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Education Funding in Maine in Light of Zelman and Locke: Too Much Play in the Joints?

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I. INTRODUCTION

The United States Supreme Court has struggled with the countervailing directives of the Free Exercise Clause and the Establishment Clause for decades. One area in which this battle has been particularly contentious is the issue of public funding of religious schools. On one hand, opponents argue that such funding is an impermissible co-mingling of church and state, thereby violating the Establishment Clause. Meanwhile, proponents of public funding of religious schools argue that, to withhold funding from religious schools would place a burden on those wishing to send their children to religious schools, thereby impermissibly preventing individuals from practicing their faith and violating the Free Exercise Clause.

In two recent cases involving public funding of religious education, *Locke v. Davey*[1] and *Zelman v. Simmons-Harris*,[2] the Court arrived at outcomes that seem at first glance to be as difficult to reconcile as the Religion Clauses themselves; *Locke* resulted in the lack of public funding for religious education, while in *Zelman* the receipt of public funds by religious schools was declared constitutional. The *Zelman* opinion, though, was primarily a pronouncement that states may fund religious schools if they affirmatively choose to do so, while the *Locke* opinion articulated that a state cannot be forced to fund religious education if it chooses not to do so. The Court, unfortunately, did not clarify where the first principle left off and where the second principle picked up.

In *Zelman*, a divided Court upheld a program in Ohio that allowed Cleveland parents to remove their children from the public school system, send them to private schools—both secular and religious—and have that private school tuition paid for in part by vouchers distributed by the government.[3] Finding that the program did not constitute a violation of the Establishment Clause, the Court highlighted the fact that the Cleveland public school system was, by all accounts, woefully under-serving the students of Cleveland.[4] The Court also found important the fact that public funds were

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1. 540 U.S. 712 (2004).
2. 536 U.S. 639 (2002).
3. *Id.* at 662-63.
4. *Id.* at 644. The Court observed that:

> Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

Id.

not going directly to religious institutions, but rather were being diverted to parents, who then were free to choose to pass those funds along to pay for tuition at religious schools.[5]

Two years later, in *Locke*, the Court upheld a Washington state postsecondary scholarship program that expressly excluded from eligibility any student who was pursuing a degree in devotional theology.[6] Even though, as in *Zelman*, the government funding in *Locke* was diverted through an individual whose private choice would have resulted in the funding of religious education, the Court issued an anti-funding ruling and held that the state of Washington could constitutionally withhold funding.[7]

The two cases look at first glance as though their outcomes are in opposition. *Locke* and *Zelman* do, however, have important distinguishing characteristics. First, the funding at issue in *Zelman* paid for education that was both religious and secular in nature, while *Locke* involved funding of purely religious education in the form of ministerial training.[8] This allowed the *Locke* Court to remain focused—as is their responsibility—on the constitutional principles implicit in the Establishment Clause and in Establishment Clause jurisprudence. The majority in *Zelman*, however, became distracted by extra-constitutional factors, such as Cleveland's failing schools, perhaps because the religious elements of parochial elementary and high school education appear more innocuous at first glance than does postsecondary ministerial training.

Second, the Court's analysis in *Locke* focused on a provision of the Washington Constitution,[9] which includes a more strictly-worded notion of the separation of church and state.[10] The reasoning of *Zelman*, on the other hand, was limited to the U.S. Constitution. These holdings imply that establishment and free exercise concerns will be weighed differently in each state, raising questions of federalism and consistency. The Establishment Clause is a protection that should be emphatically maintained for all citizens of the United States, regardless of their state of residence. In fact, the

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5. *Id.* at 652-53. Rehnquist stated that "the program challenged here is a program of true private choice" and went on to assert that "[t]here are no 'financial incentive[s]' that 'ske[w]' the program toward religious schools. . . . The program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools." *Id.* at 653-54 (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487-88 (1986)). These statements do nothing to negate the constitutional problem that religious schools are in fact receiving public funds. Furthermore, the manner in which Rehnquist framed his statements ("private schools receiving only half the government assistance given to community schools") entirely contradicts his statements regarding diversion of funds through parents, and makes his "indirectness" argument ring hollow. *See* discussion *infra* Part II.C.

6. *Locke*, 540 U.S. at 725 n.9.

7. *Id.*

8. Mr. Davey did participate in mixed secular and religious education, in that he attended a religiously affiliated college. *Locke*, 540 U.S. at 717. However, the only aspect of his education that was in dispute in the case was that which was directed solely at ministerial training. *Id.* at 718.

9. WASH. CONST. art. I, § 11 states, in relevant part:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion . . . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

10. *Locke*, 540 U.S. at 722 ("[T]he differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution . . . .").

Supreme Court, in *Everson v. Board of Education*,[11] specifically declared that the Establishment Clause was to apply to the individual states.[12]

The *Zelman* and *Locke* decisions, juxtaposed both in time and in subject matter, indicate that the future of jurisprudence of public funding for religious schools will be murky at best. The Court has seemingly conveyed that there is a standard to be used—that of the First Amendment of the U.S. Constitution—except when one of fifty potential other standards might be used—those of the various state constitutions. Taking into account the fact that some states have statutes on point in addition to or instead of constitutional provisions, the matter becomes even more confusing. This area of the law has the potential to leave educators, legislators, and judges in every state wondering about the permissibility of proposed programs and those already in effect.

This Comment will examine the *Zelman* and *Locke* decisions, the flaws present in the Court's reasoning of the two cases, and the resulting uncertainty left in their wake. The Comment will then examine a sample of recent lower court decisions regarding education funding to show how other states have dealt with the *Zelman-Locke* confusion. Finally, the Comment will consider Maine's handling of this confusing area of the law.[13]

II. EDUCATION FUNDING: PLAY IN THE JOINTS OR GAPING HOLES?

Although both the Free Exercise[14] and Establishment Clauses[15] have been invoked by various plaintiffs in education funding cases,[16] the issue of whether government dollars may be used to fund religious schools more squarely implicates the Establishment Clause because the issue is whether the government may sponsor religion.[17] Lack of funding of religious schools does not hinder individuals in their

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11. 330 U.S. 1 (1947).

12. The Court stated:

> The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of the Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause.

Id. at 14-15 (footnotes omitted).

13. Although plaintiffs in various cases have advanced creative arguments such as those based on equal protection and free speech claims, this Comment is more narrowly focused on the religion clauses—in particular the Establishment Clause—as they relate to religious education funding jurisprudence.

14. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

15. *Id.* ("Congress shall make no law respecting an establishment of religion.").

16. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Mueller v. Allen, 463 U.S. 388 (1983); Everson v. Bd. of Educ., 330 U.S. 1 (1947).

17. *See* Bagley v. Raymond Sch. Dep't, 1999 ME 60, ¶ 22, 728 A.2d 127, 135-36. The *Bagley* Court articulated that:

ability to practice religion, and the Free Exercise Clause is therefore not implicated as directly as is the Establishment Clause.[18] The mere refusal of the government to provide funding does not hinder an individual's ability to practice religion.[19]

In order to make a free exercise argument that would have even a chance at success under accepted First Amendment jurisprudence, a plaintiff would have to show that sending one's children to a sectarian school is an important aspect of his or her faith, and that he or she could not adequately practice such faith otherwise. This argument has not arisen in education funding jurisprudence to date;[20] even if it did, its success would be questionable because the Court has articulated that, while a right such as exercising one's religion may be fundamental, the government is not required to subsidize a fundamental right.[21] For this reason, while the Free Exercise Clause is of relevant concern here—that is, both federal and state governmental actors must be careful not to infringe on citizens' ability to practice their respective faith, be it Judaism, Buddhism, or Atheism[22]—most of the in-depth analysis in this area of the law has focused on the Establishment Clause.

A. The History of the Establishment Clause in Education Funding— Everson *to* Agostini

Establishment Clause jurisprudence in the area of education funding traces back to the 1947 case of *Everson v. Board of Education*,[23] the first case in which the

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> The Establishment Clause prohibits the government from supporting or advancing religion and from forcing religion, even in subtle ways, on those who choose not to accept it. It has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion.

Id. (footnote omitted).

18. The Law Court in *Bagley* noted that "[i]t is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely operates so as to make the practice of [the individual's] religious beliefs more expensive." *Id.* ¶ 18, 728 A.2d at 134 (internal quotation marks omitted); *cf.* Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). The Free Exercise Clause is of concern in education-funding cases because it represents the limit a government entity may approach when addressing Establishment Clause concerns. For instance, if a state decided to charge families a tax for sending their children to religious schools and paying for that tuition independently, or otherwise prevented families from sending their children to religious schools, such state action would violate the Free Exercise Clause. A mere refusal of the government to affirmatively fund religious education does not violate the Free Exercise Clause.

19. The Court "ha[s] held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right . . . ." Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983).

20. Although the Plaintiff in *Locke* did assert that he felt a religious calling to enter the ministry, he did not claim that he would otherwise be fundamentally unable to practice his faith. *See* Locke v. Davey, 540 U.S. 712, 721 (2004).

21. *Regan*, 461 U.S. at 545 ("This Court has never held that Congress must grant a benefit . . . to a person who wishes to exercise a constitutional right.").

22. *See* County of Allegheny v. ACLU, 492 U.S. 573, 598 (1989) ("Perhaps in the early days of the Republic [the religion clauses] were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to 'the infidel, *the atheist*, or the adherent of a non-Christian faith such as Islam or Judaism.'") (quoting Wallace v. Jaffree, 472 U.S. 38, 52 (1985)) (emphasis added).

23. 330 U.S. 1 (1947).

