

# TOWARD A “MORE ENLIGHTENED AND TOLERANT VIEW”: EDUCATIONAL CHOICE AND THE REGULATION OF RELIGIOUS INSTITUTIONS

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## INTRODUCTION

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>1</sup>

In the eighty-five years since a unanimous Supreme Court decided *Pierce v. Society of Sisters*, the precedent it established regarding

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1. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (invalidating state law requiring public school attendance); *see also* *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . .”).

the family's autonomy from the state has justified judicial solicitude for a range of liberty interests related to personal and family life.<sup>2</sup> Yet the particular interest at issue in *Pierce*, educational pluralism, has been difficult to realize. Whatever constitutional limits the decision placed on the government's use of its regulatory power to promote "standardization"<sup>3</sup> directly, the use of the spending power may indirectly produce the same result: "By taxing everyone, but subsidizing only those who use secular schools, the government creates a powerful disincentive for parents to exercise their constitutionally protected option to send their children to parochial schools."<sup>4</sup> Without any aid for private schools, parents must either accept their children's education in majoritarian norms at a public school or forfeit their right to a publicly financed education.<sup>5</sup>

The same concern for educational pluralism that animated the *Pierce* Court led many to advocate a system of educational choice.<sup>6</sup> Such leading liberal thinkers as Thomas Paine and John Stuart Mill had proposed educational vouchers as a solution.<sup>7</sup> In 1955, econo-

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2. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (consensual sexual conduct); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (right to rear children); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996) (parental rights); *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978) (right to marry); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (family living arrangements); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (abortion); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (education of children); *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972) (use of contraception by unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (use of contraception by married persons).

3. See *Pierce*, 268 U.S. at 535 (noting that the state may not "standardize its children by forcing them to accept instruction from public teachers only").

4. Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 132 (1992) [hereinafter McConnell, *Religious Participation in Public Programs*].

5. One may dispute the extent to which the norms prevailing in public schools are "majoritarian," a controversy not addressed here. See generally JONATHAN ZIMMERMAN, *WHOSE AMERICA? CULTURE WARS IN THE PUBLIC SCHOOLS* (2002).

6. Educational choice refers to a program in which parents may choose to send their children to a school other than the one assigned to them by geographic default. In many proposals, the government issues a voucher to a parent or guardian to be used to fund a child's education in either a public or a private school. See *SCHOOL CHOICE: THE MORAL DEBATE* (Alan Wolfe ed., 2003).

7. In *On Liberty*, Mill wrote:

A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body. An education

mist Milton Friedman proposed a voucher system as a means of improving educational quality.<sup>8</sup> At the same time, others continued to see vouchers primarily as a means of avoiding educational standardization.<sup>9</sup> “Educational choice,” writes Michael McConnell, “would allow families to choose for themselves, among a range of choices that present different philosophical alternatives. That would be far more consistent with our constitutional commitment to pluralism.”<sup>10</sup>

With respect to religious schools, however, the Supreme Court initially suggested that such a program would be impermissible. In effect, the Establishment Clause<sup>11</sup> was held to require states to promote “standardization” through selective funding.<sup>12</sup> The interest in educational pluralism returned in *Zelman v. Simmons-Harris*, in which the Court upheld a school choice program that permits parents to use vouchers at any participating religious or nonreligious school of their choosing.<sup>13</sup> “The program does not force any indi-

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established and controlled by the State should only exist, if it exist at all, as one among many competing experiments.

JOHN STUART MILL, ON LIBERTY 156 (Edward Alexander ed., 1999) (1869); *see also* THOMAS PAINE, THE RIGHTS OF MAN 252 n.1 (Ernest Rhys ed., 1951) (1791) (“Education, to be useful to the poor, should be on the spot, and the best method, I believe, to accomplish this is to enable the parents to pay the expences themselves.”).

8. Milton Friedman, *The Role of Government in Education*, in EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES 12 (George R. LaNoue ed., 1972) (“Governments could require a minimum level of education financed by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on ‘approved’ educational services. Parents would then be free to spend this sum and any additional sum on purchasing educational services from an ‘approved’ institution of their own choice.”).

9. *See, e.g.*, VIRGIL C. BLUM, FREEDOM OF CHOICE IN EDUCATION 36 (1958) (“Government control over the processes of education is infinitely more objectionable than government control of businesses which supply the physical needs of life. . . . Freedom can survive, to a considerable degree, even if government tells the citizen what brand of food he must eat and what fashion of clothes he must wear. But freedom cannot long survive when government tells him what thoughts he must think.”).

10. Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 851 (1999).

11. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

12. *See, e.g.*, *Roemer v. Bd. of Pub. Works.*, 426 U.S. 736, 762 (1976) (upholding state aid to religious colleges provided that colleges perform “essentially secular educational functions”); *Bd. of Educ. v. Allen*, 392 U.S. 236, 245 (1968) (upholding the state’s provision of textbooks to parochial school students only if they use secular textbooks that are “not unsuitable for use in the public schools.”).

13. 536 U.S. 639 (2002).

vidual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children,” explained Justice Thomas, citing *Pierce*.<sup>14</sup>

No sooner had the Court made this nod to educational pluralism than the standardizers leapt into action. The president of the American Federation of Teachers, Sandra Feldman, promised a dual response: “If this decision brings new efforts to enact voucher legislation, we will fight these efforts,” she said.<sup>15</sup> “But we will also work with local, state, and national policymakers to ensure that private schools that receive public funds are held accountable—just as public schools are.”<sup>16</sup> The Progressive Policy Institute, meanwhile, began promoting its own version of “accountable choice,” which would impose statewide standards on private and parochial schools that participate in school choice programs.<sup>17</sup>

Similarly, some legal scholars argue that religious schools that participate in such programs must promote majoritarian norms. “Publicly subsidized schooling,” writes Martha Minow, “must also advance public values.”<sup>18</sup> She argues that voucher plans should have “public strings attached and enforced through adequate oversight and monitoring.”<sup>19</sup> Thus, the state would ensure that religious schools respect such principles as the individual’s freedom of belief and expression, political neutrality toward religion, fair trials by impartial decision-makers, and nondiscrimination on the basis of race, gender, religion, national origin, and sexual orientation.<sup>20</sup> Moreover, “any religious school receiving public funds or vouchers must engage in educational programming to address the legacies of

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14. *Id.* at 680 (Thomas, J., concurring).

15. Press Release, American Fed’n of Teachers, Statement by Sandra Feldman, President, American Fed’n of Teachers, on the Supreme Court’s Ruling on School Vouchers (June 27, 2002), *available at* <http://archive.aft.org/presscenter/releases/2002/062702.htm>.

16. *Id.*

17. ANDREW J. ROTHERHAM, PROGRESSIVE POL’Y INST., PUTTING VOUCHERS IN PERSPECTIVE: THINKING ABOUT SCHOOL CHOICE AFTER *Zelman v. Simmons-Harris* (July 2, 2002), [http://www.ppionline.org/documents/Ed\\_vouchers\\_702.pdf](http://www.ppionline.org/documents/Ed_vouchers_702.pdf) (proposing that “public accountability, as well as funding, follow[ ] students into new or existing schools of choice—whether operated by government, private, or parochial authorities. But, these schools remain public in the most critical sense—public results and accountability in exchange for public funding.”).

18. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1261 (2003).

19. *Id.*

20. *Id.*; *see also* MARTHA MINOW, PARTNERS, NOT RIVALRY: PRIVATIZATION AND THE PUBLIC GOOD 104 (2002) (“Religious groups should not be exempted from state and local laws against discrimination on the basis of sexual orientation.”).

intergroup hatred and conflict and to promote tolerance and respect among religious, racial, and ethnic groups.”<sup>21</sup>

It is not difficult to see a suspicion of religious belief in such proposals. James Dwyer, for example, advocates using vouchers as a means to standardize education in accordance with majoritarian norms:

The beauty of vouchers, for anyone concerned about the current lack of regulation of private schools, is that vouchers provide a mechanism for states to greatly influence the nature and quality of instruction in religious and other private schools. By offering this large benefit to all private schools willing to comply with state education standards, states can greatly influence the market for private education. In all likelihood, a substantial percentage of parents who send their children to religious schools would be willing to sacrifice some control over their children’s education in order to be relieved of the burden of private school tuition.<sup>22</sup>

According to Dwyer, states ought to “use vouchers as a wedge to open the doors of God’s schools to state regulators, to restrict the freedom of parents and religious groups to educate children in accordance with their deeply held beliefs.”<sup>23</sup> He argues that states should prevent the teaching of doctrines, such as a belief in traditional gender roles, that conflict with modern liberalism.<sup>24</sup> Meanwhile, Stephen Macedo sees educational vouchers as “a vehicle by which public values further ‘colonize’ the private realm, including the religious realm.”<sup>25</sup> State regulation of participating schools will “have the effect of reconstituting private institutions in ways that make them more conformable with public values. They seem likely to alter the nature of many religious schools that receive vouchers—perhaps dampening some forms of religious diversity.”<sup>26</sup>

If vouchers serve to standardize education by undermining the religious diversity of private sectarian schools, school choice programs may prove to be, from the standpoint of their proponents, a

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21. MINOW, *supra* note 20, at 118.

22. James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963, 994 (2001).

23. *Id.* at 999–1000.

24. *Id.* at 996 (“Even more so than academic curricular requirements, this would go to the content of instruction, targeting specific forms of expression, and so would surely exclude or disadvantage some religious groups.”).

25. Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Non-profit Organizations, and Liberal Public Values*, 75 CHI.-KENT. L. REV. 417, 441 (2000).

26. *Id.* at 440–41 (noting further that “altering the nature of religious schools will likely exert pressure on religious communities more broadly”).

self-defeating endeavor. Indeed, many hailed *Zelman* and other decisions by the Rehnquist Court as signaling a new openness toward the participation of religious institutions in public life.<sup>27</sup> But the nature of the new church-state relationship depends on what sorts of conditions the state may place on religious organizations when they participate in public fora. The effect could as easily be to secularize religious institutions as to religionize the public square. The question of state regulation of private schools that accept vouchers is especially pressing in light of the *Zelman* decision because sectarian—even “pervasively sectarian”<sup>28</sup>—schools may now participate in state-funded voucher programs. State regulation of private religious schools may compromise the institutions’ religious missions and raise concerns about establishment and religious liberty under the First Amendment. Yet there is no consensus on the extent to which the state may regulate such schools.<sup>29</sup>

This Article explores obstacles to the regulation of religious schools through school voucher programs following the Supreme Court’s decisions in *Mitchell v. Helms*<sup>30</sup> and *Zelman v. Simmons-Harris*.<sup>31</sup> Part I provides background on the regulations that apply to religious schools participating in the Ohio Pilot Project Scholarship Program and the Milwaukee Parental Choice Program, the two publicly funded, general-admission choice programs that include religious schools,<sup>32</sup> and the legal developments that render such

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27. See, e.g., Bob Egelko, *Rehnquist Dies: Conservative Jurist Helped Steer High Court on Path to the Right*, S.F. CHRON., Sept. 4, 2005, at A1 (noting that Rehnquist Court “lowered barriers to religion in public life”).

