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Quo Vadis: The Continuing Metamorphosis of the Establishment Clause toward Realistic Substantive Neutrality

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QUO VADIS: THE CONTINUING METAMORPHOSIS OF THE ESTABLISHMENT CLAUSE TOWARD REALISTIC SUBSTANTIVE NEUTRALITY

Paul E. Salamanca*

For years, the rhetoric of substantive neutrality has dominated interpretation of the Establishment Clause. Under this approach, courts and commentators purport to ask whether a public policy under scrutiny is likely to affect religious choices in an unacceptable way.[1] In fact, so broadly has this approach been taken that both separationists and accommodationists resort to it freely, although with radically differing perceptions as to when policy becomes unacceptable. Arguably, however, adherents to this approach have paid insufficient attention to religious behavior per se. Had they paid sufficient attention to this phenomenon, they would have been forced to acknowledge that little of what government does actually affects people's religious beliefs. Moreover, they would have been forced to recognize that vindication of basic human rights will operate as a bar to religious persecution long before such persecution is likely to affect religious choices. In fact, I would argue that a desire to vindicate such rights far more fully accounts for the United States Supreme Court's approach to the Establishment Clause in the mid-twentieth century than any real concern for substantive neutrality.

In *Zelman v. Simmons-Harris*,[2] the Supreme Court took a big step toward establishing formal neutrality as the preferred means of interpreting the Establishment Clause.[3] Under the plan at issue in the case, qualifying children

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[1] *See generally* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-02 (1990):

> My basic formulation of substantive neutrality is this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. [In other words,] religion is to be left as wholly to private choice as anything can be.

[2] 536 U.S. 639, 122 S. Ct. 2460 (2002).

[3] For purposes of this paper, I am defining "formally neutral" interpretation of the Establishment Clause as use of the clause exclusively to prohibit acts by the government designed to promote or inhibit religion as such. *See generally* Laycock, *supra* note 1, at 999-

in Cleveland could take public money in the form of a voucher and spend it at any of a number of schools, public and private — even sectarian.[4] In fact, most of the participating private schools had religious affiliations, and most students used their vouchers at such schools.[5] The majority upheld the plan, refusing to allow actual experience to resolve the case.[6] In reaching this conclusion, the Court emphasized parents' role in the plan, noting that the decision where to apply a voucher lay with them, not with the government.[7] The following essentially formalist rule guided the Court's decision:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.[8]

In upholding Cleveland's plan on these grounds, the Court took a large step away from ostensible substantive neutrality and toward formal neutrality as the touchstone for non-establishment. Although the Court included some constraints in its rule — the assistance must go "directly" to a "broad class of citizens," who then redirect aid to religious entities — this rule nevertheless portends a significant shift in the jurisprudence of the Establishment Clause. Elementary and secondary education lie at the center of American cultural and political strife, and finance is and always has been a fundamental aspect of educational policy. Although the Court had previously decided cases involving

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1001. For obvious reasons, a formally neutral approach toward free exercise is also conceivable. *See* Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) (arguing that the Religion Clauses, "read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden"). In fact, the Supreme Court essentially adopted such an approach in *Employment Div. v. Smith*, 494 U.S. 872 (1990).

[4] *See Zelman*, 122 S. Ct. at 2463 ("Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered school district and meets statewide educational standards.").

[5] *See id.* at 2464 ("In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation."); *id.* ("More than 3,700 students participated in the . . . program, most of whom (96%) enrolled in religiously affiliated schools.").

[6] *See id.* at 2470 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.").

[7] *See, e.g., id.* at 2464 ("Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child.").

[8] *Id.* at 2467.

educational finance on formally neutral terms, the activities at issue in these earlier cases had never provided more than marginal or idiosyncratic benefits to religiously based education — marginal in the sense of not going to central, unavoidable expenses, such as teachers' salaries or brick-and-mortar needs,[9] and idiosyncratic in the sense of affecting only small, inherently circumscribed categories of students.[10]

I support the decision in *Zelman*, for reasons I explain more fully elsewhere,[11] but which I will describe quickly here. Education is a complex social activity that facilitates and organizes the transfer of vast amounts of cultural and technical information. It is also an inherently normative process, where it is difficult to separate the secular from the theological. On the other hand, the promotion of diverse opinion and philosophy is an affirmative value that underlies the First Amendment. Thus, a financial plan that facilitates myriad approaches to learning, including approaches that ground themselves in theology, both avoids problems arising from monolithic approaches to education and promotes values associated with the First Amendment. This reasoning, I have argued, can also support so-called "charitable choice" plans.