Establishment Clause was explicitly applied to the states via the Fourteenth Amendment.[24] In *Everson*, the U.S. Supreme Court upheld a New Jersey program reimbursing parents for the cost of transporting their children to and from both secular and religious private schools.[25] The Court, in upholding the program, articulated a clear and strict interpretation of the Establishment Clause.[26]

Two decades later, the Court decided *Board of Education v. Allen*,[27] in which it was found permissible for the State of New York to require public schools to lend textbooks to students attending religious schools[28] because the benefit involved was one to the students rather than to the religious schools.[29] The Court highlighted the fact that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation . . . ."[30]

From there, the Court's analysis of education funding under the Establishment Clause shifted its focus, beginning with *Lemon v. Kurtzman*.[31] Rather than examining the benefit to the public from the program in question, the Court began to look at a program's benefit to religious institutions.[32] In *Lemon*, the State of Pennsylvania instituted a program whereby private schools, both secular and religious, were reimbursed for certain secular expenses.[33] The Court struck down the program[34] and articulated a new test for determining the constitutionality of funding under the Establishment Clause.[35] The Court announced that, for state action to be permissible under the Establishment Clause, it "must have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion; [and] the statute must not foster an excessive government entanglement with religion."[36]

The application of the *Lemon* test, however, has been fraught with instability and confusion. Sporadically, the Court has used it to strike down programs involving public funding assistance for religious schools.[37] In one of those cases, *Committee for*

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24. *Id.* at 8.

25. *Id.* at 17.

26. *Id.* at 15-16 ("The 'establishment of religion' clause of the First Amendment means at least . . . [that] [n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."). One commentator noted, "*Everson* is clear and unyielding in its language[;] . . . the Court made a robust antiestablishment statement." Virginia Chase Crocker, Note, Zelman v. Simmons-Harris*: The Establishment Clause and the Fight for School Vouchers*, 58 ARK. L. REV. 395, 408 (2005).

27. 392 U.S. 236 (1968).

28. *Id.* at 238.

29. *Id.* at 243-44 ("[N]o funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.").

30. *Id.* at 242.

31. 403 U.S. 602 (1971).

32. *Id.* at 615.

33. *Id.* at 609.

34. *Id.* at 607.

35. *Id.* at 612-13.

36. *Id.* (internal quotation marks and citations omitted).

37. *See, e.g.*, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) (holding that programs allowing public school teachers to teach certain classes in private religious schools "have the 'primary or principal' effect of advancing religion, and therefore violate the dictates of the Establishment Clause . . . ."); Meek v. Pittenger, 421 U.S. 349, 363 (1975) ("[T]he direct loan of instructional material and equipment

Public Education & Religious Liberty v. Nyquist,[38] the Court considered the constitutionality of a New York statute that provided, as a means of offsetting the cost of tuition, income tax benefits to the parents of students attending nonpublic institutions, including parochial, elementary, and secondary schools.[39] The Court held that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."[40] The *Nyquist* Court went on to imply that aid would be similarly unconstitutional even if diverted through an "ingenious plan[] for channeling aid to sectarian schools" through parents.[41]

Despite the Court's statements in *Nyquist*, its application of the *Lemon* test in other cases has resulted in decisions upholding state funding of religious education.[42] At times, the Court addressed issues and fact patterns that were similar to those of previous cases, only to arrive at seemingly opposite, and therefore confusing, outcomes. For instance, in *Mueller v. Allen*,[43] the Court upheld a Minnesota statute that permitted parents to deduct education-related expenses in the computation of their state income taxes, regardless of whether their children attended secular or religious schools.[44] The *Mueller* Court, perhaps questionably, attempted to distinguish *Nyquist*, focusing in part on the fact that tax statutes have historically been given a higher degree of deference by the courts.[45] Also, in *Agostini v. Felton*,[46] the Court found it permissible for public school teachers to spend time, paid for with government funds, teaching in private religious schools.[47] However, in doing so, the Court explicitly

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has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting . . . ."); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973) (holding that repair grants, tuition reimbursement grants, and tax benefits to parents of children attending private religious schools failed the "effect" prong of the *Lemon* test and were therefore unconstitutional).

38. 413 U.S. 756.

39. *Id.* at 764.

40. *Id.* at 780.

41. *Id.* at 785.

42. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that the salary of sign language interpreter in religious school may be paid for with public funds); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (upholding a grant to aid blind college student in studying to become a pastor); Mueller v. Allen, 463 U.S. 388 (1983) (allowing state income tax deductions for the cost of transportation, materials, and tuition at religious schools).

43. 463 U.S. 388.

44. *Id.* at 391, 403.

45. *Mueller*, 463 U.S. at 396-97 n.6. The *Mueller* Court stated:

> While the economic consequences of the program in *Nyquist* and that in this case may be difficult to distinguish, we have recognized on other occasions that "the form of the [State's assistance to parochial schools must be examined] for the light that it casts on the substance." The fact that the Minnesota plan embodies a "genuine tax deduction" is thus of some relevance, especially given the traditional rule of deference accorded legislative classifications in tax statutes.

Id. (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

46. 521 U.S. 203 (1997).

47. *Id.* The *Agostini* Court stated:

> We therefore hold that a federally funded program providing supplemental, remedial

overruled its prior holding in *Aguilar v. Felton*,[48] in which the Court had, twelve years earlier, struck down New York City's use of federal money to fund a program under which public school teachers had provided instruction and guidance in religious schools.[49]

The result of the Court's inconsistency was a collection of rulings that made for confusing, unclear precedent.[50] This was, perhaps, caused in part by the Court's reluctance to either renounce or adhere to the *Lemon* test.[51] For instance, in *Nyquist*, the Court indicated that the prongs of the *Lemon* test should only be "viewed as guidelines."[52] Thereafter, the Court has also said in other cases that the *Lemon* test is "no more than [a] helpful signpost[],"[53] and that the Court would not be bound by that or any other test.[54]

Rather than either adhering to the *Lemon* test or simply renouncing it, the Court attempted to modify it in *Agostini*,[55] arguably adding to the confusion surrounding Establishment Clause jurisprudence for lower courts.[56] The *Agostini* Court effectively condensed the three prongs of the *Lemon* test into a single "effect" test; the entanglement prong became folded into an effect analysis, and the purpose prong was

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> instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here.

Id. at 234-35.

48. *Id.* at 235. ("[W]e must acknowledge that *Aguilar* . . . [is] no longer good law.").

49. Aguilar v. Felton, 473 U.S. 402, 414 (1985). Writing for the majority, Justice Brennan said:

> Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate—that neither the State nor Federal Government shall promote or hinder a particular faith or faith generally . . . .

Id.

50. For example, in one recent case, Justice Thomas lamented, "This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges." Van Orden v. Perry, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring).

51. Indeed, the Court recently stated that "[m]any of our recent cases simply have not applied the *Lemon* test." *Id.* at 686 (majority opinion).

52. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 n.31 (quoting Tilton v. Richardson, 403 U.S. 672, 678 (1971)).

53. Mueller v. Allen, 463 U.S. 388, 394 (1983) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

54. Lynch v. Donnelly, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.").

55. Crocker, *supra* note 26, at 413 ("[T]he Court . . . repackaged the *Lemon* test by folding the inquiry of excessive entanglement into the inquiry of whether or not the government program had the impermissible effect of inhibiting or aiding religion.").

56. The Justices themselves, while certainly not confused about the *Lemon* test, per se, were perhaps unable to coalesce around a sufficiently clear and workable methodology for its use in education funding cases. The muddled nature of this area of the law, then, perhaps has enabled the Justices to arrive at holdings that are to some extent ideologically convenient for them. With a precisely defined set of workable standards, the Court would be constrained to deciding cases in line with precedent. However, with the array of cases using, modifying, and ignoring the *Lemon* test, there is precedent available for pretty much any proposition regarding education funding that one favors.

simply overlooked.[57] In doing so, the Court further worsened the instability surrounding the subject area.[58]

B. The Proper Reading of the Establishment Clause

The Court has become mired in confusion regarding the Establishment Clause—developing, modifying, and at times ignoring the *Lemon* test, and seems uncertain as to how to proceed. Constitutional principles would be better served by a return to a more streamlined approach. At its core, the Establishment Clause bars the government from imposing religion on its citizens directly or indirectly: "Congress shall make *no* law respecting an establishment of religion . . . ."[59] To say that the Establishment Clause merely prohibits the government from, for example, authorizing an official state church ignores the fact that the clause is not worded precisely to refer to such state action. Thus, it can and should be deemed as a broad prohibition against various and subtle ways in which government action could be perceived as supportive of religion.

Historically, it certainly cannot be said that all of the Framers were in agreement as to what would and would not constitute a government "establishment" of religion. There were those who advocated direct funding of training for the clergy, a sentiment that was acceptable in the far more ideologically homogeneous setting of the nineteenth century. Today, however, in a society that is more pluralistic than any of the Framers could possibly have imagined, it would be wiser to follow the sentiments of those who foresaw a need to take a more separationist approach. Thomas Jefferson, for instance, called for a "wall of separation between church and state,"[60] in order to allow individuals the freedom to worship (or not worship) as they so chose. James Madison also viewed religion as something which "must be left to the conviction and conscience of every man[,]"[61] rather than imposed by the government.

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57. Agostini v. Felton, 521 U.S. 203, 234 (1997). The Court elaborated:

> [The] program does not run afoul of any of the three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here.

Id. at 234-35.

58. *See* William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 194 (2000) ("[T]he Court's commitment to its announced doctrines is tenuous at best. Every new case accepted for argument presents the very real possibility that the Court might totally abandon its previous efforts and start over."); Steven D. Smith, *The Iceberg of Religious Freedom: Sub-Surface Levels of Nonestablishment Discourse*, 38 CREIGHTON L. REV. 799, 800 (2005) (referring to Establishment Clause jurisprudence as a "chaotic mass of modern precedents").

59. U.S. CONST. amend. I (emphasis added).

60. Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), *available at* http://www.usconstitution.net/jeffwall.html.

61. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt ed., 1900), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, app. at 64 (1947).

