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# The School Voucher Debate After Zelman: Can States Be Compelled to Fund Sectarian Schools Under the Federal Constitution?

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# THE SCHOOL VOUCHER DEBATE AFTER *ZELMAN*: CAN STATES BE COMPELLED TO FUND SECTARIAN SCHOOLS UNDER THE FEDERAL CONSTITUTION?

**Abstract:** The U.S. Supreme Court in *Zelman v. Simmons-Harris* held in June 2002 that a state does not violate the Establishment Clause by providing funding to a religiously affiliated school if the program meets certain criteria outlined in that opinion. One of the questions that remains after *Zelman*, however, is whether a state, once it has initiated some form of tuition voucher program that includes non-sectarian private schools, can be compelled under the federal Constitution to include sectarian schools in its program. This Note analyzes this question under two lines of U.S. Supreme Court precedent—the limited public forum cases and the government-as-speaker cases—and concludes that *Zelman* does not require a state to include religiously affiliated schools in its school voucher program. This Note then applies this reasoning to the Maine school voucher program that is currently the focus of two lawsuits, and concludes that the Maine program, which excludes sectarian schools, does not violate the federal Constitution.

## INTRODUCTION

Prior to the U.S. Supreme Court decision in June 2002 in *Zelman v. Simmons-Harris*, the primary issue in the school voucher debate focused on whether a state or municipality would violate the federal Establishment Clause by providing funding to a religiously affiliated school.[1] In a 5-4 decision, the Court held that Ohio's school voucher program did not violate the Establishment Clause.[2] The program was neutral, the Court held, with respect to religion, and "provide[d] assistance directly to a broad class of citizens who, in turn, direct[ed] government aid to religious schools wholly as a result of their own genuine and independent private choice."[3] Although hailed as a landmark victory for school voucher proponents, many scholars believe that this was only the beginning of the legal challenges facing

[1] *See* U.S. CONST. amend. I.; 536 U.S. 639, 639 (2002).
[2] *Zelman*, 536 U.S. at 662–63.
[3] *Id.* at 652.

school voucher programs that provide government funding for tuition at sectarian schools.[4]

The term "school voucher" includes a broad range of government aid programs.[5] One can raise a variety of legal challenges to school voucher programs on both the state and federal levels.[6] 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.[7] School voucher proponents can also raise federal claims under the Free Exercise and

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[4] *See, e.g.*, *School Vouchers: Settled Questions, Continuing Disputes* (The Pew Forum on Religion and Public Life, Washington, D.C.), Aug. 2002, at 4 [hereinafter Pew Forum] (stating that in opening the Establishment Clause door for vouchers, *Zelman* also invites a new set of constitutional questions).

[5] *See* Jill Jasperson, *Renaissance in Education: The Constitutionality and Viability of an Educational Choice or Voucher System*, 1993 BYU EDUC. & L.J. 126, 126 (1993); Martha M. McCarthy, Zelman v. Simmons-Harris*: A Victory for School Vouchers*, 171 EDUC. L. REP. 1, 1 (2003).

[6] *See, e.g.*, Pew Forum, *supra* note 4, at 8–12.

[7] In *School Vouchers: Settled Questions, Continuing Disputes*, a group of leading constitutional law professors issued a joint statement providing an overview of the next rounds of constitutional debate in the wake of *Zelman*. *See* Pew Forum, *supra* note 4, at 8–12. The statement finds that the first set of issues includes state constitutional restrictions on vouchers. *See id.* at 8. The statement describes how more than two-thirds of the states have constitutional provisions that restrict aid to religious organizations more explicitly than does the Establishment Clause. *See id.* These state restrictions vary in their language and will generate their own distinct set of textual, historical, and precedent-based arguments. *See id.* These scholars find it helpful to group these state provisions into three categories: provisions that say government funds may not be used for any private school or that all schools supported by public funds must be under the exclusive control of public authorities (thereby excluding secular as well as religious private schools); provisions that prohibit the expenditure of public funds in aid of, or to support or benefit, any sectarian school controlled by a religious organization (thereby restricting aid to religious, but not to secular, private schools); and provisions that forbid the compelled support of religious worship or instruction, or that forbid state money to be appropriated for or applied to religious worship or instruction (which may permit aid to religious schools as long as the aid could be segregated from aid used for religious teaching). *See id.* at 8–9. For further elaboration of some of the issues presented in the Pew Forum statement, see Ira C. Lupu & Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 917–94 (2003).

For additional reading on state challenges to school choice programs, see, for example, JOSEPH P. VITERITTI, CHOOSING EQUALITY 168–78 (1999); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 551–626 (2003); Richard W. Garnett, Brown*'s Promise, Blaine's Legacy*, 17 CONST. COMMENT. 651, 670–74 (2000); Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 125–34 (2000); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 661–80 (1998).

Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[8]

In addition to the legal battles over school choice legislation, there are a large number of policy considerations for and against vouchers.[9] These heated policy issues create vigorous debate over vouchers, and often blur the line between constitutionality and social concerns.[10] There is also a well-documented anti-Catholic motivation for the enactment of many of the more restrictive state constitutions, which further adds to the controversy surrounding school vouchers.[11]

The field of school vouchers is vast, with countless areas to explore and debate.[12] This Note, however, focuses on the question of whether a state, once it has initiated some form of tuition voucher program that includes non-sectarian private schools, can be compelled under the federal Constitution to include sectarian schools in such a program. This Note uses the Maine "tuitioning" program as an example for analysis.[13] Part I provides an introduction to school vouchers and the policy issues surrounding the voucher debate.[14] Part II provides a brief summary of the requirements outlined in *Zelman* for a school choice program to be valid under the Establishment Clause.[15] Part III reviews the major U.S. Supreme Court free exercise cases,[16] and Part IV reviews the major U.S. Supreme Court free speech cases, each in order to provide a background for future voucher litiga-

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[8] *See, e.g.*, Garnett, *supra* note 7, at 666–69; Viteritti, *supra* note 7, at 699–703; Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 365–73 (1999). In addition, the Pew Forum statement discusses two lines of federal challenges if a state enacts a voucher program and excludes religious schools from participation. *See* Pew Forum, *supra* note 4, at 9–10. The first argument is that the exclusion of religious schools from a voucher program discriminates against religion and so violates the Free Exercise Clause, the Free Speech Clause (as a form of viewpoint discrimination against religion), and/or the Equal Protection Clause. *See id.* The second argument is that many of the state anti-aid provisions are constitutionally tainted because their enactment was substantially motivated by nineteenth century Protestant hostility toward the growing Catholic population and Catholic school system. *See id.* at 9.

[9] *See generally* VITERITTI, *supra* note 7, at 1–22, 180–208; Nicole Stelle Garnett & Richard W. Garnett, *School Choice, The First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 341–61 (2000); Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Reform, and the Common Good*, 23 CARDOZO L. REV. 1281, 1303–12 (2002).

[10] *See* VITERITTI, *supra* note 7, at 1–22, 180–208; Garnett & Garnett, *supra* note 9, at 341–61; Garnett, *supra* note 9, at 1303–12.

[11] *See* VITERITTI, *supra* note 7, at 1–22, 180–208; Garnett & Garnett, *supra* note 9, at 341–61; Garnett, *supra* note 9, at 1303–12.

[12] *See, e.g.*, VITERITTI, *supra* note 7; Pew Forum, *supra* note 4.

[13] *See infra* notes 174–193 and accompanying text.

[14] *See infra* notes 21–50 and accompanying text.

[15] *See infra* notes 51–73 and accompanying text.

[16] *See infra* notes 74–107 and accompanying text.

tion.[17] Part V introduces the school choice program currently being challenged by two lawsuits in Maine.[18] This Part provides an overview and history of the tuitioning program in Maine as well as a discussion of two unsuccessful challenges to the Maine program.[19] Part VI attempts to analyze the Maine program under the free exercise reasoning discussed in Part III and the free speech reasoning discussed in Part IV, and predicts that the Maine program can survive federal constitutional scrutiny under each of these challenges.[20]

## I. An Introduction to the History and Policy of School Voucher Legislation

Although the terms "school choice" and "school voucher" are often used interchangeably, school choice is a broader term that encompasses voucher programs, magnet and charter schools, and tuition tax credits.[21] Under a basic school voucher system, eligible families receive a designated amount of state aid toward each school-age child's education at a public or private school of their choice.[22] Such school voucher programs are traditionally associated with public schools located in economically depressed communities.[23] Other voucher programs, like those in Maine and Vermont, provide for students residing in towns without public schools to receive public funds to attend public or non-sectarian private schools located outside of their district.[24]

### A. *The Policy of School Vouchers*

In addition to the legal battles over school choice legislation, there are a large number of policy considerations for and against vouchers.[25] Economist Milton Friedman first proposed school vouchers in 1955, promoting educational vouchers as a means of remedying

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[17] *See infra* notes 108–173 and accompanying text.

[18] *See infra* notes 174–193 and accompanying text.

[19] *See infra* notes 174–223 and accompanying text.

[20] *See infra* notes 224–284 and accompanying text.

[21] Jasperson, *supra* note 5, at 126.

[22] McCarthy, *supra* note 5, at 1.

[23] *See* Jason S. Marks, *What Wall? School Vouchers and Church-State Separation After* Zelman v. Simmons-Harris, 58 J. Mo. B. 354, 354 (2002).

[24] *See* Christopher W. Hammons, *School Choice Issues in Depth: The Effects of Town Tuitioning in Vermont and Maine* (Milton & Rose D. Friedman Foundation, Indianapolis, IN), Jan. 2001, at 5.