28. See *Mitchell v. Helms*, 530 U.S. 793, 826 (2000). The significance of this term is discussed *infra*.

29. See, e.g., Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003) (arguing that states have considerable leeway to impose conditions on schools that receive vouchers); Steven Menashi, *The Church-State Tangle: School Choice and Religious Autonomy*, POL’Y REV., Aug.–Sept. 2002, at 37 (arguing that state regulation of religious schools through vouchers faces serious constitutional obstacles); Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397 (2003) (describing divergent approaches).

30. 530 U.S. 793 (2000).

31. 536 U.S. 639 (2002).

32. See SchoolChoiceInfo.org: Cleveland Scholarship and Tutoring Program, [http://www.schoolchoiceinfo.org/facts/index.cfm?fl\\_id=2](http://www.schoolchoiceinfo.org/facts/index.cfm?fl_id=2) (last visited Mar. 9, 2010) (explaining the Cleveland program); SchoolChoiceInfo.org: Milwaukee Parental Choice Program, [http://www.schoolchoiceinfo.org/facts/index.cfm?fl\\_id=1](http://www.schoolchoiceinfo.org/facts/index.cfm?fl_id=1) (last visited Mar. 9, 2010) (explaining the Milwaukee program). Florida’s McKay Scholarship Program, which provides scholarships that allow students with disabilities to attend private school, also includes religious schools. See Florida Department of Education: McKay Scholarship Program FAQs, <http://www.floridaschool>

regulation constitutionally suspect. Following these legal developments, certain conditions on public funds that were once required are no longer mandated by the Establishment Clause. Part II explains how the religion clauses of the First Amendment establish a right of religious institutions to remain free of government oversight and prohibit the government from involving itself in ecclesiastical questions reserved to religious institutions. Even if a religious institution consents to government oversight, an “excessive entanglement” will nevertheless render such oversight unconstitutional. Part III considers whether a state may regulate a religious school as a condition of its participation in a voucher program. It concludes that if a regulation would violate a school’s First Amendment rights when imposed directly, it is an unconstitutional condition when pressed indirectly. Moreover, because a school choice program that aims to promote educational pluralism resembles a limited public forum, the state may not discriminate on the basis of viewpoint by imposing regulations that exclude certain types of religious belief and practice. Together, these Parts show that while the government need not empower parents to choose educational alternatives, if it does establish such a program it may not police those alternatives in ways that implicate religious expression.

## I. RELIGIOUS EDUCATION AND THE STATE

Religious schools that participate in school choice programs in Cleveland and Milwaukee face a number of regulations that implicate religious teaching and institutional autonomy. State legislators imposed these regulations in order to comply with precedents that had prohibited states from using public funds to support religious instruction and required the exclusion of pervasively sectarian schools from public programs.<sup>33</sup> The Supreme Court, however, has abandoned that view. According to the Court, the religious character of a school and the ultimate destination of public funds are not matters of judicial concern so long as the funds are provided on the basis of neutral, secular criteria and directed to religious institutions wholly as a result of individuals’ independent and private choices. In the new constitutional landscape, the state regulation

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choice.org/Information/McKay/faqs.asp, (last visited Mar. 9, 2010). Congress has decided to phase out the Opportunity Scholarship Program in Washington, D.C. See Editorial, *D.C. Vouchers on Life Support*, WASH. POST, Dec. 14, 2009, at A20 (noting that the 2010 spending bill “would continue funding for students currently in the program but close it down for new students.”).

33. See *infra* Part I.A.

of private religious schools that was once thought required by the Establishment Clause is now constitutionally suspect.<sup>34</sup>

#### A. *Regulating Religious Schools*

Even the modest school choice programs now operating in Cleveland and Milwaukee impose some noteworthy restrictions on parochial schools that accept voucher children. Ohio's Pilot Project Scholarship Program precludes participating schools from discriminating on the basis of race, religion, or ethnic background.<sup>35</sup> Schools also may not "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."<sup>36</sup> While schools may accord preference to siblings of current students or those residing within the local district, the school must make all other admissions decisions by lottery.<sup>37</sup> Milwaukee's Parental Choice Program requires participating private schools to comply with federal antidiscrimination laws,<sup>38</sup> follow health and safety laws that apply to public schools,<sup>39</sup> meet specified academic standards,<sup>40</sup> and undergo annual financial audits.<sup>41</sup> Like the Cleveland program, participating Milwaukee schools must accept children by lottery rather than by selective admission.<sup>42</sup> Thus, the laws in both cities prevent a religious school from favoring students of its own denomination. Unlike the Cleveland program, when the Wisconsin legislature amended the program to include religious schools in 1995, it also added an "opt-out" provision that forbids participating schools from requiring a pupil to participate in "any religious activity" that a parent finds objectionable.<sup>43</sup>

Not all schools could accept such conditions. Most Catholic schools in Milwaukee chose to accept the conditions and admit

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34. *See infra* Part I.B.

35. OHIO REV. CODE ANN. § 3313.976(A)(4).

36. § 3313.976(A)(6).

37. § 3313.977(A)(1)(a)-(d).

38. WIS. STAT. § 119.23(2)(a)(4) (requiring compliance with 42 U.S.C. § 2000d, which prohibits discrimination under federally assisted programs).

39. § 119.23(2)(a)(5).

40. § 119.23(7)(a).

41. § 119.23(7)(am).

42. WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, MILWAUKEE PARENTAL CHOICE PROGRAM FREQUENTLY ASKED QUESTIONS—2010–11 SCHOOL YEAR (2010), [http://dpi.wisconsin.gov/sms/doc/mpcp\\_faq\\_2010\\_01.doc](http://dpi.wisconsin.gov/sms/doc/mpcp_faq_2010_01.doc).

43. WIS. STAT. § 119.23(7)(c); *see also* 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, 97 (1999).

voucher children, for example, while most schools in the Wisconsin Evangelical Lutheran Synod, the second-largest provider of religious schools in Milwaukee, declined to participate in the voucher program.<sup>44</sup> Pervasively sectarian institutions, at which religious faith informs the whole curriculum, are least able to accept the opt-out provision because it imposes an artificial distinction between religious and secular activities that would be impossible to administer without secularizing some elements of the curriculum—in other words, compromising the school’s educational mission and holistic religious environment.<sup>45</sup> Even the simple requirement of nondiscriminatory admissions, which prevents the matching of a student’s family with the school’s religious tradition, could fundamentally alter an institution’s religious mission.<sup>46</sup> The United States Department of Education found that forty-six percent of religious schools, in twenty-two urban areas, would not participate in a school choice program that required an admissions lottery system.<sup>47</sup> The same study revealed that eighty-six percent of religious schools would refuse to join a program that required them to offer exemptions from religious activities.<sup>48</sup> The Lutheran Church-Missouri Synod cited the importance of “maintaining our mission and our spiritual nature which permeates our total school program.”<sup>49</sup> As a result, the Synod would restrict admission to “students from families who wanted Lutheran school education,” not students randomly admitted by lottery.<sup>50</sup>

Because Supreme Court precedents had suggested that the Establishment Clause required an opt-out provision,<sup>51</sup> legislators, at

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44. Joe Loconte, *Paying the Piper: Will Vouchers Undermine the Mission of Religious Schools?*, POL’Y REV., Jan.–Feb. 1999, at 30, 34.

45. *See id.*

46. “One suspects that this accommodation of religious schools to public norms could alter the nature of religious schools as communities. . . . The school’s affiliation with the particular sponsoring religious community may be somewhat muted, even attenuated, or at least revised as a consequence.” Macedo, *supra* note 25, at 436–37 (noting further that “religious references in the curriculum may become more ecumenical, or else perhaps robust expressions of sectarianism will tend to be confined to certain voluntary aspects of the curriculum”).

47. LANA MURASKIN & STEPHANIE STULLICH, U.S. DEP’T OF EDUC., BARRIERS, BENEFITS, AND COSTS OF USING PRIVATE SCHOOLS TO ALLEVIATE OVERCROWDING IN PUBLIC SCHOOLS: FINAL REPORT 50 (1998).

48. *Id.* at 51.

49. *Id.*

50. *Id.* at 50. Christian Schools International also explained that “[a]lmost all our schools would not allow the exemption because every class is permeated by a Christian religious viewpoint.” *Id.* at 52.

51. *See supra* note 12; *see also infra* notes 53–59 and accompanying text.

least when the Milwaukee Parental Choice Program was crafted over a decade ago, seemed to face a Hobson's choice: either exclude religious schools from voucher programs or undermine their independence. The Supreme Court's decision in *Zelman*, however, removes any necessary tradeoff between autonomy for religious schools and the constitutionality of the choice program.<sup>52</sup>

### B. *The New Constitutional Landscape*

Wisconsin legislators added the opt-out provision in order to comply with the Establishment Clause.<sup>53</sup> In *Meek v. Pittenger*,<sup>54</sup> the Supreme Court held that a state could not provide aid to religious schools that "from its nature can be diverted to religious purposes."<sup>55</sup> Thus, when the Court allowed state aid to sectarian colleges the following year, in *Roemer v. Board of Public Works*,<sup>56</sup> it did so only because the institutions were "not so permeated by religion that the secular side cannot be separated from the sectarian" and the "aid in fact was extended only to the secular side."<sup>57</sup> By this logic, exempting voucher students from religious activities ensures that public aid supports only those aspects of education "indisputably marked off from the religious function."<sup>58</sup> The opt-out provision, as well as the open admissions policy, guarantees that participating schools will perform "essentially secular educational functions," as did the institutions at issue in *Roemer*.

Unlike the Milwaukee program, the Cleveland program lacked an opt-out provision. As a result, opponents of Cleveland's voucher program emphasized that participating schools featured curricula in which sectarian and secular elements were interwoven; they argued the program was unconstitutional because public funds would unavoidably support religious activities at such pervasively sectarian

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52. See *infra* Part I.B.