These separationist sentiments highlight two very important rationales for the existence of the Establishment Clause in the U.S. Constitution, and its important role in the success of our constitutional government. In prohibiting governmental support of religion, the Establishment Clause both ensures that individual citizens perceive that their beliefs are respected as much as the beliefs of others, and that they in turn respect the government.[62] The Establishment Clause also limits the risk of potentially disruptive religious conflict.[63]

In keeping with these Jeffersonian and Madisonian views, the Court in *Everson* correctly stated that the Establishment Clause forbids the government from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another."[64] Additionally, the Court articulated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[65] The fact that these strongly worded statements appear in an opinion ultimately upholding a challenged funding program helps to delineate where the line between permissible and impermissible funding should be drawn; the program at issue in *Everson* used state funds to cover the transportation expenses of students attending secular and religious schools, but was not allocated to parochial school tuition. The connection between expenditures for buses and religious indoctrination is quite attenuated, and thus the government funding is permissible. Meanwhile, the connection between parochial school tuition and religious teachings is much closer and thus should be subject to the separationist logic of *Everson*.

Clarity from the Supreme Court on public funding of religious education—although it has been sorely lacking, primarily because of the confusion surrounding the *Lemon* test—is of utmost importance. While many school funding cases in recent years have involved state constitutional provisions,[66] the majority of case law on the subject has centered on the First Amendment of the U.S. Constitution.[67] Indeed, *Zelman* was decided entirely based on the U.S. Constitution, and while the reasoning of *Locke* examined a state constitutional provision, the Court also endeavored to determine whether that Washington State Constitutional provision was permissible under the U.S. Constitution. In the interest of stability going forward in this area of the

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62. Justice Black explained:

> The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.

Engel v. Vitale, 370 U.S. 421, 431 (1962).

63. One of the purposes of the Establishment Clause is to "protect[] the Nation's social fabric from religious conflict . . . ." Zelman v. Simmons-Harris, 536 U.S. 639, 717 (Breyer, J., dissenting).

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

65. *Id.* at 16.

66. Rita-Anne O'Neill, *The School Voucher Debate After* Zelman*: Can States Be Compelled to Fund Sectarian Schools Under the Federal Constitution?*, 44 B.C. L. REV. 1397, 1398 (2003) ("The most widely discussed state challenges involve individual state constitutional provisions that require a more stringent separation of church and state than the federal Establishment Clause.").

67. Even in those cases involving state constitutional provisions, those provisions are, in turn, necessarily examined under the Federal Constitution as well.

law, all parties involved would be best served by clear guidance from the Court as to how to interpret the Establishment Clause in light of the Free Exercise Clause. As the Court has strayed further and further from the text and rationale of the Establishment Clause, any guidance provided for lower courts has become increasingly murky. A better course of action, then, would be to return to a more simplified analysis, focusing on the text of the clause itself, and its Jeffersonian and Madisonian roots, as the Court did in *Everson*. Unfortunately, the Court instead chose to muddy the waters further in two recent Establishment Clause cases: *Zelman* and *Locke*.

C. Zelman v. Simmons-Harris

In *Zelman v. Simmons-Harris*, decided in 2002, Chief Justice Rehnquist, writing for a divided Court, upheld the constitutionality of Ohio's Pilot Project Scholarship Program.[68] The program, which provided tuition aid for primary and secondary students in school districts "under federal court order requiring supervision and operational management of the district by the state superintendent[],"[69] allowed families in the failing Cleveland school district to send their children to private secular schools, private religious schools, or neighboring public schools, and to use government-issued vouchers to offset tuition costs at those schools.[70] The use of program vouchers at private religious schools prompted a group of Ohio taxpayers to challenge the program, alleging that it violated the Establishment Clause.[71]

Although both the district court[72] and the court of appeals[73] found that the Pilot Project Scholarship Program ran afoul of the Establishment Clause, the Supreme Court upheld the program.[74] Writing for the Court, Chief Justice Rehnquist found that the program had a valid secular purpose, while not having the effect of advancing religion. In order to arrive at this conclusion, however, Chief Justice Rehnquist twisted the issue at hand and based his logic less on principles of law than on legally irrelevant facts.

Rather than analyzing the use of public funds for religious education and whether that amounts to a government endorsement of religion, Rehnquist focused on statistics pertaining to the educational failures of the Cleveland public school system, and on the fact that the money in question found its way to parochial schools by way of parents' private choices. While the statistics regarding the academic failure of the Ohio public school system may be sympathetic, they are not relevant to a constitutional analysis of whether state action violates the Establishment Clause.[75]

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68. 536 U.S. 639, 643-44 (2002).

69. *Id.* at 644-45 (quoting OHIO REV. CODE ANN. § 3313.975(A) (Anderson 1999 and Supp. 2000)).

70. *Id.* at 646 ("Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250.").

71. *Id.* at 648.

72. Simmons-Harris v. Zelman, 54 F. Supp. 2d 725 (N.D. Ohio 1999).

73. Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).

74. *Zelman*, 536 U.S. at 663.

75. Justice Stevens, in his *Zelman* dissent, stated, "[T]he severe educational crisis that confronted the Cleveland City School District when Ohio enacted its voucher program is not a matter that should affect our appraisal of its constitutionality." *Id.* at 684 (Stevens, J., dissenting). Justice Stevens went on to say that "the emergency may have given some families a powerful motivation to leave the public school system and accept religious indoctrination that they would otherwise have avoided, but that is not a valid reason

Rehnquist's focus on the fact that Ohio's program was one of "private choice"—that is, parents could choose whether or not to send their children to religious schools—is similarly irrelevant to a proper Establishment Clause analysis.[76] The fact that parents chose the schools at which to use their vouchers does nothing to remove the essential problem that the government was impermissibly funding religious education.[77] Unfortunately, the manner in which Rehnquist approached *Zelman* resulted in a very important and influential opinion concerning a currently contentious area of law that lacks the intellectual rigor and constitutional precision needed to be helpful, persuasive, and fully respected as precedent. Rather, the holes in its logic leave it vulnerable to intellectual critique.

In initially presenting the issue before the Court in *Zelman*, Rehnquist stated as a truism that the program at issue was enacted "for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."[78] While that may be true, Rehnquist went no further in examining whether this actually was a secular purpose, and if so, why it was valid. Even if his reasoning was relatively simple on this point, it should have been articulated in the opinion. If he had done so, Rehnquist would have penned an opinion far more capable of clarifying much confusion, and more worthy of judicial respect for years to come.

Having quickly and cursorily stated that the Ohio program had a valid secular purpose, Rehnquist continued by stating that the question before the Court thus became "whether the Ohio program nonetheless has the forbidden 'effect' of advancing or inhibiting religion."[79] Later in the opinion, Rehnquist reframed that issue further, stating "[t]he Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools . . . ."[80] However, these two manners of framing the issue at hand are not the same. Whether or not coercion is present is simply one of several factors involved in an analysis of the effect of state action under the Establishment Clause.[81] The fact that state action does not coerce citizens does not automatically rule out impermissible effect under the Establishment Clause and

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for upholding the program." *Id.* at 684-85.

76. The Court has previously stated that choice cannot save an otherwise unconstitutional program; "[t]he absence of any element of coercion . . . is irrelevant to questions arising under the Establishment Clause." Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973).

77. Justice Stevens, in his *Zelman* dissent, stated:

> [T]he voluntary character of the private choice to prefer a parochial education over an education in the public school system seems to me quite irrelevant to the question whether the government's choice to pay for religious indoctrination is constitutionally permissible. . . . [T]he Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds. . . . [T]he Court's decision is profoundly misguided.

Zelman, 536 U.S. at 685 (Stevens, J., dissenting). Justice Breyer also articulated that "'parental choice' cannot significantly alleviate the constitutional problem" with the Ohio voucher program. *Id.* at 717 (Breyer, J., dissenting).

78. *Id.* at 649.

79. *Id.*

80. *Id.* at 655-56.

81. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 ("The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause.").

therefore confer on that action a stamp of constitutionality. Indeed, state action which does not coerce could nonetheless have an impermissible effect for other reasons. In order to persuasively show the constitutionality of the program, Rehnquist should have examined whether any features of the program had an effect of advancing or inhibiting religion.[82] Instead, Rehnquist considered the lack of coerciveness in the program to be conclusive as to its effect. That narrow approach has no constitutional support. The level of analysis Rehnquist gave to this particular part of the opinion leaves his logic open to much criticism, and therefore is less likely to hold up as clear, helpful precedent in the future.

Also problematic is the fact that Rehnquist referred to the *primary* effect of state action in this context.[83] A primary effect analysis does not get to the core of what the Establishment Clause seeks to prevent. Whether state action runs afoul of the Establishment Clause should be based on more than simply the primary effect of that action; indeed, the analysis should be far more thorough. Any one state action could potentially have innumerable effects, and if any of them advance or inhibit religion, that state action should be declared unconstitutional.[84] For instance, if a government voucher program that includes religious schools has the multiple effects of benefiting churches, increasing the number of religious adherents in a community, and providing students with adequate education, the first two effects should not be judicially overlooked merely because one could plausibly say that the effect on education is *primary*. If the remaining effects are truly present in a particular community, they provide justification for a program to be declared unconstitutional.

Rehnquist attempted to bolster his argument by lamenting the failing public schools in Cleveland, including statistics showing this failure.[85] While it may be deplorable for public school children to be subject to substandard education, that fact should not find its way into Establishment Clause jurisprudence. Nowhere in the Establishment Clause—or anywhere in the Constitution, for that matter—is there an express or implied exception for instances in which a group of people are particularly sympathetic.[86] Admittedly, an issue as heated as substandard education can cause one

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82. In fact, some scholars might argue that the Pilot Project Scholarship Program—and other voucher programs like it—inhibit religion. For instance, one could argue that involvement with the government dilutes the religiosity of parochial education, or even dilutes religion generally. As a specific example, Florida's Opportunity Scholarship Program allowed voucher funds to go to religious schools as long as those schools agreed "not to compel any student attending the private school [by benefit of the voucher program] to profess a specific ideological belief, to pray, or to worship." FLA. STAT. § 229.0537(4) (1999), *invalidated by* Bush v. Holmes, 919 So. 2d 392 (Fla. 2006) (current version at FLA. STAT. § 1002.38 (2007)). Such restrictions dilute and hinder the manner in which religious institutions are able to indoctrinate their young followers. This indoctrination is a key facet of the success of organized religion, and, as long as not funded by the government, is entirely permissible. Indeed, for the State of Florida to include this limitation raises serious free exercise questions. Without it, of course, the state believed it would run afoul of the Establishment Clause. Hence the decades-old and confusing concern with that elusive concept of "entanglement."