[25] *See infra* notes 26–35 and accompanying text.

the poor performance of public schools by removing government control and placing control in the hands of parents.[26]

Proponents of school vouchers today have adopted Friedman's reasoning, and argue that the educational quality of public schools will increase as a result of vouchers because public schools would be forced to improve or risk losing students and teachers to private schools.[27] Opponents to school vouchers counter that the benefits of such competition are insignificant.[28]

Proponents of school vouchers also argue that fairness requires the government to provide an educational alternative for the inner-city poor who are forced to attend failing public schools.[29] Opponents contend, however, that empirical evidence reveals that new, for-profit private schools entering inner-city voucher markets may actually have worse academic records than "failing" public schools.[30] Moreover, these opponents argue that the voucher system is actually unfair to the students who are left behind in the public schools.[31] This is because evidence shows that voucher programs can result in "cream skimming" by removing the higher-scoring students to private schools, driving down average public school test scores.[32]

Lastly, voucher supporters contend that voucher programs help close the education gap between black and white Americans.[33] Justice Thomas explicitly mentioned this benefit of the neutral school voucher program in his concurring opinion in *Zelman v. Simmons-Harris*.[34] Opponents, however, argue that because most school voucher programs only subsidize part of a private education, the poorest families, who will not be able to make up the difference between the tuition and the subsidy, will bear the greatest burden.[35]

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[26] *See generally* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 158–71 (2d ed. 1990).

[27] Brian L. White, *Potential Federal and State Constitutional Barriers to the Success of School Vouchers*, 49 U. KAN. L. REV. 889, 897 (2001).

[28] Martin Carnoy, *Should States Implement Vouchers Even if They Are Constitutional?*, in *School Vouchers: Settled Questions, Continuing Disputes* (The Pew Forum on Religion and Public Life), Aug. 2002, at 28.

[29] *See* White, *supra* note 27, at 896–97.

[30] *See* Carnoy, *supra* note 28, at 26.

[31] *See id.* at 30.

[32] *Id.*

[33] Paul E. Peterson, *A Call for Citywide Voucher Demonstration Programs*, in *School Vouchers: Settled Questions, Continuing Disputes* (The Pew Forum on Religion and Public Life), Aug. 2002, at 16.

[34] *See* 536 U.S. 639, 676–77, 681–84 (2002) (Thomas, J., concurring).

[35] *See* White, *supra* note 27, at 899.

### B. *A Shady Past: Anti-Catholic Sentiments in Common School Origins*

The apprehension about using public monies to fund sectarian schools has a long history in the United States, and traces back to the origin of the common school.[36] The common school concept was founded on the pretense that religion has no legitimate place in public education.[37] Some scholars contend, however, that the common school curriculum promoted a kind of religious orthodoxy of its own that centered on the teachings of mainstream Protestantism.[38] Furthermore, one of the admitted functions of the common school system was to serve as an instrument for the acculturation of the growing immigrant populations during the eighteenth and nineteenth centuries.[39] These almost entirely Catholic immigrants from Italy and Ireland, however, resisted the Protestant teachings of the common school and founded a large number of sectarian schools in response.[40] This created tension between the Protestant majority and the mostly Catholic minority on the issue of education.[41]

### C. *The Blaine Amendment*

The Blaine Amendment of 1875, a product of this tension, was named after congressional representative James G. Blaine of Maine.[42] Blaine agreed to sponsor an amendment to the federal Constitution that was drafted by Ulysses S. Grant to encourage free schools and resolve that not one dollar be appropriated to support any sectarian schools.[43]

The proposed Blaine Amendment to the federal Constitution was accompanied by nativist and anti-Catholic rhetoric.[44] Although the amendment never passed (it fell merely four votes short of the required two-thirds majority in the Senate), Blaine's message was incorporated into the Republican national party platform against "Rum, Romanism and Rebellion."[45] More important, however, was that many new territories seeking statehood were required to incorporate Blaine Amendments into their state constitutions in order to receive con-

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[36] *See* Viteritti, *supra* note 7, at 661–79.
[37] *Id.* at 666.
[38] *Id.*
[39] *See id.* at 668.
[40] *See id.* at 669.
[41] *See* Viteritti, *supra* note 7, at 670–72.
[42] *See id.* at 670–71.
[43] *Id.*
[44] *See id.* at 671.
[45] *Id.* at 672.

gressional approval.[46] The result is that today, approximately thirty-eight states have Blaine Amendments in their constitutions, which prevent state governmental entities from appropriating money to aid sectarian institutions.[47] In addition, approximately twenty-nine states have "compelled support" clauses in their constitutions, which say, in essence, that no one shall be compelled to support a church or religious ministry without his or her consent.[48] As can be seen by the numbers, many states have both types of provisions.[49] Only three states, however, have neither provision in their constitutions: Maine, Louisiana, and North Carolina.[50]

## II. Establishment Clause Requirements for School Choice Programs After *Zelman v. Simmons-Harris*

The tension surrounding the funding of sectarian schools, as well as the concern that providing government aid to sectarian schools may violate the Establishment Clause, was the focus of the June 2002 Supreme Court decision in *Zelman v. Simmons-Harris*.[51] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[52] In *Zelman*, Chief Justice Rehnquist's majority opinion stated that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens, who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause."[53]

The Cleveland, Ohio voucher program at issue in *Zelman* was created after a federal court ordered state supervision of that city's public schools.[54] The federal court issued this order because, for more than a generation, Cleveland's public schools had been among the worst performing in the nation.[55] The Cleveland voucher program gave qualified families residing in the Cleveland school district the

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[46] *See* Viteritti, *supra* note 7, at 672–73.