53. See Cusack, *supra* note 43, at 95 (describing the Milwaukee Parental Choice Program as "carefully constructed to overcome an inevitable Establishment Clause challenge."); see also U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

54. 421 U.S. 349 (1975).

55. *Id.* at 357 (quoting *Meek v. Pittenger*, 374 F. Supp. 639, 662) (E.D. Pa. 1974)) (internal quotation marks omitted).

56. 426 U.S. 736 (1976).

57. *Id.* at 759 (internal quotation marks omitted).

58. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Souter, J., dissenting) (arguing that "[t]he applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson* . . .").

institutions.<sup>59</sup> But in the 2000 case of *Mitchell v. Helms*,<sup>60</sup> the Supreme Court discarded the notion that public aid can never flow to pervasively sectarian institutions.<sup>61</sup>

When the Court decided *Meek* in 1975, Chief Justice Burger looked forward to this development. He hoped the Court would eventually “come to a more enlightened and tolerant view of the First Amendment’s guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools” and adopt “a more realistic view that carefully limited aid to children is not a step toward establishing a state religion.”<sup>62</sup> Twenty-five years later, the *Mitchell* Court formally repudiated *Meek*,<sup>63</sup> holding instead that a school’s religious character is

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59. See *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (upholding funding because Baptist college had not been shown to be “an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission”); see also *Bowen v. Kendrick*, 487 U.S. 589 (1988) (rejecting a challenge to the Adolescent Family Life Act because the religiously affiliated grant recipients had not been found to be pervasively sectarian); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) (invalidating state’s provision of maintenance and repair grants to private schools because “[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions”); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) (holding reimbursements to private schools to be impermissible because the religious and nonreligious aspects of the services could not be differentiated); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding grants to colleges because they were not pervasively sectarian); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (finding aid impermissible because the “substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.”).

60. 530 U.S. 793 (2000).

61. *Id.* at 829 (plurality opinion) (holding that “nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it.”).

62. *Meek*, 421 U.S. at 387 (Burger, C.J., concurring in part and dissenting in part); see also *id.* at 386–87 (“To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children . . . and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads.”) (emphasis in original).

63. *Mitchell*, 530 U.S. at 835 (plurality opinion) (“To the extent that *Meek* and *Wolman* conflict with this holding, we overrule them.”); *id.* at 837 (O’Connor, J., concurring) (“To the extent our decisions in *Meek v. Pittenger* and *Wolman v. Walter* are inconsistent with the Court’s judgment today, I agree that those decisions should be overruled.”) (citations omitted).

irrelevant as long as the government acts with a secular purpose and distributes aid in a neutral fashion.<sup>64</sup>

“If a program offers permissible aid to the religious (including the pervasively sectarian), the a-religious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be,” wrote Justice Thomas for the Court’s plurality.<sup>65</sup> Going further, the Court’s plurality explained that focusing on whether a school is pervasively sectarian necessitates an inquiry into the school’s religious views that “is not only unnecessary but also offensive” because of the well-established principle that “courts should refrain from trolling through a person’s or institution’s religious beliefs.”<sup>66</sup> Thus, the pervasively sectarian nature of an institution no longer justifies unequal treatment by the state.<sup>67</sup> In fact, such unequal treatment is constitutionally suspect.<sup>68</sup>

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64. *Id.* at 827.

65. *Id.* at 827–28 (“The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would . . . reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.”).

66. *Id.* at 828 (“[T]he application of the ‘pervasively sectarian’ factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.”).

67. Though only four Justices joined Justice Thomas’s plurality opinion, Justice O’Connor, joined by Justice Breyer, similarly discarded the “pervasively sectarian” test. She wrote separately to insist on the distinction between a per-capita school-aid program and a true private-choice program. *Id.* at 842–44 (O’Connor, J., concurring). In direct aid cases such as the former, she argued, plaintiffs should be able to establish a First Amendment violation by proving that state aid has been diverted to religious purposes. *Id.* at 857. She declined to adopt, however, a presumption that aid to pervasively sectarian institutions will always be so diverted. *Id.* at 858 (arguing that “presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause” and suggesting that “plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination”).

68. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995) (rejecting a state university’s authority to “scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief”); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that the exclusion of a speaker from public property because of the religious character of his views violates the First Amendment); *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (warning that inquiries into the religious significance of words and activities risk greater First Amendment problems than nondiscrimination).

In *Zelman*, the Court confirmed that the Establishment Clause does not require unequal treatment of religious instruction through an opt-out provision or similar regulation. There was no dispute that some of the schools receiving vouchers were pervasively sectarian or that public funds would ultimately support religious instruction.<sup>69</sup> The important question in *Zelman* was whether the program had the forbidden effect of advancing or inhibiting religion—namely, that the aid must not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement between church and state.<sup>70</sup> Because the state provided vouchers on the basis of neutral, secular criteria, there was no financial incentive to undertake religious instruction, so the aid did not constitute a government endorsement of religion.<sup>71</sup> Because the state provided aid only to parents, who then chose where to direct the money, public funds flowed to religious schools only as a result of parents’ own independent and private choices; thus, the aid to religious schools cannot be attributed to government decision-making.<sup>72</sup> Accordingly, the voucher program did not alter the relationship between religious schools and the government, “whose role ends with the disbursement of benefits” to parents.<sup>73</sup> Thus, “the circuit between government and religion was broken, and the Establishment Clause was not implicated.”<sup>74</sup>

As *Zelman* made clear, the Establishment Clause did not require the legislative horse-trading that forced religious schools in Milwaukee to relinquish control of their admissions and curricula. The case for mandating exemptions from religious activities or forbidding religiously selective admissions policies rests on the idea that state aid must not result in “governmental religious indoctrination” or “define its recipients by reference to religion.”<sup>75</sup> But in a

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69. Only the dissenters found the “pervasively sectarian” test relevant. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 709 n.19 (2002) (Souter, J., dissenting); see also *infra* notes 78–79 and accompanying text.

70. 536 U.S. at 649. In other words, the Court applied the “effects” prong of the “*Lemon* test.” See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); see also *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

71. *Zelman*, 536 U.S. at 653.

72. *Id.* at 655 (“[N]o 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.”).

73. *Id.* at 652.

74. *Id.*; see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witers v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

75. *Agostini*, 521 U.S. at 234.

system of private choice, religious schools are not state actors and their services are not state aid.<sup>76</sup> The only state aid is the initial transfer from the state to parents, who then direct the money as they see fit. It is no different from issuing a paycheck to a government employee, who may then divert the funds to a religious cause.<sup>77</sup> In that case, as in the case of a school voucher, the Establishment Clause does not require that the state monitor its eventual use. Thus, even though the Cleveland program contained no opt-out provision, the Court sustained it against an Establishment Clause challenge.

The nondiscrimination provisions in the Cleveland program, moreover, were thought relevant only by the four *Zelman* dissenters, who worried that enforcing the conditions against private religious schools would occasion an excessive entanglement between religion and government that would itself violate the Establishment Clause.<sup>78</sup> In other words, no Justice opined that the nondiscrimination provisions were necessary, but four thought the provisions might be constitutionally impermissible.<sup>79</sup>

In fact, there is good reason to question the nondiscrimination provisions. Laws that target religious conduct—prohibiting a religious school from requiring “any religious activity,” for example, or disallowing employment and admissions decisions based on religious criteria—implicate the Free Exercise Clause<sup>80</sup> and must be jus-

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76. *Cf. Jackson v. Benson*, 578 N.W.2d 602, 627 (Wis. 1998) (“[T]he mere appropriation of public monies to a private school does not transform that school into a district school . . .”).

77. *Witters*, 474 U.S. at 486–87 (“It 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. For example, 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.”); *see also Mitchell v. Helms*, 530 U.S. 793, 841 (2000) (O’Connor, J., concurring) (“This characteristic of both programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution.”).

78. *Zelman*, 536 U.S. at 712–15 (Souter, J., dissenting) (calling voucher program a “foot-in-the-door of religious regulation” that will draw courts into disputes over admissions, employment, and curriculum at religious schools); *see also id.* at 728 (Breyer, J., dissenting) (noting “entanglement problems”).

79. This possibility is discussed below. *See infra* Part II.B.

80. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”); *id.* at 546 (“A law that targets religious

tified by a compelling state interest and be narrowly tailored to advance that interest.<sup>81</sup> In *Mitchell*, the Court’s adoption of a more neutral approach to the Establishment Clause rendered the “pervasively sectarian” test—once thought constitutionally required—constitutionally suspect.<sup>82</sup> In the same way, after the Court’s determination in *Zelman* that programs of private choice do not implicate the Establishment Clause, the monitoring of religious organizations to ensure that the program does not support religion—also once thought to be constitutionally required<sup>83</sup>—must similarly be suspect. In other words, state regulation of religious schools cannot be justified by a government interest in preventing public funds from supporting religious instruction; under *Zelman* the Establishment Clause does not mandate such a segregation of funds. Without a rationale based on the Establishment Clause, the regulation appears to be gratuitous government intrusion in the affairs of religious institutions and itself a violation of the Free Exercise Clause. Indeed, judicial action under Milwaukee’s opt-out law, for example, would occasion an inquiry similar to the “pervasively sectarian test”: courts would need to determine which activities are “too religious” and which are “sufficiently secular” to be required.<sup>84</sup>

It makes sense that, as the Court adopts an increasingly neutral attitude toward religion, the regulations that developed to support a previous regime of strict no-aid separationism would become impermissible. In *Rosenberger v. University of Virginia*,<sup>85</sup> for example, the university believed that the Establishment Clause required it to evaluate the content of student publications to avoid funding religious evangelism.<sup>86</sup> But the Court, taking a view that the Establishment Clause required only neutrality, held that the evaluation itself—once thought to be constitutionally required—was impermissible.<sup>87</sup> Similarly, in *Employment Division v. Smith*,<sup>88</sup> the Court

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conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.”).

81. *Id.* at 533 (“Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”) (internal citations omitted).

82. *See supra* notes 60–68 and accompanying text.

83. *See supra* note 55.

84. *Cf. Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (“[C]ourts should refrain from trolling through a person’s or institution’s religious beliefs.”).

85. 515 U.S. 819 (1995).

86. *Id.* at 837.