83. Zelman v. Simmons-Harris, 536 U.S. at 660 (dismissing as arbitrary one suggested way "to assess primary effect"). Justice O'Connor also referred to the "primary effect" examination in her concurrence. 536 U.S. at 668 (O'Connor, J., concurring).

84. *See supra* Part II.B.

85. *Zelman*, 536 U.S. at 644.

86. Justice Souter, in his *Zelman* dissent, reminded the Court that "'constitutional lines have to be

to "blur the line between constitutionality and social concerns,"[87] but Supreme Court Justices are charged with the difficult but very important task of avoiding the temptation of being swayed by sympathetic but glaringly extra-constitutional reasoning.[88] The fact that Cleveland's schools were failing simply does not justify Ohio's allocation of taxpayer dollars to religious schools in order to solve the problem. As Justice Souter said in his *Zelman* dissent, "If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these."[89]

Rehnquist also departed from the examination of the text of the Establishment Clause by highlighting the fact that the state of Ohio did not, under the Pilot Project Scholarship Program, give funds directly to religious schools.[90] Funds were sent to families in voucher form, and those families then chose to which educational institution to send their children, and thus to which institution to allocate the voucher representing government funds. The result, however, is no different than if the state had funded religious schools directly. Both through direct funding and through voucher programs, religious institutions receive money from public coffers—money that is collected compulsorily from the general population—and this is what the Establishment Clause was designed to prohibit.

Further, Rehnquist's reasoning that the Ohio program involved indirect funding is even more disingenuous in light of the fact that the funding is only indirect because of a procedural formality; only when families choose to send children to private schools are "checks made payable to the parents who then endorse the checks over to the chosen school."[91] The implication of this reasoning, then, is that states may take advantage of a constitutional "loop-hole" and appropriate public funds to religious organizations as long as those funds are first diverted through individuals.[92] In fact, those individuals need not ever have genuine control over the funds in question. Parents are not permitted to use the funds in any way, other than signing them over to the school they have chosen for their children, which may, under *Zelman*, be a religious school. Simply signing over an uncashed check to a religious school will suffice for indirectness under *Zelman*—a result that entirely ignores the Court's determination in

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drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government.'" *Id.* at 686 (Souter, J., dissenting) (quoting Agostini v. Felton, 521 U.S. 203, 254 (1997).

87. O'Neill, *supra* note 66, at 1399.

88. Rehnquist has, in the past, joined a dissent by Justice Scalia, which spoke approvingly of "those who adhere to the Court's . . . traditional view that the Constitution bears its original meaning and is unchanging." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 371-72 (1995) (Scalia, J., dissenting). Therefore, it is curious that he would then write an opinion that is far from based on the Constitution's "original" and "unchanging" meaning.

89. *Zelman*, 536 U.S. at 686 (Souter, J., dissenting).

90. *Id.* at 652-53 (majority opinion).

91. *Id.* at 646.

92. As one commentator has noted, "*Zelman* indicates that, so long as the programs exhibit governmental neutrality toward religion, indirect aid programs are permissible under the Establishment Clause, regardless of whether or not tuition money is ultimately diverted for religious purposes." Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 12 (2005).

Nyquist that the constitutionality of government aid to religious schools could not be saved by an "ingenious plan[] for channeling state aid to sectarian schools"[93] through parents, rather than funding religious schools directly.[94]

Chief Justice Rehnquist did not offer sound legal reasoning as to why the Pilot Project Scholarship Program was constitutional.[95] As distressing as that may be, perhaps more problematic is the fact that the *Zelman* opinion left educators and policy makers with little guidance as to how to proceed in this area. Rehnquist "did not answer the question of whether a state or municipality *must* include sectarian schools in a school voucher program that provides aid to public and non-sectarian private schools."[96] In fact, the Court "substantially weakened the mandate [of the Establishment Clause] when it decided that neutrality and 'true private choice' were the criteria used in evaluating the constitutionality of government programs."[97]

D. Locke v. Davey

Chief Justice Rehnquist also wrote for the Court two years later, in *Locke v. Davey*,[98] which resulted in the lack of public funding for religious education,[99] and provided a counterpoint—although not clearly articulated—for the excessively permissive tone of the *Zelman* decision. *Locke* centered on the State of Washington's Promise Scholarship Program, which provided funds for college students who had achieved academic success in high school[100] and demonstrated financial need.[101] The program allowed students to spend their scholarship funds at eligible, accredited

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93. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 785 (1973).

94. The *Nyquist* Court's denunciation of government aid to sectarian schools was unambiguous: "Special tax benefits . . . cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions." *Id.* at 793.

95. One commentator has surmised, generally:

> [M]aybe the lawyers and scholars and judges are not so much deriving their conclusions from the arguments they publicly offer, but rather are (consciously or unconsciously) selecting from a rich batch of rhetorical resources whatever materials and arguments operate to support outcomes that they are already predisposed to favor on other grounds. Maybe premises are being derived from conclusions, not the other way around.

Smith, *supra* note 58, at 801.

96. O'Neill, *supra* note 66, at 1409.

97. Crocker, *supra* note 26, at 395-96.

98. Many were surprised that Chief Justice Rehnquist supported, and even wrote, the separationist opinion in *Locke*. *See, e.g.*, Martha McCarthy, *Room for "Play in the Joints"*—Locke v. Davey, 33 J.L. & EDUC. 457 (2004) (speculating that perhaps Rehnquist's "fear of federal encroachments on states' rights may have simply overridden [his] support of government accommodation toward religion").

99. Locke v. Davey, 540 U.S. 712, 725 (2004).

100. The parameters of academic success were defined as follows:

> To be eligible for the scholarship, a student must meet academic, income, and enrollment requirements. A student must graduate from a Washington public or private high school and either graduate in the top 15% of his graduating class, or attain on the first attempt a cumulative score of 1,200 or better on the Scholastic Assessment Test I or a score of 27 or better on the American College Test.

Id. at 716.

101. *Id.* ("The student's family income must be less than 135% of the State's median.").

institutions,[102] including sectarian colleges (a point not before the Court), but excluding the pursuit of degrees in theology.[103] After his Promise Scholarship had been revoked because of his pursuit of a degree in devotional theology, Mr. Davey filed suit, asserting that the exclusion violated his rights of free exercise, establishment, and free speech.[104] The State of Washington, however, contended that, regardless of whether funding of Mr. Davey's religious education would violate the Establishment Clause of the U.S. Constitution, the Washington Constitution's prohibition against funding religion applied and the denial of funds it required did not violate his rights under the U.S. Constitution.[105]

Writing for a seven-member majority of the Court, Chief Justice Rehnquist acknowledged that the Free Exercise and Establishment Clauses of the First Amendment "are frequently in tension[],"[106] but that "'there is room for play in the joints' between them."[107] By falling back on this imprecise notion of the space between what the Free Exercise Clause requires of government and what the Establishment Clause forbids, Rehnquist failed to provide a clear and useful directive for lower courts, particularly in light of the earlier *Zelman* decision. While *Locke* was correctly decided in that it prevented public funds from subsidizing Davey's religious education, the Court would have been wiser to state a more clear and forceful rationale, rather than wade further into the murkiness that is their public funding of religious education jurisprudence. In fact, as one commentator noted, "[t]he Court's holding left a great deal of uncertainty on when states may withhold benefits on the basis of religion."[108]

It has also been suggested that the *Locke* Court, realizing that state constitutional amendments could increasingly become the focal point of arguments in school funding cases,[109] was concerned that an accomodationist ruling—including a determination that Washington's state constitutional prohibition against funding religion violated the Free Exercise Clause of the U.S. Constitution—would lead to states being compelled to

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102. *Id.* ("[T]he student must enroll 'at least half time in an eligible postsecondary institution in the state of Washington . . . .'" (quoting WASH. ADMIN. CODE § 250-80-020(12)(f))).

103. *Id.* ("[T]he student . . . may not pursue a degree in theology . . . while receiving the scholarship.").

104. *Id.* at 718.

105. At oral argument, counsel for the State of Washington articulated the following:

> The line between funds for secular purposes and for religious purposes is a line that's been recognized by this Court in various funding cases and in reviewing government activities. . . . [S]imply because the State of Washington is extending those values of the Establishment Clause beyond direct funding into indirect funding does not convert those values into hostility.

Transcript of Oral Argument at 8, *Locke*, 540 U.S. 712 (No. 02-1315), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1315.pdf.

106. *Locke*, 540 U.S. at 718.

107. *Id.* (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970)).

108. Brett Thompson, Note, Locke v. Davey: *The Fine Line Between Free Exercise and Establishment*, 56 MERCER L. REV. 1093, 1093 (2005).

109. According to one commentator, "almost all school litigation involving church/state questions has been based on interpretations of the First Amendment to the Federal Constitution. This may change significantly, given the vitality of state antiestablishment provisions solidified in *Locke* combined with the Court's relaxed interpretation of the Establishment Clause." McCarthy, *supra* note 98, at 464.

include religious schools in voucher programs.[110] Under such reasoning, the holding in *Locke* served to avoid this negative potential outcome. Questions at oral argument in *Locke* indicate that this was indeed a key factor for the Justices; that is, they seemed concerned with maintaining the rights of states to decide whether or not to include religious schools in such programs. For instance, Justice O'Connor asked several times about the Promise Scholarship Program's possible similarities to an elementary or secondary school voucher program,[111] the likely format in which future debates over those states' rights issues would arise. If state courts are left to tackle an increasing number of cases dealing with these issues, then states will potentially have more control over how these issues will be resolved. One commentator has suggested that the applicability of *Locke*, a case dealing with a university scholarship program, to elementary and secondary school voucher programs in general may be limited.[112]

The *Locke* Court did, however, suggest that the requirement for future litigants might be to show that, in failing to provide funds in a given context, the state showed animus toward religion.[113] This is a high hurdle—and an appropriate one—for future plaintiffs seeking to use state funds at religious institutions. This properly allows states the flexibility to choose not to fund sectarian instruction because of antiestablishment concerns. Indeed, a state would have to enact a quite egregious statute or constitutional provision in order to reach the point of actual "animus" toward religion.