Nevertheless, there is cause for concern regarding a completely formal approach to the Establishment Clause. These concerns are not troublesome enough to change my mind on the subject, but they are certainly worth pointing out and addressing. Ultimately, I believe the courts can develop rules to

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[9] *See* Mitchell v. Helms, 530 U.S. 793 (2000) (plurality) (government may lend educational equipment to private, sectarian schools as part of a formally neutral program); Agostini v. Felton, 521 U.S. 203 (1997) (government may provide remedial educational services to students at private, sectarian schools as part of a formally neutral program). Arguably, the law at issue in *Mueller v. Allen*, 463 U.S. 388 (1983), which permitted parents to deduct part of the tuition they paid to private, sectarian schools from their gross income for purposes of taxation, went to central, unavoidable educational expenses, but it was not an outright grant, and was therefore considerably more complicated to obtain than such a grant. *See also Zelman*, 122 S. Ct. at 2497 (Souter, J., dissenting) ("The scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systematic school expenditure supported.").

[10] *See* Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (government may provide a sign-language interpreter for a deaf student at a religious school as part of a formally neutral program); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (government may pay the tuition of a blind student at a seminary as part of a formally neutral program). *See also Zelman*, 122 S. Ct. at 2490 (Souter, J., dissenting) (describing *Zobrest*, *Witters*, and one other case as arising "in circumstances where any aid to religion was isolated and insubstantial").

[11] *See* Paul E. Salamanca, *Choice Programs and Market-Based Separationism*, 30 BUFF. L. REV. 931 (2002).

alleviate these concerns. In fact, I think the deviations from formal neutrality of which the Supreme Court has already spoken approvingly justify such confidence.

One problem with formal neutrality, other than the difficulty of defining the term,[12] is that it permits quite a bit. Assume, for example, that "peace on earth" is a legitimate secular value. It would be hard to say that it is not. Or, assume that "freedom from addiction" or "greater self-awareness" are legitimate secular values. Again, it would be hard to deny these assumptions. Formal neutrality would permit the government to sponsor activities that foster these secular values, provided the government did not limit its sponsorship to any category of activities that could be described as religious. Thus, formal neutrality, taken to a plausible, logical extent, would permit the government to sponsor religious meetings, including rituals, provided it agreed to sponsor conceptually similar non-religious meetings (reading groups that specialize in Nietzsche, perhaps). Similarly, formal neutrality would permit the government to sponsor meetings of Alcoholics Anonymous and similarly religiously inspired organizations (provided A.A. would take the money, which at present it would not do[13]) in order to facilitate escape from addiction, so long as it agreed to sponsor similar non-religious organizations, such as Rational Recovery. And the list would go on.

This would not end the debate, of course. At most, it would simply begin it. For example, one could respond to the preceding *quasi-reductio ad absurdum* by "buying the reductio," in the reputed words of Professor Larry Alexander. In other words, one could accept the logic of the foregoing argument and welcome the possibility of public funding of overtly religious and even ritualistic practices as part of a formally neutral plan. After all, such a

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[12] Definitional problems are minimized, and perhaps eliminated, if courts limit their focus to the text of the law at issue. A law that, as a matter of text, neither excludes nor includes individuals or entities because of their religious character would qualify as formally neutral under this approach. By modest expansion of focus, courts could also inquire whether the subject matter of a textually neutral law is so inherently religious as to support the inference that the government intends to promote religion. Similarly, courts could take into account other circumstantial evidence, beyond the subject matter of the law, in determining whether the government actually adopted it with an intention to promote religion.