87. *Id.* at 845.

abandoned the compelling-interest balancing test, which required judges to weigh the importance of a burdened religious practice against the state's interest in applying a neutral law that burdens it.<sup>89</sup> Thereafter, the inquiry once thought constitutionally required—to examine the “centrality” of the burdened religious belief in order to apply the compelling-interest test—became constitutionally suspect.<sup>90</sup> “Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims,” said the Court.<sup>91</sup> The more neutral attitude toward Free Exercise claims adopted in *Smith* removed the compelling justification for such an inquiry.

## II. THE FIRST AMENDMENT

Without the state interests once thought compelling, the religion clauses of the First Amendment stand as a bar to state regulations that implicate religious expression, even when religious institutions participate in a publicly established voucher program. The Free Exercise Clause establishes a right of religious institutions to remain free of government oversight and control. Accordingly, regulations that inject a secular state authority into the internal governance of religious institutions violate the First Amendment.<sup>92</sup> The Establishment Clause provides a structural constraint on the power of government to involve itself in ecclesiastical questions reserved to religious institutions. Thus, even if a religious institution consents to government oversight, an “excessive entanglement” between them will nevertheless render such oversight unconstitutional.<sup>93</sup>

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88. *Employment Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated by City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

89. *Id.* at 884–85 (holding the compelling-interest test inapplicable to Free Exercise challenges outside the unemployment compensation context).

90. *Id.* at 886–87 (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.”).

91. *Id.* at 887 (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”). Following *Smith*, the Court is to uphold neutral laws of general applicability that incidentally inhibit free exercise of religion. *Id.* at 890.

92. *See infra* Part II.A.

93. *See infra* Part II.B.

A. *The Free Exercise Clause and Religious Autonomy*

The First Amendment is not an absolute bar to all regulation. When it first establishes a voucher program, a state may set certification requirements that schools must meet in order to participate, provided those requirements are generally applicable and neutral toward religion.<sup>94</sup> But regulations that target religious activities or involve government in the internal operations of religious associations strike at First Amendment principles. Expressive associations, including those that advance a religious message, traditionally enjoy First Amendment protections from government interference.<sup>95</sup> The Court has recognized that implicit in the guarantees of the First Amendment is the right to associate with others “in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>96</sup> Government infringes this right when it seeks “to impose penalties or withhold benefits from individuals because of their membership in a disfavored group” or tries “to interfere with the internal organization or affairs of the group.”<sup>97</sup> A regulation “that forces the group to accept members it does not desire” clearly creates such interference because “[s]uch a regulation may impair the ability of the original members to express only those views that brought them together.”<sup>98</sup> Freedom of association includes the right not to associate.<sup>99</sup>

Religious associations receive additional constitutional protection from the religion clauses.<sup>100</sup> Well over a century ago, the Court described as “unquestioned” the “right to organize voluntary

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94. *See Smith*, 494 U.S. at 872; *see also* *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 304–05 (1985) (upholding minimum wage, overtime, and recordkeeping statutes as applied to nonprofit religious foundation because statutes did not interfere with foundation’s religious exercise or risk government entanglement with religion).

95. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 643 (2000) (holding that New Jersey’s public accommodations law violated the Boy Scouts’ First Amendment right of expressive association).

96. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (noting that the “freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed” but holding that the Jaycees lack the “distinctive characteristics” that would afford constitutional protection to its decision to exclude women).

97. *Id.* at 622–23.

98. *Id.* at 623.

99. *Id.*; *see also* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

100. *See generally* *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) (“[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”), *superseded by stat-*

religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers.”<sup>101</sup> So understood, religious liberty includes the right to join with others to practice a religion and to pursue religious objectives, such as education and evangelistic outreach. The Court has recognized that subjecting religious associations to secular oversight would defeat their very purpose and undermine their constitutional protection:

All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.<sup>102</sup>

Because state interference in the internal organization of religious communities threatens religious liberty, the First Amendment embraces “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>103</sup> This principle governed the decision in *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America* in which the Court held that New York’s religious corporations law, which sought to transfer control of Russian Orthodox churches in New York from the central governing authority of the Russian Orthodox Church in Moscow to the independent Russian Church of America, unconstitutionally prohibited the free exercise of religion.<sup>104</sup> “This contro-

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ute, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated* by *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

101. *Watson v. Jones*, 80 U.S. 679, 728–29 (1872).

102. *Id.* at 729.

103. *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (noting that freedom to select clergy has “federal constitutional protection as a part of the free exercise of religion against state interference”). This principle forms the core of the “church autonomy doctrine.” *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002).

104. *Kedroff*, 344 U.S. at 120–21.

versy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government,” said the Court.<sup>105</sup> “Legislation that regulates church administration, the operation of the churches, [or] the appointment of clergy . . . prohibits the free exercise of religion.”<sup>106</sup>

The Court applied the same principle in *Gonzalez v. Roman Catholic Archbishop of Manila*,<sup>107</sup> in which the Petitioner claimed he was entitled to a chaplaincy in the Roman Catholic Church.<sup>108</sup> The trial court directed the Archbishop of Manila to appoint him, but the Supreme Court held such an intervention impermissible.<sup>109</sup> “Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them,” Justice Brandeis wrote for the Court.<sup>110</sup> “In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.”<sup>111</sup>

In *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevic*,<sup>112</sup> the Court discarded even the possibility that the “arbitrariness” of an ecclesiastical decision would be a sufficient justification for interference with religious bodies.<sup>113</sup> In that case, the Court reversed the judgment of the Illinois Supreme Court, which had held that the defrockment of a bishop was invalid under the internal regulations of the Serbian Eastern Orthodox Church and invalidated the church’s division of its North American diocese.<sup>114</sup> As in *Gonzalez*, the Court noted that ecclesiastical decisions are beyond the reach of the courts. “Constitutional concepts of due process, involving secular notions of ‘fundamental fairness’ or

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105. *Id.* at 115.

106. *Id.* at 107–08.

107. 280 U.S. 1 (1929).

108. *Id.* at 10–11.

109. *Id.* at 16.

110. *Id.*

111. *Id.*

112. 426 U.S. 696 (1976).

113. *Id.* at 713 (“For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense ‘arbitrary’ must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits . . .”).

114. *Id.* at 721.

impermissible objectives, are . . . hardly relevant to such matters of ecclesiastical cognizance.”<sup>115</sup>

In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,<sup>116</sup> the Court maintained that civil courts had no role in resolving ecclesiastical questions, even when necessary to resolve property disputes.<sup>117</sup> “If civil courts undertake to resolve such controversies [over religious doctrine and practice] in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.”<sup>118</sup>

The concern that state regulation threatens free exercise has led the Court also to uphold exemptions for religious organizations from property taxes and from Title VII’s prohibition on religious discrimination. The need for protection from regulation applies especially to parochial schools. In *NLRB v. Catholic Bishop of Chicago*,<sup>119</sup> for example, the Court addressed a determination by the National Labor Relations Board (NLRB) that church-operated schools violated the National Labor Relations Act by refusing to recognize or to bargain with unions representing lay faculty members at the schools.<sup>120</sup> The NLRB argued that the schools had involved themselves in the secular world when they decided to hire lay teachers and were therefore subject to the Board’s jurisdiction.<sup>121</sup> The NLRB also argued that it could exercise jurisdiction over schools that were only “religiously affiliated” rather than “completely religious.”<sup>122</sup> The Court, however, worried that NLRB oversight could “run afoul of the Religion Clauses and hence preclude jurisdiction

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115. *Id.* at 714–15 (“[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria.”) (internal footnote omitted).

116. 393 U.S. 440 (1969).

117. *Id.* at 449–50.

118. *Id.* at 449 (“Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes; the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”) (internal citation omitted).

119. 440 U.S. 490 (1979).

120. *Id.* at 494.

121. *Id.* at 498 (“In the Board’s view, the Association had chosen to entangle itself with the secular world when it decided to hire lay teachers.”).

122. *Id.* at 499.

on constitutional grounds.”<sup>123</sup> Recognizing “the critical and unique role of the teacher in fulfilling the mission of a church-operated school,”<sup>124</sup> the Court concluded that “[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board’s exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.”<sup>125</sup> In particular, because several religious schools claimed their religious creeds mandated the challenged practices, resolving the charges would “necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.”<sup>126</sup> Thus, it was not only the Board’s conclusions that threatened rights guaranteed by the religion clauses, “but also the very process of inquiry leading to findings and conclusions.”<sup>127</sup> In this way, the Court suggested that the First Amendment might prohibit a secular regulatory authority from enforcing generally applicable labor laws against religious schools. In the absence of a clear expression of Congress’s intent to bring church-operated schools under the NLRB’s jurisdiction, however, the Court declined to construe the Act to so require.<sup>128</sup>

Out of similar concerns, the Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*<sup>129</sup> unanimously upheld Congress’s decision to exempt all church activities from Title VII’s prohibition on religious discrimination.<sup>130</sup> Previ-

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123. *Id.*

124. *Id.* at 501; *see also* *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) (“Religious authority necessarily pervades the school system.”); *id.* at 616 (“[P]arochial schools involve substantial religious activity and purpose.”); *id.* at 628 (Douglas, J., concurring) (noting “the admitted and obvious fact that the *raison d’être* of parochial schools is the propagation of a religious faith”).

125. *Catholic Bishop*, 440 U.S. at 504.

126. *Id.* at 502.

127. *Id.* The Court also noted that the NLRB’s role in determining what are “‘terms and conditions of employment’ and therefore mandatory subjects of bargaining” would involve it in aspects of school administration that would lead to conflicts with clergy-administrators and undermine “the former autonomous position of management.” *Id.* at 502–03.

128. *Id.* at 507 (“[I]n the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”).

129. 483 U.S. 327 (1987).

130. *Id.* at 339 (“It cannot be seriously contended that § 702 [of the Civil Rights Act of 1964] impermissibly entangles church and state; the statute effectu-

ously, only religious activities had been exempt.<sup>131</sup> Exempting only those activities identifiable as “religious” could undermine the free exercise of religion because “it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.”<sup>132</sup> As Justice White wrote for the Court, “[t]he line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.”<sup>133</sup> Thus, the broader exemption served the permissible legislative purpose of alleviating “governmental interference with the ability of religious organizations to define and carry out their religious missions.”<sup>134</sup> Under *Amos*, a threat to the free exercise of religion exists when secular courts must police a line between secular and religious activities within a sectarian institution. The Court’s concern mirrors that of Milwaukee educators who worried that an opt-out provision would undermine their schools’ religious missions.<sup>135</sup> Judicial action under the opt-out law would hinge on the distinction between secular and religious activities, so the prospect of litigation would present the same Free Exercise Clause concerns the Court found in *Amos*.