[47] *See Oversight Hearing on the Supreme Court's School Choice Decision and Congress' Authority to Enact Choice Programs Before the House Judiciary Committee on the Constitution*, 108th Cong. 9 (testimony of Richard D. Komer of the Institute for Justice), http://www.house.gov/judiciary/komer091702.pdf (Sept. 17, 2002).

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] *See* 536 U.S. 639, 639 (2002).

[52] U.S. Const. amend. I.

[53] 536 U.S. at 652.

[54] *See id.* at 644–45.

[55] *Id.* at 644.

option of sending their children to a participating public school, a private sectarian school, or a private non-sectarian school.[56]

In its analysis, the Court determined that three characteristics were essential to the Cleveland program's validity under the Establishment Clause.[57] These elements were neutrality among participating schools, the award of aid based on neutral, secular criteria, and individual parental choice in selecting a school.[58] Implicitly, the Court required that any school voucher program that includes sectarian schools must contain, at a minimum, some variation of these three elements.[59]

The first element of Cleveland's school voucher program was neutrality among participating schools and the requirement that these schools remain neutral in their admissions process.[60] Any private school could participate in the program if it were located in the district and met state educational standards.[61] In addition, participating private schools had to "agree not to discriminate on the basis of race, religion, or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.'"[62]

A second element of Cleveland's voucher program was that it awarded aid "'on the basis of neutral, secular criteria that neither favor[ed] nor disfavor[ed] religion, and [was] made available to both religious and secular beneficiaries on a nondiscriminatory basis.'"[63] Thus, there were "no 'financial incentives' that 'skewed' the program toward religious schools."[64] The Court noted that the Cleveland "program, in fact, create[d] financial *dis*incentives for religious schools."[65] Private schools in the Cleveland program received "only half the government assistance given to community schools and one-third the assistance given to magnet schools."[66] The Court further noted, however, that such disincentive features were not constitutionally required.[67]

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[56] *Id.* at 645.

[57] *Id.* at 645–46.

[58] *Zelman*, 536 U.S. at 645–46.

[59] *See id.*

[60] *Id.* at 645.

[61] *See id.*

[62] *Id.* (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (Anderson 1999 & Supp. 2000)).

[63] *Zelman*, 536 U.S. at 653–54 (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)).

[64] *Id.* at 653 (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487–88 (1986) (alterations removed)).

[65] *Id.* at 654.

[66] *Id.*

[67] *See id.*

A third element of the Cleveland program was that families who qualified for a school voucher could exercise true private choice in determining where among the participating schools to send their child.[68] The Court found that "[w]here tuition aid [was] spent depend[ed] solely upon where parents who receive[d] tuition aid [chose] to enroll their child."[69] In conjunction with this third private choice requirement, the Court also noted that under the Cleveland program, any check for private school tuition was made payable to the parent who then endorsed the check over to the school.[70] Thus, the program was held not to violate the Establishment Clause.[71]

As discussed above, however, the Court's decision in *Zelman* only addressed the validity of the Cleveland voucher program under the Establishment Clause.[72] Voucher programs are still vulnerable to challenges under the Free Exercise and Free Speech Clauses of the First Amendment.[73]

## III. Free Exercise and School Voucher Programs: A Review of Precedent

The Free Exercise Clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[74] To show a violation of the Free Exercise Clause, an individual must first prove that the offending law is not neutral and not of general applicability.[75] After this threshold challenge has been met, a court then determines whether the government has placed a substantial burden on the observation of a central religious belief or practice, and, if so, whether a compelling governmental interest justifies that burden.[76] Thus, free exercise challenges typically involve one of three situations: a law burdening an individual's ability to observe his or her religious practices,[77] a law re-

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[68] *See Zelman*, 536 U.S. at 645.

[69] *Id.* at 646.

[70] *See id.*

[71] *Id.* at 662–63.

[72] *See supra* notes 51–71 and accompanying text.

[73] *See infra* notes 74–173 and accompanying text.

[74] U.S. Const. amend. I.

[75] *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

[76] *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989). Although there is considerable disagreement over whether a court should determine what is considered a central religious belief, courts in practice do consider what qualifies as a protected religious belief when evaluating free exercise challenges. *See generally* McConnell et al., Religion and the Constitution 869–905 (2002).

[77] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963) (holding restriction on state unemployment compensation violated Free Exercise Clause because it required individu-

quiring conduct that is prohibited by an individual's religious beliefs,[78] or a law prohibiting conduct that is required by one's religion.[79]

### A. Employment Division v. Smith: *Minimum Requirements for a Successful Free Exercise Challenge*

In 1990, in *Employment Division v. Smith*, the U.S. Supreme Court set out the minimum requirements necessary for a successful free exercise challenge and held that if a law is neutral and of general applicability, it need not be justified by a compelling governmental interest, even if the law has the incidental effect of burdening a particular religious practice.[80] In *Smith*, two members of the Native American Church were fired from their jobs for ingesting peyote for sacramental purposes.[81] The two were subsequently denied unemployment benefits because the use of peyote was a criminal offense under state law.[82] They claimed that they should not have been denied unemployment benefits because the use of peyote was central to their practice of religion.[83]

The Court, however, reasoned that to allow religious exceptions to criminal laws "'would be to make the professed doctrines of religious belief superior to the law of the land.'"[84] Thus, the Court held that to succeed on a free exercise claim, an individual must prove that the law was not enacted with a neutral purpose and was not of general applicability.[85]

### B. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: *When a Facially Neutral Law Is Enacted with Impermissible Intent*

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the U.S. Supreme Court, in 1993, expanded on the neutrality requirement

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als to make themselves available for work Monday through Saturday, and denied compensation to individuals whose religious observations took place on Saturday).