[13] *See* ALCOHOLIC ANONYMOUS WORLD SERVS., INC., TWELVE STEPS AND TWELVE TRADITIONS 160 (1952) (Seventh Tradition) ("Every A.A. group ought to be fully self-supporting, declining outside contributions."). I have argued elsewhere that A.A. is sufficiently religious to implicate the Establishment Clause. *See* Paul E. Salamanca, *The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous*, 65 U. CIN. L. REV. 1093, 1159-61 (1997).

plan would be even more liberally conceived (in the classic sense of the word) than the so-called "non-preferentialist" interpretation of the Establishment Clause espoused by at least one Justice.[14] On this view, it can hardly be argued that the government "establishes" religion by the simple act of making public funding available on a formally neutral basis to all organizations, religious and non-religious, willing to provide an identifiably secular service.

Moreover, as regards pure policy, there are good reasons to support a non-preferentialist plan that goes beyond religious organizations as such. We have plausibly assumed that the plans at issue serve legitimate secular interests, and peace on earth, freedom from addiction, and greater self-awareness are laudable goals — compelling, even. Any plan that pursued these goals could therefore be justified, absent undesirable side effects and undesirable motivations. Moreover, a formally neutral plan would have the added advantage of not excluding religious approaches to social problems.[15] As a matter of equal treatment, this is appealing.[16]

The idea of bringing religiously based organizations on board as part of a formally neutral program is also appealing in a purely instrumental sense. Given the intractability of many of the problems noted earlier, we would be well-advised to ascertain whether unconventional or overlooked solutions, including solutions that draw from religious traditions, may help us solve

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[14] *See* Wallace v. Jaffree, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting) (arguing that the Establishment Clause "was definitely not concerned about whether the Government might aid all religions evenhandedly"). *But see* Douglas Laycock, *Nonpreferential Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY. L. REV. 875 (1986); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT xvii (2d ed. 1994) ("[N]onpreferentialists are wrong about the framers' intentions, not just because the framers had no position on schools, parochial or public, but because the narrow view [nonpreferentialism] is based on a misunderstanding of what they meant.").

[15] *Cf.* Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 831 (1995) (requiring a public university to pay certain expenses of an explicitly Christian evangelical newspaper as part of a general program supporting publications by students) ("It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought.").

[16] *See* Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 345 (1999) ("Equality rings truer to our notions of the government's proper role with regard to religion than does discrimination."). *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) ("A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.").

them.[17] This view contrasts somewhat with the so-called "civic republican" model from the founding era.[18] Whereas civic republican thinkers from the founding era were convinced that a religious establishment is indispensable to public morality, this view more modestly claims that religious organizations might contribute positively to a particular secular project, and should therefore be allowed to participate with the benefit of public funding.

But separationists at least would refuse to buy the reductio of permitting public funding of overtly religious, even ritualistic, practices pursuant to formally neutral plans. They would rest their refusal largely on the ground that the Establishment Clause requires more than formal neutrality in official treatment of religion. Instead, they would argue that the clause requires the government to avoid taking actions that materially affect people's religious choices, even if those actions are an unintended byproduct of formally neutral policy.[19] In other words, they would advocate substantive rather than formal neutrality as the proper approach to non-establishment.

In theory, substantive neutrality has much to recommend it as an approach to the Establishment Clause. From a classically liberal perspective, we want people to choose their religion freely, and, from a theological perspective, we want people to be absolutely free to follow whatever divine call they hear.[20] In

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[17] There is at least some empirical basis for concluding the religious approaches to social problems may prove effective. *See* RODNEY STARK & ROGER FINKE, ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION 18 (2000) (noting "the immense pile of studies that have explored the link between religiousness and psychopathology, and their consistent finding that religious people enjoy better mental (and physical) health"); *id.* at 31-32; *id.* at 33 ("[A] huge empirical literature finds that religious people are more likely to observe laws and norms, and that cities with higher rates of religious participation consequently have lower rates of deviant and criminal behavior.").

[18] *See generally* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 385-88 (1996). Edmund Burke shared this view:

> Every sort of moral, every sort of civil, every sort of politic institution, aiding the rational and natural ties that connect the human understanding and affections to the divine, are not more than necessary, in order to build up that wonderful structure, Man; whose prerogative it is, to be in a great degree a creature of his own making.

REFLECTIONS ON THE REVOLUTION IN FRANCE 189 (Conor Cruise O'Brien, ed. 1968).