In addition to this concern about a chilling effect on free exercise, religious schools also retain the protections of a “century-old

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ates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.”).

131. *Id.* at 336.

132. *Id.*

133. *Id.* In his concurrence, Justice Brennan elaborated the point:

[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community’s process of self-definition would be shaped in part by the prospects of litigation.

*Id.* at 343–44 (Brennan, J., concurring) (citation omitted).

134. *Id.* at 335 (majority opinion).

135. See *Loconte*, *supra* note 44, at 34 (noting concern about the prospect of the “religious sterilization of academic courses”).

affirmation of a church’s sovereignty over its own affairs.”<sup>136</sup> Circuit courts have long held that the Free Exercise Clause exempts the selection of clergy from antidiscrimination statutes and precludes civil courts from adjudicating employment discrimination suits by ministerial employees against the religious institutions that employ them.<sup>137</sup> The ministerial exception applies to members of the clergy as well as “to lay employees of religious institutions whose ‘primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.’”<sup>138</sup> If the employee’s duties are “important to the spiritual and pastoral mission of the church,” the exception applies.<sup>139</sup> Indeed, as the Third Circuit has noted, “attempting to forbid religious discrimination against non-minister employees where the position involved has any religious significance is uniformly recognized as constitutionally suspect, if not forbidden.”<sup>140</sup> Under a reasonable application of this test, the ministerial exception applies to the faculty at parochial schools, thereby granting the schools freedom from judicial oversight in most employment decisions.<sup>141</sup> Beyond personnel, when religious

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136. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996); *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right [sic] to Church Autonomy*, 81 COLUM. L. REV. 1373, 1397 (1981) (noting that the Supreme Court has been willing to extend “the right of church autonomy as far as necessary to include the cases before it”).

137. *See Catholic Univ.*, 83 F.3d at 461 (citing cases from the D.C., First, Fifth, Seventh, and Eighth Circuit Courts of Appeals).

138. *Id.* (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)).

139. *Rayburn*, 772 F.2d at 1169.

140. *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991).

141. *See Clapper v. Chesapeake Conference of Seventh-Day Adventists*, No. 97-2648, 1998 U.S. App. LEXIS 32554, at \*21 (4th Cir. Dec. 29, 1998) (applying ministerial exception to an elementary school teacher because “the Seventh-day Adventist Church relies heavily upon its full-time, elementary school teachers to carry out its sectarian purpose”); *Catholic Univ.*, 83 F.3d at 470 (holding that adjudication of professor’s sex discrimination claim against Catholic university would violate Free Exercise and Establishment Clauses); *Little*, 929 F.2d at 951 (dismissing Title VII claim because parochial school may discharge a teacher who has publicly engaged in conduct regarded by the school as inconsistent with religious principles); *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283–84 (5th Cir. 1981) (holding that Title VII cannot be applied to non-ordained faculty or administrative staff at a seminary); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 884, 891 (E.D. Mich. 2008) (noting that the ministerial exception applies to a kindergarten teacher at a Lutheran school offering a “Christ-centered education”); *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858, 869 (E.D. Wis. 2004) (applying the ministerial exception to an elementary school teacher because the school required the teacher to integrate

organizations make administrative decisions for religious reasons, the civil courts and regulatory agencies may not evaluate those decisions.<sup>142</sup> “In these sensitive areas,” the Fourth Circuit has written,

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Native American culture and religion into her classes, she participated in and sometimes led the school’s religious ceremonies and cultural activities, and she helped develop her students spiritually); *Powell v. Stafford*, 859 F. Supp. 1343, 1345 (D. Colo. 1994) (holding that the Age Discrimination in Employment Act cannot be applied to a teacher in a Catholic high school); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1505 (E.D. Wis. 1986) (holding that sex discrimination claim at Catholic university cannot be adjudicated because “[t]he state, through this court, would involve itself in theological questions . . .”), *aff’d in part and vacated in part*, 814 F.2d 1213 (7th Cir. 1987); *Pardue v. Ctr. City Consortium Schs. of the Archdiocese of Wash., Inc.*, 875 A.2d 669, 677 (D.C. 2005) (applying the ministerial exception to a Catholic elementary school principal whose “many responsibilities—some predominantly ‘secular’ and some predominantly religious—are inextricably intertwined in the school’s mission”); *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195, 200 (Mich. Ct. App. 1995) (applying ministerial exception to an elementary school teacher who, by virtue of “the pervasive religious authority in teaching,” was “inexorably intertwined with the primary function of defendants’ school, which is the education of its students consistent with the Catholic faith”); *Coulee Catholic Schs. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868, 890 (Wis. 2009) (applying ministerial exception to a first-grade teacher because “[s]he was an important instrument in a faith-based organization’s efforts to pass on its faith to the next generation”).

Some courts have declined to apply the ministerial exception to teachers at religious schools whose duties are not inherently religious. *See, e.g.*, *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993); *Redhead v. Conference of Seventh-day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 853 (S.D. Ind. 1998) (denying ministerial exception to teacher at religious school who participated in religious activities because “the application of the ministerial exception to non-ministers has been reserved generally for those positions that are . . . close to being exclusively religious based, such as a chaplain or a pastor’s assistant.”); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700, 705–06 (S.D. Ohio 1990) (denying ministerial exception to employees of religious school where there was “no indication that any of the teachers [were] ordained ministers of the churches, nor [performed] sacerdotal functions”). This approach focuses on the teacher’s “primary duties,” but fails to appreciate the importance of those duties “to the spiritual and pastoral mission of the church,” *Rayburn*, 772 F.2d at 1169, which the Supreme Court has recognized. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (recognizing “the critical and unique role of the teacher in fulfilling the mission of a church-operated school”); *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) (“Religious authority necessarily pervades the school system.”); *id.* at 616 (“[P]arochial schools involve substantial religious activity and purpose.”); *id.* at 628 (Douglas, J., concurring) (noting “the admitted and obvious fact that the *raison d’être* of parochial schools is the propagation of a religious faith”).

142. *See Rayburn*, 772 F.2d at 1169 (“[T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it.”).

“the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.”<sup>143</sup>

As the D.C. Circuit has noted, the ministerial exception stands for two judicial conclusions: “[T]he first is that the imposition of secular standards on a church’s employment of its ministers will burden the free exercise of religion; the second, that the state’s interest in eliminating employment discrimination is outweighed by a church’s constitutional right of autonomy in its own domain.”<sup>144</sup> Religious associations, then, retain broad autonomy from government regulation under the First Amendment that even so compelling a government interest as nondiscrimination cannot trump. If secular oversight of employees who communicate a religious message offends the Free Exercise Clause, a governmental attempt to specify a parochial school’s curriculum or to make certain religious activities optional—which intrudes even more centrally on a school’s religious mission and undermines its ability to maintain a religious community in accordance with its own beliefs—faces the same constitutional barrier.

There remains the question of whether the ministerial exception survived the Supreme Court’s decision in *Smith*, which limited the scope of Free Exercise Clause exemptions from generally applicable laws.<sup>145</sup> The D.C. Circuit, for example, concluded that *Smith* left the exception intact because the new rule affected only the rights of *individuals* to practice their faiths rather than the rights of *churches* to manage their internal affairs.<sup>146</sup> Significantly, the rule established in *Smith* explicitly does not apply to cases where:

[the] application of a neutral, generally applicable law to religiously motivated action [involves] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of

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143. *Id.*

144. *Catholic Univ.*, 83 F.3d at 467.

145. *Employment Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997); *see supra* notes 88–91 and accompanying text.

146. *Catholic Univ.*, 83 F.3d at 463 (“We conclude from our review of the Supreme Court’s First Amendment jurisprudence that whereas the Free Exercise Clause guarantees a church’s freedom to decide how it will govern itself, what it will teach, and to whom it will entrust its ministerial responsibilities, it does *not* guarantee the right of its members to practice what their church may preach if that practice is forbidden by a neutral law of general application.”); *see also* Sullivan, *supra* note 29, at 1398 n.4 (“*Smith* did not overrule earlier decisions protecting the autonomy of church organizations over their internal affairs . . .”).

the press, or the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children.<sup>147</sup>

The opinion also remarks that “it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”<sup>148</sup> Because burdens on the autonomy of religious organizations always implicate both freedom of association and the Free Exercise Clause, religious autonomy falls into this category of hybrid, doubly protected rights. Freedom of speech will also be implicated when a law burdens a religious organization’s ability to express its beliefs, and the freedom of parents to direct their children’s education may be implicated in the case of laws affecting religious schools. Thus, *Smith* acknowledges that the First Amendment may still bar laws that burden religious associations.

### B. *The Establishment Clause and Excessive Entanglements*

But may religious organizations *voluntarily* accept government regulation by choosing to participate in a public program? Presumably, any individual right, such as the free exercise of religion, can be waived.<sup>149</sup> The cases that establish the autonomy of religious organizations in ecclesiastical matters, however, also ground that autonomy in the Establishment Clause.<sup>150</sup> The Establishment Clause, unlike the Free Exercise Clause, is a structural constraint on the government’s power that cannot be waived.<sup>151</sup>

In articulating the religious institutional autonomy principle, the Court has often spoken as if adjudication of religious matters stood outside the courts’ institutional competence and constitu-

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147. *Smith*, 494 U.S. at 881 (internal citations omitted).

148. *Id.* at 882.

149. See, e.g., *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”).

150. See, e.g., *Catholic Univ.*, 83 F.3d at 457 (holding that “application of Title VII to [case of religious] employment requires an intrusion by the Federal Government in religious affairs that is forbidden by the Establishment Clause”); *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991) (“Application of Title VII’s prohibition against religious discrimination to the Parish’s decision would also be suspect because it arguably would create excessive government entanglement with religion in violation of the establishment clause.”).

151. See Carl H. Esbeck, *The Establishment Clause as a Structural Constraint on Governmental Power*, 84 IOWA L. REV. 1, 3–4 (1998) (“[T]he Supreme Court’s case law is more easily understood when the Establishment Clause is conceptualized as a structural restraint on the government’s power to act on certain matters pertaining to religion.”).

tional authority.<sup>152</sup> In *Presbyterian Church*, for example, the Court wrote that “[s]tates, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”<sup>153</sup> Even if religious organizations had voluntarily consented to a structure that required civil courts to resolve ecclesiastical questions, the courts would still lack the authority to resolve them. In effect, courts lack subject matter jurisdiction when it comes to religious disputes.<sup>154</sup>

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152. See, e.g., *Serbian E. Orthodox Diocese for the United States & Canada v. Milivojevich*, 426 U.S. 696, 713 (1976) (noting that “religious controversies are not the proper subject of civil court inquiry”); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (“[T]he First Amendment enjoins the employment of organs of government for essentially religious purposes; the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.”) (internal citation omitted). For the rationale behind the institutional autonomy principle and concerns about judicial involvement in religious affairs, see *supra* Part II.A.