III. APPLICATION OF *ZELMAN* AND *LOCKE*

The seemingly competing *Zelman* and *Locke* cases have been applied by courts in various states, including Florida, New Hampshire, and Maine. Following an analysis of the manner in which the Florida Supreme Court and the United States Court of Appeals for the First Circuit have weighed these issues, Part IV of this Comment goes on to examine the course taken in Maine.

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110. "Justice Breyer referred to the implications of ruling in favor of Davey as 'breathtaking,' impacting the way states allocate funds so that they cannot 'be purely secular' and 'they must fund all religions who want' to engage in the same activity." Jason S. Marks, *Spackle for the Wall? Public Funding for School Vouchers After* Locke v. Davey, 61 J. MO. B. 150, 155-56 (quoting Transcript of Oral Argument at 51-52, *Locke*, 540 U.S. 712 (No. 02-1315), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1315.pdf).

111. Transcript of Oral Argument at 4, *Locke*, 540 U.S. 712 (No. 02-1315), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1315.pdf.

112. *See* Shannon Black, Note, Locke v. Davey *and the Death of Neutrality as a Concept Guiding Religion Clause Jurisprudence*, 19 ST. JOHN'S J. LEGAL COMMENT. 337, 374-76 (2005).

> [T]he Court took pains to limit *Locke* to its particular facts. . . . [A]t least one of the justices in the *Zelman* majority expressed concern about the impact of a decision in Davey's favor on school voucher plans already in place in several states that do exclude religious schools[;] it is unlikely that the Court would reverse the trend it started in *Locke* in school vouchers cases.

Id.

113. *Locke*, 540 U.S. at 725 (holding that "we [do not] find . . . in the operation of the Promise Scholarship Program[] anything that suggests animus towards religion. . . . [W]e therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.").

A. Bush v. Holmes

The State of Florida had an opportunity to struggle with the *Zelman-Locke* precedents and the confusing issues those opinions have left in their wake in *Bush v. Holmes*.[114] In that case, a group of voucher opponents attacked the constitutionality of Florida's Opportunity Scholarship Program under Florida's state constitution.[115] Much like the Pilot Project Scholarship Program at issue in *Zelman*, Florida's voucher program was created in response to what legislators saw as "failing" public schools,[116] rather than a lack of available public schools or for any other stated reason.

The validity of the Florida Constitution's so-called "no-aid" provision was in turn questioned under the U.S. Constitution.[117] The Florida provision states that "[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury *directly or indirectly* in aid of any church, sect, or religious denomination or in aid of any sectarian institution."[118] Voucher proponents argued that either the Florida Constitution imposed greater restrictions on aid to religious schools than does the Establishment Clause of the U.S. Constitution, and thus should be declared violative of the Free Exercise Clause and therefore unconstitutional, or that the no-aid provision did not impose additional restrictions, and thus the Opportunity Scholarship Program must be upheld under the reasoning of *Zelman*.[119] The District Court of Appeal of Florida, on rehearing en banc, agreed that, if the two provisions were coterminous, *Zelman* dictated that the program must be upheld.[120] However, it

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114. 886 So.2d 340 (Fla. Dist. Ct. App. 2004).

115. When this litigation began, the plaintiffs advanced both federal and state constitutional arguments. *Id.* at 344. In 2000, the trial court found the Opportunity Scholarship Program to be impermissible; the District Court of Appeal of Florida reversed, upheld the program, stated simply that the state legislature may fund private school education if it deems such funding necessary, ignored the plaintiffs' constitutional arguments, and remanded the case back to the trial court. *Id.* at 345. While on remand, the U.S. Supreme Court decided *Zelman*. *Id.* Based on the reasoning of *Zelman*, the plaintiffs dismissed their federal constitutional claims and relied instead on state constitutional principles. *Id.* The trial court found the program violative of the state constitution, and entered an injunction preventing implementation of the Opportunity Scholarship Program. *Id.* at 346.

116. The Florida Legislature construed that state's constitution as promising a high-quality education for all students, a promise which the U.S. Constitution does not make. *Id.* at 347. Under the Opportunity Scholarship Program, when Florida public schools were deemed to be "failing" for two years out of a four year period, the legislature required that the schools notify parents and guardians of attendees of such failure, and of their option to send their children to another, more successful public school, or to use state funds (in the form of a voucher) to send their children to private school. *Id.* If a parent or guardian chose the latter, the state issued a warrant payable to the parent, but *mailed to the private school*, at which point the parent was to endorse the warrant over to the school. *Id.*

117. *Id.* at 344.

118. FLA. CONST. art. I, § 3 (emphasis added).

119. *Bush*, 886 So. 2d at 344.

120. *Id.* at 359. The *Bush* court elaborated:

> If we were resolving this case purely on Establishment Clause principles, the fact that the OSP program on its face has a religiously neutral purpose—to aid children in failing public schools—and the fact that the OSP gives parents or guardians the freedom of choice in selecting an alternative to a failing public school, would be dispositive factors, without regard to whether a disbursement was made directly to a parent or guardian rather than the school.

Id.

found that the Establishment Clause and the relevant part of the Florida Constitution were not synonymous.[121] Accordingly, it struck down the Opportunity Scholarship Program. Importantly, the court found the state constitutional provision to be more restrictive than the Establishment Clause,[122] but not so much so that it ran afoul of the Free Exercise Clause.[123] Apparently, Florida's no-aid provision fell in the vast "play in the joints"[124] between the two clauses.[125]

Ultimately, the Opportunity Scholarship Program, to the extent that program funds found their way to religious schools, was struck down in *Bush v. Holmes* because it ran afoul of the no-aid provision in Florida's state constitution.[126] The no-aid provision itself was found to be acceptable under the Federal Free Exercise Clause as well as the free exercise clause of the Florida Constitution.[127]

The *Bush* court also asked the Florida Supreme Court to weigh in on the question of whether the Florida Opportunity Scholarship Program violated the Florida constitution.[128] The reasoning under the no-aid language of the Florida Constitution—that is, that no government funds may reach religious institutions either directly or indirectly—is arguably also the appropriate reasoning to use under the Federal Establishment Clause for all jurisdictions.[129] While the Florida Constitution included the explicit "direct or indirect" language and the Federal Establishment Clause does not, the Federal Establishment Clause was intended to provide the same protection, and the "direct or indirect" concept should be deemed to be implied.[130]

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121. *Id.* at 344. The *Bush* court stated:

> [W]e cannot read the entirety of article I, section 3 of the Florida Constitution to be substantively synonymous with the federal Establishment Clause, [and therefore] find the appellants' arguments without merit.
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> . . . [T]he no-aid provision . . . expands the restrictions in state aid and to religion by specifically prohibiting the expenditure of public funds "directly or indirectly" to aid sectarian institutions.

Id.

122. *Id.* at 359-60 ("We find it significant that the United States Supreme Court has recognized that a state constitutional provision substantially similar to Florida's no-aid provision is 'far stricter' than the Establishment Clause." (quoting Witters v. Wash. Dep't of Servs. for the Blind, 479 U.S. 481, 489 (1986))).

123. *Id.* at 363.

124. The Supreme Court first coined the phrase "play in the joints" in upholding property tax exemptions granted to religious organizations. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970).

125. The *Bush* court stated that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause. This case involves that 'play in the joints' . . . ." *Bush*, 886 So. 2d at 364.

126. *Id.* at 344 ("There is no dispute in this case that state funds are paid to sectarian schools through the OPS vouchers. Thus, we hold the OSP unconstitutional under the no-aid provision to the extent that the OSP authorizes state funds to be paid to sectarian schools.").

127. *Id.*

128. *Id.* at 367.

129. The text of the Establishment Clause is as follows: "Congress shall make *no* law respecting an establishment of religion . . . ." U.S. CONST. amend. I (emphasis added). This text indicates that any law thus respecting an establishment of religion will be unconstitutional. The Establishment Clause does not merely prohibit laws respecting a "direct" establishment of religion. Therefore, both direct and indirect funding should be considered impermissible under the Federal Constitution.

130. *See* discussion *supra* Part II.B.

B. Gary S. v. Manchester School District

Zelman and *Locke* were applied in a New Hampshire case as well, although somewhat more tangentially. Unlike the programs at issue in the *Zelman* and *Bush* litigation, *Gary S. v. Manchester School District*[131] did not involve a voucher program. Rather, parents of a disabled child attending a private religious school contended that their child should be entitled to "the panoply of services available to disabled public school students,"[132] making the case fall more squarely, factually, under *Locke*. Among other things, the parents argued that the ineligibility for services at a religious school violated their child's free exercise rights.[133] The First Circuit disagreed, however, and affirmed summary judgment in favor of the Manchester School District.[134]

The First Circuit prefaced its discussion of the plaintiffs' free exercise claim with an acknowledgement that this area of law is murky at best, and that the U.S. Supreme Court has not given lower courts adequate guidance as to how to properly resolve religion cases such as this one.[135] Obviously, the *Zelman* and *Locke* opinions did not provide lower courts with sufficient guidance on the topic.

What the court did take clearly from *Zelman*, however, is the view that states may divert public funds to private schools, but are not required to do so.[136] Meanwhile, *Locke*, which was factually more similar to the case, was mentioned only cursorily in a footnote.[137]

Ultimately, the First Circuit based its holding in favor of the Manchester School District on the fact that the benefit sought by plaintiff was not generally available and that it would be "unreasonable and inconsistent to premise a free exercise violation" on a benefit of such limited availability.[138] Accordingly, the opinion did not implicate the "play in the joints" model as directly as other cases have, and the court did not

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131. 374 F.3d 15 (1st Cir. 2004).

132. *Id.* at 17.