[78] *See* United States v. Lee, 455 U.S. 252, 258–61 (1982) (holding that Amish employer was not exempt from social security taxes even though the Amish faith prohibited participation in governmental support programs).

[79] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993) (striking down ordinance prohibiting animal sacrifice as a violation of the Free Exercise Clause because the law had the purpose of disfavoring a particular religious practice).

[80] *See* 494 U.S. at 878–79.

[81] *See id.* at 874.

[82] *Id.* at 874–75.

[83] *Id.* at 878.

[84] *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

[85] *Smith*, 494 U.S. at 878–79.

announced in *Smith*, and held that a law enacted specifically to target the practices of one religious group "must undergo the most rigorous of scrutiny."[86] The Court stated that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[87] In *Lukumi*, the Court reviewed several ordinances enacted in the city of Hialeah, Florida that prohibited animal sacrifices.[88] The Court found that these laws were enacted to target the Santeria religion, which had opened a church in the city, and planned to engage in the religious practice of animal sacrifice.[89]

First, the Court found that the animal sacrifice ordinances were not neutral or of general applicability, as required by *Smith*.[90] In its analysis, the Court found guidance in its equal protection jurisprudence, noting that evidence relevant to a determination of neutrality "includes, among other things, the historical background of the [legislation], the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[91] In applying this analysis to the facts of the case, the Court found that the resolutions and ordinances prohibiting animal sacrifice within the city limits were enacted specifically because the Hialeah community did not want the Santeria sacrifices taking place in their midst.[92] Furthermore, the Court found that the ordinances were all enacted "in tandem" to target the Santeria church and their religious practices.[93] Thus, the Court determined that "the ordinances were enacted '"because of," not merely "in spite of,"' their suppression of Santeria religious practice."[94]

After concluding that the City of Hialeah ordinances were not neutral and of general applicability, the Court next asked whether the ordinances were justified by compelling state interests and were "narrowly tailored in pursuit of those interests."[95] Although the Court found the City proffered the legitimate governmental interests of protecting the public health and of preventing cruelty to animals, the

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[86] 508 U.S. at 546; *see Smith*, 494 U.S. at 878–79.

[87] *Lukumi*, 508 U.S. at 532.

[88] *Id.* at 526–28, 535–38.

[89] *See id.* at 534–35.

[90] *Id.* at 531–32.

[91] *Id.* at 540 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977)).

[92] *Lukumi*, 508 U.S. at 540–42.

[93] *Id.* at 535–36.

[94] *Id.* at 540 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

[95] *Id.* at 546.

Court found that the City could address these concerns with "restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice."[96]

### C. Wisconsin v. Yoder: *What Constitutes a Deep Religious Conviction?*

Some laws, however, are not neutral on their face and explicitly discriminate against a religious practice.[97] In this situation, an individual must prove that the law impairs the exercise of a central religious practice.[98] In *Wisconsin v. Yoder*, the U.S. Supreme Court, in 1972, held that a Wisconsin law requiring compulsory high school attendance for all children residing in the state violated the free exercise rights of Amish parents.[99] In coming to this determination, the Court discussed what would be necessary to prove that a practice was central to a religious belief.[100]

To find compulsory high school attendance unconstitutional as applied to the Amish, the Court first determined whether the Amish religious faith and their mode of life were, as the plaintiffs claimed, "inseparable and interdependent."[101] This is because "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to a reasonable state regulation of education if it is based on purely secular considerations."[102] Thus, for individuals to have the protection of the Free Exercise Clause, they must prove that the religious practice being infringed is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[103]

To satisfy the burden of proving that the Amish opposition to compulsory high school education was rooted in religious belief, the Amish parents presented expert witness scholars on religion and education.[104] The Court found that the Amish presented evidence that "abundantly support[ed] the claim that the traditional way of life of the Amish [was] not merely a matter of personal preference, but one of deep religious conviction."[105] Moreover, the expert testimony revealed that, to the Amish, "religion [was] not simply a matter of theocratic belief . . . . [but] pervade[d] and determine[d] virtually their

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[96] *Id.* at 538.

[97] *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

[98] *See* Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 133 (Me. 1999).

[99] 406 U.S. at 234.

[100] *See id.* at 215–19.

[101] *Id.* at 215.

[102] *Id.*

[103] *See id.* at 216.

[104] *Yoder*, 406 U.S. at 209.