153. 393 U.S. at 440; see also *supra* notes 116–18 and accompanying text.

154. See *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457–58 (1988) (noting that a judicial inquiry into the centrality of religious beliefs and practices to certain religions “cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.”); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”); *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (observing that “the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice”); *Presbyterian Church*, 393 U.S. at 450 (considering an approach that “requires the civil court to determine matters at the very core of a religion” and concluding that “the First Amendment forbids civil courts from playing such a role”); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (holding that “the First Amendment precludes” submitting the truth of particular religious beliefs to a jury); see also *Lee v. Weisman*, 505 U.S. 577, 616–17 (1992) (Souter, J., concurring) (“I can hardly imagine a subject less amenable to the competence of the federal judiciary” than for “the courts to engage in comparative theology.”); *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) (holding that “[j]udging the centrality of different religious practices” is “unacceptable” and “not within the judicial ken”) (citations omitted), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in part and dissenting in part) (observing that “[t]his Court is ill-equipped to sit as a national theology board” and stating that “I can conceive of no judicial function more antithetical to the First Amendment”); *United States v. Lee*, 455 U.S. 252, 257 (1982) (observing that

When courts are asked to evaluate matters of religious faith and doctrine, they act outside their constitutionally delegated powers.

While the Free Exercise Clause protects the liberty of individuals to practice their faiths, the Establishment Clause aims at maintaining a particular relationship between state and church by withdrawing from government the power to act in religious affairs.<sup>155</sup> The *Presbyterian Church* Court determined that civil courts lack jurisdiction in ecclesiastical matters on precisely this basis.<sup>156</sup> As the Court explained in *Walz v. Tax Commission*, the “establishment” of religion as contemplated by the First Amendment includes any “active involvement of the sovereign in religious activity.”<sup>157</sup>

A law that occasions excessive entanglement of the government with religion runs afoul of the Establishment Clause.<sup>158</sup> Thus, in *Amos*, Justice Brennan worried that the lack of a broad tax exemption not only would inhibit free exercise, but also would “result[] in considerable ongoing government entanglement in religious affairs.”<sup>159</sup> Likewise, in *Catholic Bishop*, the Court objected to NLRB oversight not only because of the possible impact on free exercise, but also because the agency could not avoid “entanglement with the religious mission of the school.”<sup>160</sup> Similarly, in *Walz*, the Court upheld property tax exemptions to religious organizations for properties used solely for religious worship because, inter alia, the lack of such an exemption would lead to greater state involvement in the affairs of religious organizations.<sup>161</sup> It was un-

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it is outside the judicial function and competence “to determine whether appellee or the Government has the proper interpretation of the Amish faith”); *id.* at 263 n.2 (Stevens, J., concurring) (“It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims.”).

155. See generally Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311 (2000).

156. *Presbyterian Church*, 393 U.S. at 449 (“[T]he First Amendment enjoins the employment of organs of government for essentially religious purposes.”).

157. *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

158. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002); *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000); *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (“Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis.”); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Walz*, 397 U.S. at 674 (“We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.”).

159. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring).

160. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

161. *Walz*, 397 U.S. at 674 (“Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property,

necessary to justify the tax exemption by reference to the secular activities of religious groups, such as social welfare services, because “[t]o give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize.”<sup>162</sup> In other words, the city could extend the benefit of a tax exemption to religious groups—indeed, such an accommodation of religion was constitutionally preferable—but the attempt to attach public strings to the benefit would be constitutionally suspect.<sup>163</sup>

The Establishment Clause shields religious institutions from public regulation because the purpose of separating religion and government is to protect the integrity of each. “[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere,” the Court has said.<sup>164</sup> If religious organizations and state authorities wanted to enter into an excessively entangling relationship *voluntarily*, the corrosive effects on both religion and government would be no less real because the parties consented to such corrosion. The Establishment Clause aims to preserve a particular institutional arrangement between religion and the state—an arrangement that can be threatened equally by force or by collusion.<sup>165</sup> For this reason, James Madison described free exercise of religion as “in its nature an unalienable right” because:

[W]hat is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: . . . .

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tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.”).

162. *Id.*

163. *Id.* (“[T]he use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.”)

164. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

165. *Cf. Aguilar v. Felton*, 473 U.S. 402, 413 (1985) (“The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in [a] way that infringes interests at the heart of the Establishment Clause.”).

[E]very man who becomes a member of any particular Civil Society [must] do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.<sup>166</sup>

The Establishment Clause renders "what is here a right towards men," the free exercise of religion, unalienable by denying government any jurisdiction in religious matters. It does so, moreover, precisely to safeguard the integrity of religious belief by preserving religious obligations as a spiritual duty rather than subjecting them to the claims of civil society.<sup>167</sup>

This view of the Establishment Clause runs contrary to the preferences of those who want to conscript religious schools in the service of majoritarian civic values by attaching "public strings." But this is how the Establishment Clause, through the Court's "excessive entanglement" test, already works. In *Lemon v. Kurtzman*,<sup>168</sup> for example, the Court evaluated state programs that provided salary supplements to parochial school teachers and reimbursement of the costs to teach secular subjects in private schools.<sup>169</sup> To ensure that the subsidized teachers did not inculcate religion, each state conditioned its aid on certain restrictions: subsidized teachers could teach only those subjects offered in the public schools; could use only those textbooks and materials approved for use in the public schools; and had to refrain from religious teaching and worship.<sup>170</sup> The Court held, however, that "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state."<sup>171</sup> The monitoring necessary to assure compliance with the restrictions would involve the state too profoundly in the internal operations of

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166. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973).

167. For a related argument regarding expressive associations generally, see Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION 75, 76 (Amy Gutmann ed., 1998) (arguing that "liberal democracy is consistent with and even requires the incongruence between voluntary groups and public norms that always accompanies freedom of association").

168. 403 U.S. 602 (1971).

169. *Id.* at 606–07.

170. *Id.* at 619, 621.

171. *Id.* at 620–21.

parochial schools,<sup>172</sup> so the Court struck down the aid program altogether. Even if the parochial schools were willing to accept the funds with strings attached, the program would still represent an unconstitutional entanglement of church and state.<sup>173</sup> The *Lemon* Court offered a structuralist reading of the Establishment Clause, writing that “[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.”<sup>174</sup> Those lines may not be redrawn by mutual consent.

Similarly, in *Aguilar v. Felton*,<sup>175</sup> the Court found an excessive entanglement with religion where public employees who taught on religious school premises were to be closely monitored to ensure that they would not inculcate religion.<sup>176</sup> The Court cited the “administrative cooperation” between “personnel of the public and parochial school systems” that would be required to maintain the program as an unconstitutionally excessive entanglement.<sup>177</sup>

Excessive entanglement occurs, then, when regulations require the government to monitor the day-to-day operations of a parochial school; to make determinations regarding ecclesiastical matters; or otherwise to inject itself into the core functions of a religious institution even if the institution consents to such state involvement.<sup>178</sup>

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172. *Id.* at 619 (“A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed . . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church.”).

173. *Cf. McConnell, Religious Participation in Public Programs, supra* note 4, at 142 (noting that the entanglement prong averted an unconstitutional conditions problem).

174. *Lemon*, 403 U.S. at 625; *see also id.* at 614 (“The objective is to prevent, as far as possible, the intrusion of either [religion or government] into the precincts of the other.”).

175. 473 U.S. 402 (1985).

176. *Id.* at 413 (“This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement.”). *Agostini*, which overturned *Aguilar*, did not attack this reasoning. *Agostini v. Felton*, 521 U.S. 203, 236 (1997). Rather, the Court held that since *Aguilar* it had “abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.” *Id.* at 223 (internal citations omitted).

177. *Aguilar*, 473 U.S. at 413.

178. *Id.* (“Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes. In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a ‘religious symbol’ and thus off limits in a

Entanglement also arises when public authorities, such as regulatory agencies or civil courts, intervene in employment decisions of a pastoral character because such decisions are based on religious criteria.<sup>179</sup> Parochial school teachers may fall into this category.<sup>180</sup>

Because “parochial schools involve substantial religious activity and purpose,” government interference in their operations presents a special risk of excessive entanglement.<sup>181</sup> Thus, in *Bowen v. Kendrick*,<sup>182</sup> in which the Court addressed a First Amendment challenge to the Adolescent Family Life Act (AFLA),<sup>183</sup> the Justices held that although “monitoring of afla grants is necessary to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause,”<sup>184</sup> the Act did not create an excessive entanglement between church and state only because “there is no reason to assume that the religious organizations which may receive grants are ‘pervasively sectarian’ in the same sense as the Court has held *parochial schools* to be.”<sup>185</sup>

Until recently, the distinction of an organization as “pervasively sectarian” meant the government could not become involved with it at all. Unmonitored state aid to such a group would unavoidably support religious activity, thereby creating an establishment.<sup>186</sup> But

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Title I classroom. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.”) (citation omitted).

179. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (“Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church’s own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority . . . .”); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 457 (D.C. Cir. 1996) (holding that “application of Title VII to [case of religious] employment requires an intrusion by the Federal Government in religious affairs that is forbidden by the Establishment Clause”); *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991) (“Application of Title VII’s prohibition against religious discrimination to the Parish’s decision would also be suspect because it arguably would create excessive government entanglement with religion in violation of the establishment clause.”).

180. See *supra* notes 138–41 and accompanying text.

181. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (“The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.”).

182. 487 U.S. 589 (1988).

183. *Id.* at 593. The AFLA provided grants to religious organizations that offered family counseling services. *Id.*

184. *Id.* at 590.

185. *Id.* at 616 (emphasis added).