[19] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 122 S. Ct. 2460, 2486 (2002) (Souter, J., dissenting) ("It is . . . only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria.").

[20] JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 50-52 (1996) (discussing the importance of "voluntarism" in several religious traditions).

addition, we do not want the vitality and initiative of religious traditions to be sapped by excessive involvement with the state.

But substantive neutrality is by no means a perfect solution to the problem of non-establishment. As a practical matter, it is difficult to gauge. Because it requires a realistic assessment of how a particular policy is likely to affect religious choices, it provides relatively little *ex ante* guidance to politicians and bureaucrats, and it leaves judges with similarly challenging decisions to make.[21] More fundamentally, substantive neutrality has typically rested upon unfounded or inadequately defended premises and assumptions about the relationship between official policy and religious choices.

For one thing, it is not altogether clear that every form of governmental skewing of religious choices is objectionable. Certainly some are, but perhaps not all. In addition, it is relatively easy to assume that certain official practices will skew the religious marketplace without an empirical basis, when the real basis for condemning the practice lies in judicial revulsion at the practice in question. Because religious behavior is remarkably complex,[22] concerns about the effects of official policy can often be misplaced.

The idea that some forms of official skewing may be more objectionable than others may sound appalling, but I submit that it will not appear so after full consideration of the point. If the government builds a highway that enables people to drive to one church instead of another, or to drive to church at all, it probably affects the mix of religious choices in a tiny way, but not in a way that most people would find objectionable. At bottom, our refusal to object to such impact is grounded in our perception that roads are neutral, that we do not build them to encourage religious behavior, and that they typically provide benefits to a variety of recipients. But a social scientist would not distinguish public acts

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[21] *See Zelman*, 122 S. Ct. at 2470 (citation omitted) (responding to the objection that eighty-two percent of the private schools participating in Cleveland's program had religious affiliations):

> To attribute constitutional significance to this figure . . . would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater.

[22] *See* STARK & FINKE, *supra* note 17, at 113 ("[P]eople go about being religious in much the same way that they go about everything else . . . . [I]n their dealings with the gods, people bargain, shop around, procrastinate, weigh costs and benefits, skip installment payments, and even cheat.").

that unintentionally promote religion from acts that do so intentionally. In other words, the neutral valence that we customarily attach to the construction of a road is a normative choice.[23] In essence, we strike it from the sociologist's list of public interferences with the religious marketplace, not because it is not a public interference, but because we approve of it. This can be said about a variety of policies.

To be sure, there are many things we do not want the government to be doing in connection with religious choices. For example, we do not want the government punishing people for worshiping one way and not another, or for refusing to worship. Nor do we want the government putting people in a position where they have to choose between hypocritical compliance with law and adhering to their own convictions.[24] But the reasons we do not want government doing these things have remarkably little to do with how they will affect religious behavior. Many of these acts are abhorrent and should be and are quickly condemned in the United States. But our attitude toward such acts does not depend in the first instance upon our desire to protect the religious marketplace from distortion. It depends instead upon fundamental notions of how government should treat human beings.

Indeed we should be grateful that we have non-instrumentalist reasons to forbid religious persecution, because there appears to be little the government can do to cause people to become religious, or to give up their existing religious affiliation.[25] Thus, if our only concern were to protect the religious marketplace from artificial constraints, we would be forced to tolerate a large category of acts that, however shocking, do not succeed in causing people to renounce their faith. This is not to say, of course, that official action is always irrelevant to the religious marketplace and that substantive neutrality in practice is the same as formal neutrality. For example, it cannot be denied that sustained official opposition to a particular religious practice can be successful in suppressing the

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[23] *Cf.* Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956).

[24] *See* Everson v. Board of Educ. of Ewing, 330 U.S. 1, 12 (1947) (quoting the "Virginia Bill for Religious Liberty" of 1786) ("Almighty God hath created the mind free[, and] all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness.").