[105] *Id.* at 216.

entire way of life."[106] Thus, the *Yoder* Court determined that enforcement of Wisconsin's requirement of compulsory formal education after the eighth grade would "gravely endanger, if not destroy," the free exercise of the Amish religious beliefs.[107]

## IV. Free Speech and School Voucher Programs: A Review of Precedent

In addition to a free exercise challenge, school voucher programs that exclude sectarian schools may also be vulnerable to a claim that they violate the Free Speech Clause.[108] The Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech."[109] As mentioned above, although the U.S. Supreme Court held in *Zelman v. Simmons-Harris* that a carefully tailored school voucher program *could* include sectarian schools, the Court 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.[110] In attempting to predict an answer to this question, two lines of U.S. Supreme Court free speech jurisprudence must be reconciled.[111] These two lines of cases are commonly referred to as the "limited public forum" cases[112] and the "government-as-speaker" cases.[113]

### A. *Limited Public Forum Cases and Viewpoint Discrimination*

A limited public forum is a place that the government could close to speech, but that the government voluntarily and affirmatively opens to speech.[114] A limited public forum is created, for example, when a school opens up its facilities for use by community groups.[115] Once the government creates a limited public forum, it assumes an obligation to justify its discriminations under applicable constitutional

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[106] *Id.*

[107] *Id.* at 219.

[108] *See infra* notes 114–173 and accompanying text.

[109] U.S. Const. amend. I.

[110] *See* 536 U.S. 639, 662–63 (2002).

[111] *See infra* notes 114–173 and accompanying text.

[112] *See infra* notes 114–152 and accompanying text.

[113] *See infra* notes 153–173 and accompanying text.

[114] *See* Erwin Chemerinsky, Constitutional Law Principles and Policies 1095 (2d ed. 2002).

[115] *See* Good News Club v. Milford Cent. Sch. Dist., 533 U.S. 98, 106–07 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 391–93 (1993); Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 252 (1990); Widmar v. Vincent, 454 U.S. 263, 269–70 (1981).

norms.[116] Thus, if the government wants to exclude a group from use of the limited public forum because of a religious affiliation, the exclusions must be justified by a compelling state interest and must be narrowly drawn to achieve that end.[117] Cases involving a limited public forum, though not controlling, provide instruction for evaluating restrictions based on viewpoint in governmental subsidies.[118]

In the first of a line of limited public forum cases, the U.S. Supreme Court, in *Widmar v. Vincent*, in 1981, held that a state university, once it chose to make its facilities available for meetings of registered organizations on campus, could not discriminate against a group that requested to use the facilities to engage in religious worship and instruction.[119] The Court reasoned that "[t]hrough its policy of accommodating their meetings, the University created a forum generally open for use by student groups. Having done so, the University assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms."[120] Because the U.S. Constitution "forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place," the university "must show that its [discrimination] was necessary to serve a compelling state interest and that it was narrowly drawn to achieve that end."[121]

The Court agreed with the University's argument that its compliance with the federal Establishment Clause was compelling.[122] The Court concluded, however, that the Establishment Clause was not implicated because "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose, and would avoid entanglement with religion."[123] Lastly, the Court found that such a policy would not foster an excessive entanglement in religion because it did not "confer any imprimatur of state approval on relig-

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[116] *See Good News Club*, 533 U.S. at 106–07; *Lamb's Chapel*, 508 U.S. at 391–93; *Mergens*, 496 U.S. at 252; *Widmar*, 454 U.S. at 269–70.

[117] *See Widmar*, 454 U.S. at 270.

[118] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 544 (2001) (stating limited public forum cases provide instruction for evaluating cases that involve government funding).

[119] *See* 454 U.S. at 277.

[120] *Id.*

[121] *Id.* at 267–68, 270.

[122] *Id.* at 270–71.

[123] *Widmar*, 454 U.S. at 271–72. The Court here applied the three-prong test announced in *Lemon v. Kurtzman*, which states that a policy will not offend the Establishment Clause if the government policy has a secular legislative purpose, if its principal or primary effect is one that neither advances nor inhibits religion, and if the policy does not foster an excessive government entanglement in religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

ious sects or practices," and "the forum [was] available to a broad class of nonreligious as well as religious speakers."[124]

In dicta, however, the *Widmar* Court made observations that may be helpful in determining whether the federal Constitution compels a state to provide aid to sectarian elementary and secondary schools once a state makes an affirmative decision to offer aid to students attending non-sectarian private schools.[125] The first observation was that unlike other religious group access-to-facilities cases, the respondent's claims did not rest solely on rights claimed under the Free Exercise Clause.[126] The respondent's claim also implicated the First Amendment rights of speech and association, and it was on the basis of speech and association that the Court decided this case.[127] Thus, the Court explicitly stated that it did not address whether the University violated the respondent's free exercise rights.[128] Furthermore, the Court stated that it did not reach the questions that would arise if state accommodation of free exercise and free speech rights conflicted with the prohibitions of the Establishment Clause.[129]

In addition, the Court explicitly qualified its application of the limited public forum policy by stating that the Court did not "question the right of the University to make academic judgments as how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[130] This qualification left significant discretion to the University to make curricular and administrative decisions.[131]

Similarly, in *Board of Education of the Westside Community Schools v. Mergens*, the U.S. Supreme Court, in 1990, affirmed Congress's extension of the holding of *Widmar* to secondary school students.[132] In *Mergens*, the issue was whether a secondary school could exclude recognition of a religious student group under the Equal Access Act.[133] The

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[124] *Widmar*, 454 U.S. at 274.