133. *Id.* The plaintiffs also advanced due process and equal protection arguments, neither of which are relevant to this Comment. The free exercise claim was the plaintiffs' lead argument. *Id.*

134. *Id.*

135. *Id.* at 18 ("It is not always easy to predict what analytical framework the Supreme Court will apply to the various, factually dissimilar free exercise cases that arise.").

136. *Id.* at 20 n.1 ("To be sure, the Court has recently permitted a state legislature to provide for attendance at private schools at public expense *if it so desires.*" (citing Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 (2002)) (emphasis added)).

137. In referring to *Locke*, the First Circuit said:

> A further anomaly of such a holding would be that only persons such as appellants, with a declared religious belief in the necessity of sending their children to private schools, would be entitled under the First Amendment to the funding sought. Other students, including those in secular private schools, would lack a right to such funding.

Id. at 20 n.3. It seems curious that the opinion did not expand on this concept, as it speaks directly to the concept of state action favoring religion.

138. *Id.* The *Gary S.* court said:

> [Our] methodology leaves all parents with ultimate recourse to the public schools whenever the balance of services associated with attendance at a private school appears to them to be unsatisfactory; but the option thus available can necessitate their having to choose, as here, between alternatives each of which may seem imperfect. In any event, we cannot say that the federal government's structuring of benefits here violates appellants' free exercise rights.

Id. at 21.

discuss *Zelman* and *Locke* at length.[139] It did, however, mention those two cases enough to show the confusion they have caused and the baffling enormity of the resulting "play in the joints" concept with which courts have been forced to grapple.

IV. MAINE'S APPROACH

Since the passing of the Free High School Act[140] in 1873, Maine has been using state funds to pay the education expenses of those students who reside in towns without public high schools.[141] In 1981, the Maine Legislature excluded religious schools from the receipt of those funds.[142] This prohibition is purely statutory; unlike most states, Maine's constitution neither prevents the state government from allocating money to religious institutions, nor does it protect citizens from being compelled to support religion.[143] Accordingly, any legal battles involving Maine school funding in the aftermath of *Zelman* and *Locke* will not include the same federal-state constitutional arguments that were seen in *Locke*. Potentially, future school funding plaintiffs may argue that the analysis of the Maine program falls more squarely under *Zelman*, in that the First Amendment of the U.S. Constitution is controlling of Establishment Clause arguments. However, because the *Locke* Court analyzed federal, rather than state, free exercise principles, this is the controlling precedent in determining how far a particular state may permissibly go in avoiding an Establishment Clause violation before running afoul of the Federal Free Exercise Clause.

A. Bagley v. Raymond School Department

In *Bagley v. Raymond School Department*,[144] which was decided before both *Zelman* and *Locke*, the Maine Supreme Judicial Court, sitting as the Law Court, upheld Maine's education tuition program and its exclusion of religious schools from the program. Under Maine's tuition program,[145] "students of parents residing in a school district which neither maintains a secondary school nor contracts for secondary school privileges may attend a school approved for tuition purposes."[146] A school may be approved for tuition purposes "only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution."[147] When a family

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139. Both cases are mentioned briefly in footnotes. *See id.* nn.1 & 3.

140. As of the writing of this Comment, the current Maine statute governing education is as follows:

> In accordance with the Constitution of Maine, Article VIII, the Legislature shall enact the laws that are necessary to assure that all school administrative units make suitable provisions for the support and maintenance of the public schools. It is the intent of the Legislature that every person within the age limitations prescribed by state statutes shall be provided an opportunity to receive the benefits of a free public education.

ME. REV. STAT. ANN. tit. 20-A, § 2 (West 1993).

141. O'Neill, *supra* note 66, at 1417.

142. *Id.* at 1418. The Maine statute dictates that "[a] private school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution[.]" ME. REV. STAT. ANN. tit. 20-A, § 2951 (West 1993).

143. O'Neill, *supra* note 66, at 1403.

144. 1999 ME 60, 728 A.2d 127.

145. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204(4) (West 1993).

146. *Bagley*, 1999 ME 60, ¶ 2, 728 A.2d at 130.

147. ME. REV. STAT. ANN. tit. 20-A, § 2951(2) (West 1993). This further emphasizes that analysis of

chooses to send a child to an approved private school under this program, rather than diverting funds through the family by way of a voucher, the school district in which the family resides pays tuition directly to the private school.[148] Much like the program at issue in *Bush v. Holmes*, "funds . . . emanate directly from the revenue of [the state]."[149]

The Bagley family resided in Raymond, Maine, a town that did not have a secondary school and did not contract to send its students to another school.[150] Upon choosing to send their son to Cheverus High School, a religious school, and attempting unsuccessfully to have the Cheverus tuition paid for by the town of Raymond under the Maine tuition program, the Bagley family filed suit, alleging that denial of such funding violated their Free Exercise, Establishment, and Equal Protection Clause rights.[151]

The Law Court found that the exclusion of religious institutions in the Maine tuition program did not violate the Bagleys' constitutional rights.[152] Setting up the framework for the opinion, then-Justice Saufley, writing for the Law Court, clarified that the court would presume that "the rights guaranteed by the United States Constitution and Maine Constitution are coextensive" because neither of the parties had alleged otherwise.[153]

Concerning the Free Exercise Clause, the Law Court stated that a law merely making the practice of religion more expensive does not place a "substantial burden" on an individual's free exercise rights.[154] The Law Court added that the Bagleys were "no more impaired in their efforts to seek a religious education for their sons than are parents of children in school districts that provide only a free nonreligious education in public schools."[155] Accordingly, the state action (or, more precisely, non-action and non-funding) at issue did nothing to interfere with the plaintiffs' ability to exercise their religion.[156]

The Establishment Clause was primarily relevant to the facts of the *Bagley* case in that the state's choice to refuse to allocate tuition funds to sectarian schools was based on the state's compliance with the Establishment Clause of the U.S. Constitution.[157] The Law Court stated, however, that the plaintiffs' use of an

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the Maine program falls under the Establishment Clause of the U.S. Constitution. Maine's state constitution does not include increased antiestablishment protections, and its relevant statute specifically directs us to the First Amendment of the U.S. Constitution.

148. *Bagley*, 1999 ME 60, ¶ 3, 728 A.2d at 130.

149. 886 So. 2d 340, 346 (Fla. Dist. Ct. App. 2004).

150. *Bagley*, 1999 ME 60, ¶ 6, 728 A.2d at 131.

151. *Id.* ¶¶ 9, 11, 728 A.2d at 131-32.

152. *Id.* ¶ 72, 728 A.2d at 147.

153. *Id.* ¶ 13, 728 A.2d at 132. This is different from the argument made in *Locke*; in that case, counsel for the State of Washington explicitly argued that Washington's constitution heightened the separation of church and state that is articulated in the U.S. Constitution.

154. *Id.* ¶ 18, 728 A.2d at 134 ("[T]here is no substantial burden placed on an individual's free exercise of religion where a law or policy merely operates so as to make the practice of [the individual's] religious beliefs more expensive." (quoting Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995))).

155. *Id.* ¶ 18, 728 A.2d at 135.

156. *Id.* ¶ 20, 728 A.2d at 135.

157. *Id.* ¶ 5, 728 A.2d at 131 ("The State does not dispute that its only justification for excluding religious schools from the tuition program was compliance with the Establishment Clause.").

Establishment Clause argument under the facts as presented was "misplaced"[158] because the Establishment Clause "simply does not speak to governmental actions that fail to support religion"[159] and there is therefore "no support for the proposition that the Establishment Clause prevents a state from refusing to fund religious schools."[160]

B. Eulitt v. Maine, Department of Education

Eulitt v. Maine, Department of Education[161] involved the same Maine tuition program and exclusion of religious schools that was at issue in *Bagley*. However, unlike *Bagley*, *Eulitt* was decided after the issuance of the *Zelman* and *Locke* opinions, and was decided by the United States Court of Appeals for the First Circuit, rather than by the Law Court. In *Eulitt*, as in *Bagley*, a family that was denied state funding for tuition at a religious school asserted that such denial violated their constitutional rights; specifically, the Eulitts made Equal Protection and Establishment Clause arguments.[162]

The Eulitts also argued that, in the aftermath of the *Zelman* decision, Maine's interpretation of the Establishment Clause as prohibiting public funding of education at religious schools was no longer compatible with accepted Establishment Clause jurisprudence.[163] The First Circuit's analysis of this argument highlighted the chaos in which the Supreme Court left this area of the law after *Zelman* and *Locke*.[164] For instance, the opinion specifies that the district court "declined to consider the effects of *Zelman* and [*Locke*],"[165] when considering the current propriety of Maine's approach to the issue, and that the lower court was not in error in doing so.[166] The First Circuit distinguished the *Zelman* decision as not binding, in part because of the Supreme

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158. *Id.* ¶ 21, 728 A.2d at 135.

159. *Id.* ¶ 22, 728 A.2d at 136.

160. *Id.*

161. 386 F.3d 344 (1st Cir. 2004).

162. *Id.* at 347-48. In asserting an equal protection claim, the plaintiffs made the argument—distinct from their free exercise argument—that they were being discriminated against on the basis of their religious beliefs and that, because religion is a fundamental right, strict scrutiny should be applied. *Id.* at 353-54. However, the court, citing *Locke*, stated that such an argument was misguided; any state action that is permissible under the Free Exercise Clause can be subject only to rational basis scrutiny under an equal protection analysis. *Id.* at 354. The plaintiffs conceded that, using rational basis scrutiny, their equal protection claim must fail. *Id.* at 356.

163. *Id.* at 347-48. The First Circuit, in determining whether stare decisis precluded relitigation of the matter, focused on its earlier decision in *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), in which the court "rejected [an] equal protection challenge because Maine had shown a compelling interest in avoiding an Establishment Clause violation through the exclusion of sectarian schools from its secondary education tuition program." *Eulitt*, 386 F.3d at 348 (citing *Strout*, 178 F.3d at 64). The *Strout* court speculated, but did not hold, that "if Maine's proffered interest had been found to depend upon an erroneous understanding of the Establishment Clause . . . then the state's exclusion of sectarian schools from the tuition program would not withstand scrutiny." *Id.* (citing *Strout*, 178 F.3d at 64 n.12). Also, the *Strout* court found "*no* relevant precedent for using [the Establishment Clause's] negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies." *Strout*, 178 F.3d at 64.