186. This would be the result under the “effects” prong of the *Lemon* test. See *Lemon*, 403 U.S. at 612.

attempts to monitor the aid would unavoidably involve the state in religious questions, creating an entanglement.<sup>187</sup> Thus, two elements of the Court’s Establishment Clause test pushed in opposite directions, working to exclude the most deeply religious groups from ostensibly neutral public programs. As Justice Souter explained in his *Zelman* dissent:

[T]he Court saw that the two educational functions [i.e., secular education and religious instruction] were so intertwined in religious primary and secondary schools that aid to secular education could not readily be segregated, and the intrusive monitoring required to enforce the line itself raised Establishment Clause concerns about the entanglement of church and state.<sup>188</sup>

Justice Souter further argued that the constitutional inquiry ought to focus not on who chooses to distribute the funds—the government or the individual parents—but rather “on what the public money bought when it reached the end point of its disbursement.”<sup>189</sup> He chastised the majority for making “no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.”<sup>190</sup> But this argument relies on the discredited doctrines of *Meek v. Pittenger* and the “pervasively sectarian” test.<sup>191</sup>

When, therefore, the four dissenters in *Zelman* argued that the Cleveland program entangled the government with religion by opening parochial schools’ admissions, employment policies, and teachings to secular oversight,<sup>192</sup> they presumably intended to discredit the program as a whole. Following the principles of neutrality and private choice, however, the intermingling of religion and secular education at parochial schools no longer implicates the Establishment Clause.<sup>193</sup> Intrusive state monitoring, on the other hand, still does. So while the private choice of individual parents breaks “the circuit between government and religion,” the govern-

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187. This would be the result under *Lemon*’s “entanglement” prong. See *id.* at 613; see also *supra* notes 168–77 and accompanying text.

188. *Zelman v. Simmons-Harris*, 536 U.S. 639, 691 (2002) (Souter, J., dissenting).

189. *Id.* at 693.

190. *Id.* at 711.

191. See, e.g., *id.* at 708 (citing *Meek*); *id.* at 709 n.19 (invoking “pervasively sectarian” test); cf. Lupu & Tuttle, *supra* note 29, at 951 (“Justice Souter, and the dissenters who join him, seem to us mired in now-antiquated and unconvincing theories of church-state separation.”).

192. *Zelman*, 536 U.S. at 712–15.

193. See *supra* notes 65–74 and accompanying text.

ment could reactivate the circuit by entering the school to monitor and regulate.<sup>194</sup>

The concerns that Justices Souter, Breyer, Stevens, and Ginsburg embraced in dissent—possible encroachment on religious autonomy and the risk of “corrosive secularism” to sectarian schools—are alive within Establishment Clause jurisprudence and highlight the pitfalls of extensive regulatory conditions.<sup>195</sup> Just as before, an excessive entanglement with religion may doom a public program. The difference, though, is that now the “effects” and “entanglement” principles behind the Establishment Clause no longer contradict each other, but lead in the same direction: the government need not impose the special burden of exclusion on deeply religious communities, nor does it have warrant to intrude in their domain.<sup>196</sup>

### III. BUYING OFF AND PUSHING OUT

A state may not induce a religious institution to surrender its constitutional rights by placing conditions on its participation in a school choice program. The doctrine of unconstitutional conditions prevents the government from achieving a result it could not command directly by bribing a rights holder into surrendering his constitutionally protected rights.<sup>197</sup> Moreover, because a school choice program aims to promote educational pluralism by empowering parents to choose private school, it resembles a limited public forum in which the state may not discriminate on the basis of viewpoint. The state cannot constitutionally exclude certain types of religious institutions from such a program, and it must frame its laws in facially neutral, generally applicable terms that do not target religious belief or practice.<sup>198</sup>

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194. *Zelman*, 536 U.S. at 652.

195. *Id.* at 712.

196. *Cf. McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (“[G]overnment may not as a goal promote ‘safe thinking’ with respect to religion and fence out from political participation those . . . whom it regards as over-involved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.”) (citation omitted).

197. *See infra* Part III.A.

198. *See infra* Part III.B.

### A. *Unconstitutional Conditions*

Even if the Establishment Clause were not an independent barrier to government involvement in a religious school, placing conditions on participation in a voucher program presents a classic unconstitutional conditions problem.<sup>199</sup> As the Court has explained the unconstitutional conditions doctrine, “the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee’s submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution.”<sup>200</sup> In this way, the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. . . . This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is impermissible.”<sup>201</sup> As noted above, even the relatively modest regulations in force in Cleveland and Milwaukee—not to mention the more extensive conditions envisioned by scholars—implicate such constitutional rights, including the free exercise right to religious autonomy; the right of freedom of association to be selective in admissions and employment; and the free speech right to communicate a religious message.<sup>202</sup> As Justice Souter observed in *Zelman*, the Cleveland program’s prohibition on teaching hatred of any person or group on the basis of religion

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199. See generally Richard Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) [hereinafter Sullivan, *Unconstitutional Conditions*].

200. *United States v. Chicago, M., St. P. & P. R.R. Co.*, 282 U.S. 311, 328–29 (1931); see also *Frost v. R.R. Comm’n*, 271 U.S. 583, 593–94 (1926) (“It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . [O]ne of the limitations [of the power of the state] is that it may not impose conditions which require the relinquishment of constitutional rights.”); *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (“A man may not barter away his life or his freedom, or his substantial rights.”).

201. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal citation and quotation marks omitted); see also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that a state may not impose conditions on a tax exemption that “must necessarily produce a result which the State could not command directly” and that “can only result in a deterrence of speech which the Constitution makes free”).

202. See *supra* Part II.

could “prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others, if they want government money for their schools.”<sup>203</sup> Ohio could not command that result directly.

In its unconstitutional conditions cases, the Court has invalidated conditions that restrict speech when the speaker is “not able to segregate its activities according to the source of its funding.”<sup>204</sup> In *Regan v. Taxation With Representation of Washington*,<sup>205</sup> the Court held that Congress *could* deny tax-exempt status to a nonprofit corporation because it engaged in lobbying activities.<sup>206</sup> The Court reasoned that a nonprofit corporation could easily create two affiliates under the Internal Revenue Code, one to conduct non-lobbying activity using tax-deductible contributions and another to conduct lobbying using other contributions.<sup>207</sup> Thus, Congress had “not infringed any First Amendment rights or regulated any First Amendment activity,” but only declined to subsidize lobbying.<sup>208</sup> In contrast, the Court in *FCC v. League of Women Voters*<sup>209</sup> held that Congress *could not* prohibit a public broadcaster from editorializing as a condition of its receiving government grants.<sup>210</sup> The crucial difference concerned the broadcaster’s inability to segregate editorializing from non-editorializing activity:

In this case, however, unlike the situation faced by the charitable organization in *Taxation With Representation*, a noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing. Therefore, in contrast to the appellee in *Taxation With Representation*, such a station is not able to segregate its activities according to the source of its funding. The station has no way of limiting the use of its federal funds to all noneditorializ-

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203. *Zelman v. Simmons-Harris*, 536 U.S. 639, 713 (2002) (Souter, J., dissenting) (citing, inter alia, 2 *Corinthians* 6:14 (King James) (“Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?”); THE KORAN 334 (N. Dawood trans., 1974) (“As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon their hearts and ears; their sight is dimmed and a grievous punishment awaits them.”)).

204. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

205. 461 U.S. 540 (1983).

206. *Id.* at 546.

207. *Id.* at 544.

208. *Id.* at 546.

209. 468 U.S. 364 (1984).

210. *Id.* at 400.

ing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity.<sup>211</sup>

It is not difficult to see the analogy to religious schools, especially “pervasively sectarian” schools, where by definition secular activities cannot be segregated from religious activities. A state might aim to avoid supporting religious activity in the same way that the FCC aimed to avoid supporting editorial speech—by imposing a condition on the entire school. If, as a condition of participating in the voucher program, a parochial school could not use religious textbooks, hold mandatory devotional services, teach creationism or theology, and so on, the law would act as a penalty on the school’s religious speech rather than a non-subsidy. The school would be barred from using even “wholly private funds” to finance its religious, expressive activity. The law would constrain the school with respect to tuition-paying students as well as voucher students.

The requirement that schools must refrain from discrimination on the basis of religion, as a condition of participating in the program, might function in this way if a school were forced to hire or admit people it would otherwise exclude. If a traditionalist Catholic school, for example, were forced to hire an abortion-rights advocate or an atheist or simply a non-Catholic it would not otherwise hire to a teaching post, there is little doubt that its free exercise and associative rights would be implicated.<sup>212</sup> In such a case, the state would be penalizing the school for maintaining a sectarian religious community rather than simply declining to subsidize religious discrimination. There is no way to segregate the school’s religious and expressive or associative hiring practices from the inclusive hiring that the state wants to subsidize. Surely, too, if Justice Souter is right that Ohio law may be understood to prohibit participating schools from teaching certain articles of faith,<sup>213</sup> then that restriction would also represent a penalty on the school’s speech and free exercise rights.

Conditions such as the opt-out law, which apply to the particular voucher students rather than the entire school, seem to be a different case but may have the same effects. If the right of a student to opt out of “any religious activity” implies that there must be

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211. *Id.*

212. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 712–13 (2002) (Souter, J., dissenting) (“Nor is the State’s religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job.”).

213. *Id.* at 713.

some activities that are “not religious” or “secular,” then the law might require a secularization of the school’s curriculum or other activities. In that case, the law would affect the entire school and act as a penalty rather than a non-subsidy. The broadcaster in *League of Women Voters* was unable to “limit[ ] the use of its federal funds to all noneditorializing activities.”<sup>214</sup> In other words, the broadcaster was “pervasively editorializing”<sup>215</sup> and consequently could not cordon off those activities from its use of federal funds. Likewise, a pervasively sectarian school cannot seal its religious activities away from public monies or voucher students, and forcing it to accept such an artificial segregation compromises significant constitutional principles.

Kathleen Sullivan recognizes a parallel between the no-editorializing condition at issue in *League of Women Voters* and restrictions on religious speech imposed as a condition of receiving public funds.<sup>216</sup> But, she writes, “[t]he asymmetrical treatment is an unavoidable feature of the unique demands of the Establishment Clause,” which “will often require excluding religious organizations from public programs, or will necessitate religion-restrictive conditions on their participation.”<sup>217</sup> Yet the view that the Establishment Clause includes a “constitutional requirement not to support religious teaching with public funds,” as Sullivan puts it,<sup>218</sup> has been rejected in favor of the more neutral, nondiscriminatory Establishment Clause holdings in *Mitchell* and *Zelman*.<sup>219</sup> Indeed, in programs of private choice, the Establishment Clause is not even implicated.<sup>220</sup>

Without a reading of the Establishment Clause that mandates discriminatory treatment of religion, the unconstitutional conditions doctrine would call for greater judicial solicitude for religious associations, especially when they participate in public programs because that is when demands for political involvement in religious

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214. *League of Women Voters*, 468 U.S. at 400.