[25] *See* STARK & FINKE, *supra* note 17, at 73 ("The collapse of Soviet Communism had many remarkable consequences, not the least of which was to reveal the abject failure of several generations of dedicated efforts to indoctrinate atheism in eastern Europe and the former Soviet Union."); *id.* at 199 ("[R]eligious economies can never be fully monopolized, even when backed by the full coercive powers of the state. Indeed, even at the height of its temporal power, the medieval church was surrounded by heresy and dissent.").

practice, at least temporarily.[26] Moreover, a significant body of research has demonstrated that government can hurt institutional religion through co-option.[27] But, the general imperviousness of the religious behavior to official policy, combined with our habitual tolerance of many "neutral" policies that actually facilitate religion, suggests that a realistic, substantively neutral approach to the Establishment Clause will yield a different result from a formally neutral approach much less often than we have generally assumed.

Sociology appears to teach us three things about the religious marketplace that bear on the subject of true substantive neutrality. First, as noted above, persecution on religious grounds is rarely successful. Thus, if we want a reason to forbid such persecution, we need one that kicks in long before persecution is likely to affect behavior. Justice Sandra Day O'Connor's "endorsement test" arguably speaks to this need, because it depends on how people are likely to interpret official acts rather than how people are likely to react to them.[28] On the other hand, the cost of protecting people's sensibilities imposed by Justice O'Connor's test may be more than we are willing to pay, particularly where no injury is intended.

Second, changes in the supply of religion account for religious choice much more readily than changes in the demand of individual believers. In other words, epiphanies and historical events that radically alter individual and communal perspectives account for relatively few changes in religious behavior. Instead, the biggest explanation for such changes — such as why people become religious in the sense of moving from the category of the unchurched to the category of the churched — is that someone close to them exposes them to a tradition that they find appealing for reasons that existed before the exposure.[29] In light of this finding, pursuit of substantive neutrality

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[26] *See* Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992).

[27] See *infra* note 30 and accompanying text.

[28] *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ([Governmental endorsement of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.).

[29] *See* STARK & FINKE, *supra* note 17, at 86 ("When people change churches or even religions, it is usually not because their preferences have changed, but because the new church or faith more effectively appeals to preferences they have always had."); *id.* at 122 ("[C]onverts very seldom are religious seekers, and conversion is seldom the culmination of a conscious search — most converts do not so much as find a new faith as the new faith finds them."); *id.* at 117 (discussing a study by sociologists John Lofland and Rodney Stark about how people came

indicates that we should ask how much a particular policy will change people's close social contacts, such that they will adopt the religious affiliation of the people with whom they associate.

Finally, sociologists have documented that true religious establishment — like the establishment in England — really can inhibit active participation in the church.[30] In light of this finding, pursuit of substantive neutrality indicates that we should ask whether public policies under consideration are likely to make religious groups dependent upon the government for their existence and thereby deprive them of their independence and vitality.

To summarize, if we are going to pursue a realistic form of substantive neutrality, the focus of our attention is actually quite simple, and quite lenient from the government's point of view. In short, we should ask: (1) whether policies under consideration will cause people to form new relationships along religious lines, thus provoking changes in religious behavior that might not have occurred but for official action; and (2) whether such policies will cause religious groups to become dependent upon the government, and therefore less

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to join the Unification Church, associated with the Reverend Sun M. Moon) (emphasis removed):

> Eventually, Lofland and Stark realized that of all the people the Unificationists encountered in their efforts to spread their faith, the only ones who joined were those whose interpersonal attachments to members overbalanced their attachments to nonmembers. In part this is because . . . social networks make religious beliefs plausible and new social networks thereby make new religious beliefs plausible. . . . In effect, conversion is seldom about seeking or embracing an ideology; it is about bringing one's religious behavior into alignment with that of one's friends and family members.

[30] *See id.* at 228:

> Socialized religious economies weaken religious organizations in several ways. First, the state often intrudes, even to the point of imposing its views on church teachings and practices — invariably in ways that make the church less strict. Second, as Adam Smith pointed out, kept clergy are lazy. Thirdly, kept laity are lazy too, being trained to regard religion as free. . . . Finally, despite claims of religious freedom, in all of these nations [referring to several nations in Western Europe], the state interferes with and otherwise limits potential competitors of the state churches.