164. *Eulitt*, 386 F.3d at 348 ("The *Zelman* opinion raises the distinct possibility that *Strout's* view of Maine's asserted interest depended upon an incorrect interpretation of the Establishment Clause's strictures.").

165. *Id.* at 349.

166. *Id.* ("We do not find fault with that cautious approach.").

Court's focus on "the facts underlying the Cleveland voucher program,"[167] and went on to say that "[e]ven after *Zelman* and [*Locke*], it is fairly debatable whether or not the Maine tuition program could survive an Establishment Clause challenge if the state eliminated [the program's restrictions] and allowed sectarian schools to receive tuition funds."[168]

The manner in which the First Circuit approached the *Eulitt* opinion suggests that the *Zelman* Court, by relying heavily on the egregious condition of the public schools in Cleveland, rather than a thorough examination of Establishment Clause principles, issued an opinion that provides little guidance for lower courts. The implication is that the First Circuit would have ruled differently in the *Eulitt* case if the Maine voucher program were intended to fix a failing public school system, rather than simply to provide secondary education to students in areas with no local high school at all. But this implication reveals the deep flaws in the *Zelman* holding. Surely, the Establishment Clause could not have been intended to mean that state funding of religious institutions is permissible only when sympathetic tales of economic woe or other hardship pull at our heartstrings. Rather, the Establishment Clause should be equally applicable to all instances of state funding of religious institutions regardless of the rationale behind the funding.

The opinion in *Eulitt* also evinces that the *Locke* decision, much like the *Zelman* decision, seems insufficiently clear to be used effectively by lower courts. The First Circuit wrote, "[*Locke*] recognized that state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so."[169] Apparently, the First Circuit is unclear, under *Locke*, as to just what the Establishment Clause *does* require. This is precisely because the *Locke* opinion was indeed vague as to what the Establishment Clause requires. If the *Eulitt* opinion had spoken of legitimate state concerns and their connection with what the Establishment Clause *does not* require, *Locke* could be said to be clear and valuable precedent on the issue of public funding for religious education. However, the First Circuit's use of the phrase "may not" rather than "does not" in the preceding quote shows that this is not the case. Rather, lower courts have been left in a state of confusion as to how to proceed in this subsection of Establishment Clause jurisprudence. Although the Supreme Court correctly decided *Locke*, it should have clearly enunciated the fact that the Establishment Clause *does* require states to refrain from funding religious education, and that, while the Free Exercise Clause establishes fundamental rights for citizens, the government is not required to subsidize those rights. The First Circuit also arrived at a proper determination in *Eulitt*, but was forced to do so based on arguably unclear guidance from the *Locke* Court.

C. Anderson v. Town of Durham

The Maine Law Court was recently faced with an opportunity to revisit the issue of school vouchers and religious schools, and to clarify this area of the law in Maine,

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167. *Id.*
168. *Id.*
169. *Id.* at 355.

in the case of *Anderson v. Town of Durham*.[170] Backed by the Institute for Justice,[171] families from Durham, Minot, and Raymond—three Maine towns without public high schools—filed suit, alleging that those towns' refusal to reimburse them for tuition payments made to religious schools, pursuant to Maine's statutory exclusion of religious schools from the tuition program,[172] violated their rights under the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution.[173] The defendant towns filed a successful motion to dismiss,[174] and the plaintiffs appealed to the Law Court.

The *Anderson* plaintiffs argued that, regardless of the fact that the defendant towns were acting under color of state law, such action still constituted a violation of the plaintiffs' constitutional rights, and thus the towns themselves were liable to the plaintiffs for reimbursement of tuition.[175] The families contended that Maine's statutory exclusion of religious schools from its tuition program impinged on their free exercise rights[176] and that, in remedying this, the Law Court should overrule *Bagley*.[177] The plaintiffs also urged the Law Court to overrule *Bagley* regarding its Establishment Clause holding.[178] Finally, the plaintiffs argued that the equal protection reasoning of *Bagley* was based on an understanding of the Establishment Clause that had been invalidated by the *Zelman* case.[179]

Although the plaintiffs favored overruling *Bagley*, they relied heavily on a statement of the Law Court in that very case, that "[i]f the State's justification [for excluding religious schools from the tuition program] is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level

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170. 2006 ME 39, 895 A.2d 944.

171. Institute for Justice, http://www.ij.org/schoolchoice/maine2/ (last visited Mar. 23, 2007).

172. ME. REV. STAT. ANN. tit. 20-A, § 2951(2) (West 1993).

173. Opening Brief of Plaintiffs-Appellants Julia and Kevin Anderson, et al. at 1, Anderson v. Town of Durham, 2006 ME 39, 845 A.2d 944 (No. CUM-04-591).

174. Anderson v. Town of Durham, No. Civ. A. CV-02-480, 2003 WL 21386768 (Me. Super. May 14, 2003), *aff'd*, 2006 ME 39, 895 A.2d 944, *cert. denied*, 127 S. Ct. 661 (2006). The Superior Court (Crowley, J.) granted the motion on the grounds of municipal liability—i.e., that the action in question was state, not local action—and res judicata—i.e., that plaintiffs here were in sufficient privity with the *Bagley* plaintiffs as to bar the Anderson's claim. *Id.*

175. Opening Brief of Plaintiffs-Appellants, *supra* note 175, at 23.

176. *Id.* at 24.

177. *Id.* The plaintiffs attempted to distinguish their case from the reasoning of *Bagley* by insisting that the cases cited in *Bagley* all involved statutes that were facially neutral with respect to religion. *Id.* at 25. However, the *Bagley* case was decided in 1999, well after the state legislature excluded religious schools from the tuition program in section 2951(2).

178. The plaintiffs made an awkward attempt at an Establishment Clause argument, essentially reiterating their free exercise argument. *Id.* at 31. ("[The *Bagley* court's analysis] is correct in the sense that the Establishment Clause does not require the government to affirmatively support religion, but incorrect in not recognizing that the Clause has a role in preventing government action inhibiting or hindering religion.").

179. *Id.* at 36-37.

> The effect of *Zelman* is to render obsolete this Court's conclusion in *Bagley* that the inclusion of religious schools from parents' choices was necessary to comply with the Establishment Clause. The Establishment Clause neither requires nor allows the exclusion. . . . Thus, as this Court recognized in *Bagley*, there is no rational basis for the exclusion, since it is based on an erroneous understanding of the Establishment Clause.

Id.

of scrutiny" under an equal protection analysis.[180] In light of *Zelman*, the plaintiffs argued, the Law Court's understanding of the Establishment Clause was in fact erroneous, and should be subject to strict scrutiny and declared unconstitutional. Justice Alexander, however, writing for the Law Court, determined that even though under *Zelman* the Establishment Clause does not *forbid* states from funding religious education, *Locke* more appropriately determines the appropriate level of equal protection scrutiny, which is rational basis.[181] Because Justice Alexander found valid justifications for the tuition program, he reasoned that the statute withstood rational basis equal protection analysis.[182]

The plaintiffs' free exercise argument, that the State may not limit school choice on the basis of religion, failed as well. The Law Court determined that the tuition program's exclusion of religious schools from the receipt of public funds was not evidence of animosity toward religion, and that, even though the program incidentally burdened a religious practice, rational basis scrutiny did not mandate that the state offer a compelling governmental interest.[183] Furthermore, Justice Alexander suggested that the statute would not violate the Free Exercise Clause even if subjected to strict scrutiny.[184]

Interestingly, Justice Alexander did not address separately the plaintiffs' Establishment Clause argument, choosing instead to discuss it as it relates to the proper level of scrutiny in the analysis of the equal protection claim.[185] On the one hand, *Zelman* seems, quite obviously, to control the Establishment Clause analysis, thus making a discussion by the Law Court superfluous at best and futile at worst. However, in stating that there were "Establishment Clause concerns not necessarily governed by *Zelman*,"[186] Justice Alexander hinted at a potential rationale for more clearly demarcating at least one side of the gap that is the "play in the joints," and it is curious why he chose not to expand upon this.

V. THE VIABILITY OF MAINTAINING CURRENT POLICIES IN MAINE

The Supreme Court's lack of clear, usable precedent in the area of education funding under the Establishment Clause—coupled with its opinions supported in large part by non-legal, irrelevant arguments rather than valid constitutional principles—

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180. Bagley v. Raymond Sch. Dept., 1999 ME 60, ¶ 32, 728 A.2d 127, 138.

181. Justice Alexander stated, "*Locke* and *Eulitt* have clarified that when performing the equal protection analysis in religious school funding cases, strict scrutiny applies only to the claim that the parents' fundamental right to the free exercise of religion is implicated; all other claims of religious discrimination are subject to rational basis scrutiny." Anderson v. Town of Durham, 2006 ME 399, ¶ 56, 895 A.2d 944, 959-60, *cert. denied*, 127 S. Ct. 661 (2006).

182. Specifically, the state's justifications included "Establishment Clause concerns not necessarily governed by *Zelman*, such as excessive entanglement between religion and state." *Id.* ¶ 57, 895 A.2d at 960. Justice Alexander further conjectured that various "conflicts between state curriculum, record keeping and anti-discrimination requirements and religious teachings and religious practices in some schools . . . could result in significant entanglement of State education officials in religious matters . . . [, which] provides a rational basis to maintain the funding limitation . . . ." *Id.* ¶ 60, 895 A.2d at 961.

183. *Id.* ¶¶ 52-54, 895 A.2d at 959.

184. *Id.* ¶ 53, 895 A.2d at 959.

185. *See id.* ¶¶ 56-60, 895 A.2d at 959-61.