[125] *See id.* at 273 n.13, 278.

[126] *See id.* at 273 n.13.

[127] *See id.*

[128] *See id.*

[129] *See Widmar*, 454 U.S. at 273 n.13.

[130] *Id.* at 276 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

[131] *See id.*

[132] *See Mergens*, 496 U.S. at 253.

[133] *Id.* at 231. The Equal Access Act extended the Court's decision in *Widmar* to secondary schools, prohibiting secondary schools that receive federal financial assistance and that maintain a limited open forum from denying equal access to students who wish to meet within the forum based on the content of the speech at such meetings. *See* 20 U.S.C. §§ 4071–4074 (2003). The limited open forum in *Mergens* was the ability for student clubs and organizations to meet after school hours on school premises. *See* 496 U.S. at 231.

Court was unpersuaded by the school's contention that "because the student religious meetings [were] held under school aegis, and because the State's compulsory attendance laws [brought] the students together (and thereby provide[d] a ready-made audience for student evangelists), an objective observer in the position of a secondary school student [would] perceive official school support for such religious meetings."[134] The Court noted, however, that there was a "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[135]

Certain observations in the *Mergens* opinion, however, assist in determining whether a state can be compelled to include tuition aid to religious schools once the state opens its school voucher "forum" to include non-sectarian private schools in a voucher program.[136] First, the Court noted that "the Act expressly limit[ed] participation by school officials at meetings of student religious groups, and that any such meetings had to be held during 'noninstructional time.'"[137] Thus, the Court found that the Act avoided the problems of student "'emulation of teachers as role models'" and "'mandatory attendance requirements.'"[138] The Court also noted that "petitioners' fear of a mistaken inference of endorsement [was] largely self-imposed, because the school itself has control over any impressions it gives its students."[139] Thus, the Court concluded that, "[t]o the extent a school makes clear that its recognition of [the religious] club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."[140]

In *Lamb's Chapel v. Center Moriches Union Free School District*, the U.S. Supreme Court, in 1993, reaffirmed the principle that once a school has opened its facilities to the holding of civic and recreational meetings of community groups, it cannot deny a religious group access.[141] In *Lamb's Chapel*, a church group wanted to use the school premises to show a film series dealing with family and child-rearing issues from a Christian perspective.[142] The Court reasoned that be-

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[134] *Mergens*, 496 U.S. at 249–50.

[135] *Id.* at 250.

[136] *Id.* at 251; *see Widmar*, 454 U.S. at 273 n.13, 278.

[137] *Mergens*, 496 U.S. at 251 (quoting 20 U.S.C. § 4071(b)) (citation omitted).

[138] *Id.* (quoting Edwards v. Aguillard, 482 U.S. 578, 584 (1987)).

[139] *Id.*

[140] *Id.* (citation omitted).

[141] *See* 508 U.S. at 395.

[142] *See id.* at 388–89.

cause the school district had opened its property for such a wide variety of communicative purposes, restrictions on communicative uses of the property were subject to constitutional limitation.[143] Furthermore, the Court also reaffirmed that any exclusions must be justified by a compelling state interest and must be narrowly drawn to achieve that end.[144]

In another limited public forum case, *Good News Club v. Milford Central School District*, the U.S. Supreme Court, in 2001, held that an elementary school could not exclude a religious group from using school facilities once it had opened its facilities for use by the community.[145] The school district had decided to permit its residents to use the school for educational, social, civic and recreational meetings, entertainment events, and other uses pertaining to the welfare of the community.[146] The Good News Club sought permission to hold its weekly afterschool meetings in the school cafeteria, during which the group proposed to sing songs, hear a Bible lesson, and memorize scripture.[147] Justice Thomas, writing for the majority, did not dispute the parties' assessment that in opening school facilities for use by community groups, the district created a limited public forum.[148] The Court found that when a state establishes a limited public forum, the state is "not required to and does not allow persons to engage in every type of speech," but the state's restrictions must not discriminate "on the basis of viewpoint."[149]

Relying on its reasoning in *Lamb's Chapel*, the Court found that the school district had permitted the use of its facilities for any group that promoted the moral and character development of children, and had excluded the Good News Club from similarly promoting this very

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[143] *See id.* at 391. In its next limited public forum case, *Rosenberger v. Rector & Visitors of the University of Virginia*, the U.S. Supreme Court, in 1995, expressly relied on *Widmar*, *Mergens*, and *Lamb's Chapel* to hold that denying funds to a religious student group was impermissible viewpoint discrimination. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830–44 (1995). There, the University of Virginia refused to give funds collected from the student activity fee to a religious group that published an expressly religious magazine. *See id.* at 827. Although Justice Kennedy, writing for the majority, acknowledged that the student activity fee monies created a forum that was more metaphysical than spatial or geographic, the Court held that limited public forum principles were applicable. *See id.* at 830. The Court concluded that denial of funds to the religious group was unconstitutional because it discriminated based on the religious content of the speech in the group's publication. *See id.* at 830–44.