See also id. at 69 ("Contrary to the received wisdom, the conversion of Constantine did not cause the triumph of Christianity. Rather, it was the first, and most significant step, in slowing its progress, draining its vigor, and distorting its moral vision."); *id.* at 68-69 (explaining why Christianity failed to take Northern Europe by storm in the middle ages) ("The Christianity that triumphed over Rome was a mass social movement in a highly competitive environment. The Christianity that subsequently left most of Europe only nominally converted, at best, was an established, subsidized state church that sought to extend itself, not through missionizing the population, but by baptizing kings.").

vital. In fact, as lenient as these two tests are, the first of them is arguably too strict, because it fails to take into account whether people object to the religious dimensions of new social networks to which they are exposed because of official policy. In some cases they may object, but in other cases they may find their new contacts either unobjectionable or in fact desirable.[31] On this view, although a policy under review may, strictly speaking, be a cause in fact of religious change in the case of a willing convert brought into contact with a proselytizer, it is hard to condemn such a result on normative grounds.

In light of the foregoing observations, a small but critical list of deviations from true formal neutrality are in order. First, no matter how formally neutral a public program may be, it must include at least one meaningful secular option for all participating individuals. Thus, a court would properly find an establishment if all the organizations participating in a public program were religious in nature, even if the criteria for participating were formally neutral, and even if the government took steps to recruit secular organizations. In the worst-case scenario, the foregoing principle would require the government to set up its own secular provider. Arguably, this principle could be tempered somewhat by an adjustment to the laws of standing, such that only a person desiring a secular alternative and unable to find one would have standing to object to lack of a secular alternative, if the criteria for participation themselves were formally neutral, and if no evidence lay that the government had actually discouraged secular organizations from participating.

Second, in order to protect the independence and vitality of religious organizations that participate in educational and charitable choice programs, we will need to apply a robust version of the unconstitutional conditions doctrine. Attempts by the government to control the behavior of religious groups receiving public funds in ways that implicate religious autonomy should be limited to those that would satisfy strict scrutiny, or that are necessary to promote the purposes of the program at issue. Thus, a requirement that a group receiving public funds not discriminate on the basis of race would be justifiable, as would a requirement that recipients of funds account strictly for their use.

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[31] *See generally id.* at 137 ("People do not simply succumb to missionary efforts, for conversion not only involves interaction; it quite clearly involves introspection."); *id.* at 121 ("Research confirms that converts are overwhelmingly recruited from the ranks of those lacking a prior religious commitment or having only a nominal connection to a religious group."); *id.* at 123 ("When they do shift their affiliations, most people switch to a religious body very similar to the one in which they were raised.").

It is possible, of course, that religious organizations will grow toward the light of governmental funding programs, but this is not inherently subversive of religious independence or initiative. Enterprising religions, just like enterprising for-profit entities, will grow toward the light of whatever best serves their mission — in their case, the saving of souls and the doing of good work. What is dangerous, however, is that religious organizations will lose sight of their true market and start acting on the assumption that they succeed by pleasing the government. This is a real concern with grant-in-aid programs that do not depend upon the number of clients in the private sector that an organization serves. Thus, an organization receiving, for example, $500,000 to run a soup kitchen would have less incentive to attract clients than an organization paid in proportion to the number of clients served. In addition, a provider guaranteed a certain level of public funding, such as a grant-in-aid recipient, would have relatively little incentive to leaven its religious message with secular attractions. As a consequence, another important deviation from complete formal neutrality — and indeed the one most notably incorporated into the *Zelman* formulation — is the emphasis upon individual choice, or a consumer-oriented approach to the selection of provider, religious or not.

Finally, there may be certain activities that are simply too inherently associated with religion ever to permit their funding via a formally neutral program. I have in mind here a truly ritualistic service that serves a purpose as broadly normative as promoting peace on earth. Ultimately, we may have difficulty identifying this class of activities with precision; but we certainly can resolve some of the easier cases. Eating and obtaining shelter have sufficient secular content to permit their facilitation by religious groups without running afoul of the principle I am trying to elucidate. Similarly, receiving medical care, learning, and seeking to overcome specific addictions have acquired enough secular content in the age of secularism and science to fall into the same category as eating and obtaining shelter. But seeking to accomplish such broad, normative goals as peace on earth that have never had broad-based secular counterparts may not be funded by the government, even as part of a program that otherwise conforms to principles of formal neutrality.