215. See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 211 (1992).

216. *Id.* at 213 (“There can be little doubt that . . . the government’s condition would be a disincentive to the exercise of unfettered choice.”).

217. *Id.* at 211–13 (“[T]he Establishment Clause uniquely privileges the right of conscientious objection to religious activity, speech, or expenditures by government.”).

218. *Id.* at 212.

219. See *supra* Part I.B.

220. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (noting that when “parents were the ones to select a religious school . . . the circuit between government and religion was broken, and the Establishment Clause was not implicated”).

affairs will be loudest. “Preferred constitutional liberties generally declare desirable some realm of autonomy that should remain free from government encroachment,” Sullivan writes.<sup>221</sup> “Government freedom to redistribute power over presumptively autonomous decisions from the citizenry to itself through the leverage of permissible spending or regulation would jeopardize that realm.”<sup>222</sup> As noted above, the Free Exercise Clause establishes an autonomous realm for religious affairs. While the Establishment Clause withdraws jurisdiction over religious matters from the civil authorities, the Free Exercise Clause guarantees the right to associate to further one’s religious aims in self-governing religious communities.<sup>223</sup> Public benefits, however, bring forth an increased demand for regulatory encroachment and a greater likelihood of religious acquiescence, resulting in a corrosive balance of authority.

Additionally, “an unconstitutional condition can skew the distribution of constitutional rights *among* rightholders because it necessarily discriminates facially between those who do and those who do not comply with the condition,” Sullivan argues.<sup>224</sup> “Targeting of benefits can destroy such equality or neutrality as readily as can imposition of harms: for example, government can skew political speech, association, and the system of representation they support whether it jails Democrats or offers cash bounties to Republican converts.”<sup>225</sup> The problem here is with the differences between those schools willing to accept the conditions and those that are unwilling.<sup>226</sup> More liberal and secular denominations are comfortable with an opt-out provision, for example, because they already observe a division between religious and secular activities. Most conservative denominations and pervasively sectarian schools are not, in view of the fact that faith suffuses their entire curriculum.<sup>227</sup>

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221. Sullivan, *Unconstitutional Conditions*, *supra* note 199, at 1490.

222. *Id.*

223. *See supra* Part II.

224. Sullivan, *Unconstitutional Conditions*, *supra* note 199, at 1490 (emphasis in original).

225. *Id.* at 1496.

226. *See supra* Part I.A.

227. *See* Macedo, *supra* note 25, at 440 (“Pressures to do such things can be seen as public influences at odds with the autonomy and integrity of some religious institutions, especially pervasively religious institutions. Catholic and many other church-affiliated schools have accepted the conditions. However, the most conservative Protestant schools—those in which ‘everything is taught with regard to God’s word and how it applies in our lives’—have refused to accept voucher students. They worry that the restrictions will undermine their ability to preserve the sort of religious atmosphere they want.”) (internal citation omitted); Loconte, *supra* note 44, at 34.

In effect, conditions such as Milwaukee's opt-out law reintroduce the "pervasively sectarian test" through the back door, with all the attendant troubles occasioned by state authorities "trolling through a person's or institution's religious beliefs."<sup>228</sup>

"A more discriminatory rule privileging some theological beliefs over others could hardly be devised," writes Carl Esbeck of the "pervasively sectarian" metric.<sup>229</sup> "The inevitable result is that theologically liberal providers of educational services will be deemed 'secular enough' and thus acceptable recipients of government assistance, whereas theologically traditional providers of educational services will be found 'too religious' and thus denied assistance."<sup>230</sup> Or, if assistance comes with conditions that only the most ecumenical can accept, the combination of bribes and strings will reinforce majoritarian norms and undermine epistemic diversity.<sup>231</sup>

Surely, if the state is obligated to permit diverse alternatives to the public schools,<sup>232</sup> there must be a limit to the extent to which it may induce them to homogenize.<sup>233</sup>

### B. *Neutrality*

The government may restrict expression, however, when the government itself is the speaker or has hired a private party to convey its own message.<sup>234</sup> The Court has held that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps

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228. *Mitchell v. Helms*, 530 U.S. 793, 827–28 (2000) (noting that "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive" and observing that "the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity").

229. Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 910 (2001).

230. *Id.* at 909–10; *see also id.* at 910 n.86 ("Meaningful denominational divisions among religions are no longer along the old alignments of Protestant versus Catholic versus Jewish. The realignment is now orthodox (Protestant, Catholic, and Jewish) versus progressive (Protestant, Catholic, and Jewish).").

231. *Id.* ("To exclude from government aid programs those groups that are more sectarian is to punish those religions that resist conformity to culture while favoring those religions willing to evolve and conform to secular culture. Hence, the 'pervasively sectarian' test is discriminatory against the religiously orthodox.").

232. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

233. *See generally* *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927); *State v. Whisner*, 351 N.E.2d 750, 764 (Ohio 1976).

234. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991); *Bowen v. Kendrick*, 487 U.S. 589 (1988).

to ensure that its message is neither garbled nor distorted by the grantee.”<sup>235</sup> But the educational activity of parochial schools cannot constitute a governmental message. (If it were otherwise, the government would impermissibly be mixing religious speech with its own.) The purpose of a voucher program is not to convey a governmental message but to “give[ ] parents a greater choice as to where and in what manner to educate their children.”<sup>236</sup> The schools do not even serve as “grantees” of the government. Rather, money goes to individual parents, who then choose to direct it to a particular school.<sup>237</sup> The government’s role ends with the disbursement of benefits to parents.<sup>238</sup> So it is the individual parent, not the parochial school, who is the grantee of the government. The aim of such a program is to empower parents to choose among educational alternatives for their children, not for the state to hire the parents in order to transmit a governmental message.

Because the school receives no money from the government, it is difficult to see the justification for state-imposed conditions on how it may spend the funds. To be sure, the school derives a benefit from participating in the choice program. But the opening of a school choice program, which aims to facilitate greater access to a diversity of educational options, is more akin to the opening of a “limited public forum”<sup>239</sup> than it is to a government-funded project that furthers a state-approved message.<sup>240</sup> Indeed, the mutual independence of the parochial schools and the state’s expressive conduct is essential to the legality of the program in the first place.<sup>241</sup> In establishing the school choice program, in other words, the state “does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers,”<sup>242</sup> in this case the educational pluralism that private schools provide when parents have greater access to them. In such a limited public forum, the state may not discriminate against

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235. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

236. *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J., concurring).

237. *Id.* at 652.

238. *Id.* at 653.

239. *Rosenberger*, 515 U.S. at 829.

240. *Rust v. Sullivan*, 500 U.S. 173, 199 (1991).

241. *Zelman*, 536 U.S. at 652; *see supra* Part I.B.

242. *Rosenberger*, 515 U.S. at 834.

speech on the basis of its viewpoint, including a distinctive religious viewpoint.<sup>243</sup>

At the very least, the state must frame its laws in facially neutral, generally applicable terms.<sup>244</sup> “[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral,” the Court has said, “and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”<sup>245</sup> A law, such as Milwaukee’s opt-out provision, that specifically targets “religious activity” is not neutral.<sup>246</sup> As such, it requires a compelling interest for justification. In a program of private choice, compliance with the Establishment Clause does not provide such an interest,<sup>247</sup> and, in any event, the opt-out provision is not narrowly tailored to prevent tax dollars from supporting religious activity. If the child opts out, tax dollars still support religious activity; that particular child is simply not in the room. A state might also claim it has some interest in preventing indoctrination or protecting freedom of conscience. Yet it is unclear why this interest relates specifically to voucher students rather than students generally, and the state would have to explain why it was targeting only religious conscience rather than conscience generally. Why is there no opt-out provision for mandatory community service projects, for example?<sup>248</sup>

Any law that specifically targets religious conduct is subject to a searching strict scrutiny analysis.<sup>249</sup> In the absence of a need to enforce compliance with the Establishment Clause, however, it would

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243. *Id.* at 829; *see also* *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993).

244. *Employment Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

245. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

246. *See id.* (“[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.”).

247. *See supra* Part I.B.

248. *Cf. Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 457 (2d Cir. 1996) (“The program has no exceptions or ‘opt-out’ provisions for students who object to performing community service.”).

249. *Lukumi Babalu Aye*, 508 U.S. at 546 (“A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.”).

be difficult to justify discriminatory treatment of religious conduct or speech.<sup>250</sup>

## CONCLUSION

For some time, the Court’s reading of the First Amendment “bristle[d] with hostility to all things religious in public life,” as Chief Justice Rehnquist once fumed to his colleagues.<sup>251</sup> “The Court does not object to a little religion in our public life,” Michael McConnell wrote some eighteen years ago.<sup>252</sup> “But the religion must be tamed, cheapened, and secularized—just as religious schools and social welfare ministries must be secularized if they are to participate in public programs that are supposed to be open to all. Authentic religion must be shoved to the margins of public life . . . .”<sup>253</sup>

Today, the place of religion in American life is somewhat different, but suspicion of religious belief persists.<sup>254</sup> As churchgoers emerge from the shadows, the same critics who once sought to quarantine religion seek to colonize it in the name of public values. The founding generation, however, also recognized the potential for religious strife.<sup>255</sup> Their solution involved not assimilation, but strengthened pluralism. “In a free government the security for civil rights must be the same as that for religious rights,” James Madison wrote.<sup>256</sup> “It consists in the one case in the multiplicity of interests,

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250. *Cf.* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (“More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.”).

251. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) (charging that “[n]either the holding nor the tone of the [majority] opinion is faithful to the meaning of the Establishment Clause”).

252. McConnell, *Religious Participation in Public Programs*, *supra* note 4, at 127.

253. *Id.*

254. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 722–23 (2002) (Breyer, J., dissenting) (expressing concern about potential for “religious strife” and “religiously based social conflict”).

255. *See, e.g., THE FEDERALIST NO. 10*, at 73 (James Madison) (Clinton Rossiter ed., 2003) (“A zeal for different opinions concerning religion . . . [has], in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good.”).

256. *THE FEDERALIST NO. 51* (James Madison), *supra* note 255, at 321.

and in the other in the multiplicity of sects.”<sup>257</sup> So it should not be surprising that the Constitution they drafted would preserve that multiplicity and present roadblocks to the majoritarian conquest.

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257. *Id.*