe harbor in its *Zelman* decision. By properly incorporating the principles of neutrality and private choice, proponents can successfully fashion faith-based initiatives that do not offend the Establishment Clause of the United States Constitution.

Aaron Cain[347]

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on the distinction between voucher reimbursement and per capita allocation. *See Mitchell*, 530 U.S. at 842-44 (O'Connor, J., concurring in judgment).

346. *See generally supra* notes 111-312 and accompanying text.

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