186. *Id.* ¶ 57, 895 A.2d at 960.

could potentially leave educators, administrators, and judges at a loss as to how to best predict what programs will be deemed permissible in the future. In Maine, fortunately, the Law Court has resolved much of the uncertainty in a manner that maintains the strength of the Establishment Clause while avoiding a violation of the Free Exercise Clause. In other states, however, the analysis could change dramatically in the coming years, as voucher advocates seek to repeal applicable state constitutional amendments.[187] If those attempts are successful, the already confusing area of school funding law could be muddled anew. To be sure, the nature of the Establishment Clause does not make issues surrounding it simple,[188] but the Court could have made a better effort of clearly stating its reasoning in this area.

Maine is one of a "handful of . . . states . . . in which *Zelman* reopened the debate over the constitutionality of nonpublic school funding,"[189] in large part because of Maine's lack of a constitutional amendment specifically prohibiting the use of public funds for religious institutions. Nonetheless, the Law Court was correct to leave Maine's tuition reimbursement program and its exclusion of religious schools intact. Although there may be significant confusion as to where the line will fall between that which is permissible and that which is unconstitutional, and as to what criteria will be used to make that determination, it was important for the Law Court to articulate that Maine's ability to exclude religious organizations from the receipt of public funds falls on the "permissible" side of that line.

Even though the Maine Constitution does not mandate a more strict separation of church and state than does the Federal Constitution, the Maine tuition program and the issues it entails are more similar to the *Locke* case than they are to the *Zelman* case. That is, even if the Supreme Court insists on determining complex constitutional questions based on extra-constitutional factors such as the economic woes of the Cleveland school system, the Law Court did not apply such factors in its assessment of Maine's program, and in fact could not do so because of the manner in which the Maine tuition program functions. Certainly, many areas of Maine may be experiencing economic hardship, thus making it difficult to provide quality primary and secondary education. However, this is not the basis for Maine's tuition program. Under Maine's

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187. Luke A. Lantta, *The Post-*Zelman *Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, LAW & CONTEMP. PROBS., Summer 2004, at 213, 221 ("[T]hose that hope to establish tuition voucher programs . . . suggest that the '[state constitutional amendments] are vulnerable to challenge under the Free Exercise Clause and Equal Protection Clause . . . because of their discrimination against religious families . . . .'" (quoting Eric W. Treene, *The Grand Finale is Just the Beginning: School Choice and the Coming Battle over Blaine Amendments* 12, The Federalist Society White Papers, *available at* http://blaineamendments.org/scholarship/FedSocBlaineWP.html.pdf (last visited Mar. 23, 2007))). Voucher advocates also "argue[] that these state constitutional provisions fail the neutrality test set forth by the Supreme Court . . . ." *Id.* Alternatively, voucher advocates argue that such provisions "run[] afoul of the Free Exercise Clause because the clause protects against 'covert suppression of particular religious beliefs.'" *Id.* at 221-22 (quoting Brief of Amicus Curiae Becket Fund for Religious Liberty, State ex rel. Gallwey v. Grimm, 48 P.3d 274 (Wash. 2002) (No. 68565-7)).

188. Justice White, for example, has described Establishment Clause jurisprudence as "sacrificing[ing] clarity and predictability for flexibility." Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

189. Lantta, *supra* note 187, at 241. Lantta notes that "states like Maine . . . that based their denial of funds to religious schools on interpretations of the Federal Establishment Clause are again open to challenge." *Id.*

program, families are not eligible for state education funds because they opt to send their children to schools other than those which are offered; rather, Maine families receive state funds precisely because there are no educational options offered *at all* by the government in their communities. This removed one of the major supporting factors in Chief Justice Rehnquist's *Zelman* opinion.

If the *Locke* Court had been governed only by the First Amendment of the U.S. Constitution,[190] it might (although it should not) have found that allowing the use of public funds to pursue a degree in theology did not violate the Establishment Clause, but that denying such benefit violated the Free Exercise Clause. However, by also examining the Washington Constitution's text pertaining to religion, the Court decided that, while the scholarship program could have awarded Mr. Davey a scholarship without running afoul of the Establishment Clause, it was also free to deny him the same funding without reaching the point of violating the Free Exercise Clause.[191] This, then, implies that Establishment Clause rights will vary from state to state. It also leaves open the question of how the Court would approach state statutory, rather than state constitutional, action denying funds to religious schools.

Because Maine's exclusion of sectarian schools from its tuition program is one of these statutory, rather than constitutional, state actions, it falls into that category left unsettled by the Supreme Court. Still, the Law Court correctly upheld the Maine tuition reimbursement program.[192] States should be allowed to withhold funding for religious education, not only because state constitutional provisions or statutes so require, but because the *U.S. Constitution* so requires.[193] Indeed, the Law Court had voiced agreement with this principle even before *Anderson* in *Bagley*.[194] The Supreme Court misinterpreted and weakened the Establishment Clause in *Zelman*, but the Law Court refused to extend those flaws to the novel fact pattern involved in the Maine tuition program.

The U.S. Supreme Court has, unfortunately, eroded the strength of the Establishment Clause over the past several decades. A majority of the Justices have overlooked the important rationales behind the Establishment Clause: both that of according respect to the beliefs of all U.S. citizens by not providing governmental support to religious faiths,[195] and that of "protecting the Nation's social fabric from

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190. The First Amendment states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

191. Locke v. Davey, 540 U.S. 712, 719 (2004) ("[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . . . The question before us, however, is whether Washington . . . can deny them such funding without violating the Free Exercise Clause." (footnote and citations omitted)).

192. Anderson v. Town of Durham, 2006 ME 39, ¶ 61, 895 A.2d 944, 961, *cert. denied*, 127 S. Ct. 661 (2006).

193. U.S. CONST. amend. I ("Congress shall make *no* law respecting an establishment of religion . . . ." (emphasis added)).

194. *See* Bagley v. Raymond Sch. Dep't, 1999 ME 60, ¶ 22, 728 A.2d 127, 135 ("[T]he Establishment Clause prohibits the government from supporting or advancing religion and from forcing religion, even in subtle ways, on those who choose not to accept it.").

195. *See* Engel v. Vitale, 370 U.S. 421, 431 (1962) ("The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with . . . religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.").

religious conflict."[196] It is frighteningly rare indeed, today, for the Court to be mindful of the fact that "[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality. . . ."[197]

Accordingly, because Maine's exclusion of religious schools from its tuition program is based in a statute rather than in the state constitution, the program as it is currently formulated was seen by the *Anderson* plaintiffs as vulnerable to constitutional attack. However, the Law Court confirmed that Maine's program, in actuality, does not violate the U.S. Constitution. In light of the fact that the Supreme Court has been so erratic with its Religion Clause cases and that it has allowed the Establishment Clause to be eviscerated, the Law Court was wise to uphold Maine's antiestablishment interests in not diverting public funds to religious schools.

To further protect Maine's antiestablishment interests against future attack, the Maine legislature should also propose a state constitutional amendment clarifying the manner in which the Establishment Clause shall be interpreted in this state. Maine is one of a very small minority of states without an explicit constitutional provision regarding the impermissibility of giving public funds to religious institutions.[198] If *Zelman's* weakening of the Federal Establishment Clause is allowed to stand, the prohibition against this kind of funding in Maine is purely statutory. If it remains so, the program's exclusion of religious schools commands less deference from other courts, including the U.S. Supreme Court. However, if the exclusion were embodied in a state constitutional amendment, it would carry more force, and proponents of the program would more easily be able to argue similarities to *Locke* and *Bush*, both of which involved state constitutional provisions against aid to religious institutions.

Maine should not need to amend its constitution in order to pursue appropriate antiestablishment interests; the Federal Establishment Clause should have been up to the task. However, the *Zelman* opinion was decided incorrectly and is "profoundly at odds with the Constitution."[199] The Court overlooked important constitutional principles in arriving at the conclusion that Ohio's voucher program was constitutional. If the Establishment Clause no longer ensures that the government will not offend non-adherents' freedom of conscience, and that religion itself will not be invaded by government, of what value is it?[200] Truly, as Justice Stevens asserted, "[w]henever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[201]

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196. Zelman v. Simmons-Harris, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting).

197. McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (upholding injunction ordering the removal of the Ten Commandments from courthouses).

198. Currently, thirty-seven states have constitutional provisions that expressly prohibit government aid to religious institutions. *See* Blaine Amendments.org, http://www.blaineamendments.org/states/states.html (last visited Mar. 30, 2007).

199. *Zelman*, 536 U.S. at 708 (Souter, J., dissenting).

200. *See id.* at 711 ("It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme, but something has to be said about the enormity of the violation.").

201. *Id.* at 686 (Stevens, J., dissenting).

The Court was correct in 1947 when it "inaugurated the modern era of establishment doctrine"[202] with the *Everson* case: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[203] None of the Justices dissented from this principle in 1947, it has not been overturned, and it remains good, albeit woefully weakened, law today.[204] The fact that today's Court sees fit to continue to erode this important constitutional principle, without relying on other valid theories, is truly an insult to constitutional principles.[205] The Court's education funding analysis has erroneously expanded the concept of "play in the joints" nearly to the point of absurdity, pushing back further and further the line of permissibility under the Establishment Clause. Gone are the days of a vigorous interpretation of the Establishment Clause; under *Zelman*, even the use of public funds to support religious education will be considered permissible. Under *Locke*, it appears, states will be left to provide limitations on such potential Establishment Clause violations. In states that choose not to do so, the force of the Establishment Clause will be lost in the vast expanse that now exists in the joints between it and the Free Exercise Clause.

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202. *Id.* at 686-87 (Souter, J., dissenting).

203. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

204. *See Zelman*, 536 U.S. at 687 (Souter, J., dissenting) ("The Court has never in so many words repudiated this statement, let alone . . . overruled *Everson*.").

205. Justice Souter asserted, "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 [principles]." *Id.* at 688. Justice Souter elaborated, "Although it has taken half a century since *Everson* to reach the majority's twin standards of neutrality and free choice, the facts show that, in the majority's hands, even these criteria cannot convincingly legitimize the Ohio scheme." *Id.* at 695-96.