[144] *See Lamb's Chapel*, 508 U.S. at 391.

[145] *See* 533 U.S. at 111–12.

[146] *Id.* at 102.

[147] *Id.* at 103.

[148] *Id.* at 106.

[149] *Id.*

objective from a religious perspective.[150] The Court found no distinction between the activities of Lamb's Chapel and the actions of the Good News Club, except that the former used films to convey its Christian message, and the latter used songs and prayer.[151] Thus, the Court held that the school district could not discriminate between groups attempting to serve the same permitted purpose based solely on religion.[152]

### B. *Government-as-Speaker Doctrine*

The U.S. Supreme Court, however, has distinguished between the government creating a limited public forum to encourage private speech and the government using private speakers to transmit specific information pertaining to its own programs.[153] Under the government-as-speaker doctrine, when the government disburses public funds to private entities to convey a governmental message, "it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[154] This is distinguished from when the government does not itself speak, or subsidize transmittal of a message it favors, but instead expends funds to encourage a diversity of views from private speakers.[155] The Court has used this government-as-speaker doctrine to draw a distinction between the ability to exercise a constitutional right and the right to government aid to exercise that right.[156]

In *Regan v. Taxation With Representation*, the U.S. Supreme Court, in 1983, upheld an Internal Revenue Service regulation that prohibited the use of tax-deductible contributions to support substantial lobbying activities.[157] In enacting the legislation, "Congress chose not to subsidize lobbying as extensively as it chose to subsidize other types of activities that nonprofit organizations undertake to promote the

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[150] *Good News Club*, 533 U.S. at 107–12.

[151] *Id.* at 109–10.

[152] *Id.*

[153] *See Rosenberger*, 515 U.S. at 833 (discussing the holding in Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

[154] *Id.* (discussing *Rust*, 500 U.S. at 194).

[155] *See id.* at 834.

[156] *See Rust*, 500 U.S. at 193; Regan v. Taxation With Representation, 461 U.S. 540, 549 (1983); *see also* Harris v. McRae, 448 U.S. 297, 316 (1980) (upholding the subsidization of family planning services that will lead to conception and childbirth and decline to promote or encourage abortion); Maher v. Roe, 432 U.S. 464, 480 (1977) (upholding a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions).

[157] 461 U.S. at 543–44, 551. The Court noted that a tax exemption has much the same effect as a cash grant to an organization of the amount of tax it would have to pay on its income. *See id.* at 544.

public welfare."[158] The Court noted that the issue was not whether the nonprofit group must be permitted to lobby, but whether Congress was required to provide it with public money to lobby.[159] Furthermore, the Court defended Congress's ability to choose to fund the lobbying efforts of veterans' organizations and to choose not to fund the lobbying efforts of other nonprofit groups.[160] The Court said this distinction was justified because of the compelling interest to support veterans.[161] Thus, the Court implicitly held that the U.S. Constitution confers no affirmative duty on the government to fund protected activities.[162]

In *Rust v. Sullivan*, the U.S. Supreme Court, in 1991, upheld a federal law barring the use of Title X funds to counsel pregnant women about abortion as a method of family planning.[163] In rejecting the argument that such a prohibition was impermissible viewpoint discrimination, the Court stated that the government could, "without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[164] The Court went on to find that in doing so, the government did not discriminate on the basis of viewpoint, but merely chose "to fund one activity to the exclusion of the other."[165] The Court reasoned that a "'legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'"[166] Moreover, "'[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.'"[167] Thus, although the government cannot impose obstacles to the exercise of a constitutional right, there is no affirmative duty for the government to provide aid to exercise that right.[168]

In *Rosenberger v. Rector & Visitors of the University of Virginia*, however, the U.S. Supreme Court, in 1995, found that the University of

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[158] *Id.*

[159] *Id.* at 551.

[160] *Id.* at 550–51.

[161] *Id.*

[162] *See Regan*, 461 U.S. at 545, 551.

[163] 500 U.S. at 178.

[164] *Id.* at 193; *see also Harris*, 448 U.S. at 316 (upholding subsidization of family planning services that will lead to conception and childbirth and that decline to promote or encourage abortion); *Maher*, 432 U.S. 464, 480 (upholding state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions).

[165] *Rust*, 500 U.S. at 192–93.

[166] *Id.* at 193 (quoting *Regan*, 461 U.S. at 549).

[167] *Id.* (quoting *Harris*, 448 U.S. at 317 n.19).

[168] *See id.* at 201.

Virginia violated the First Amendment when it declined to authorize disbursements from its student activities fund to finance the printing of a Christian newspaper.[169] Although a wide variety of other student groups were eligible for this type of reimbursement, religious groups were excluded.[170] Here, the University did not qualify for the government-as-speaker exception because the University did not itself speak or subsidize transmittal of a message it favored, but instead expended funds to encourage a diversity of views from private speakers.[171] Thus, the Court was able to distinguish this discrimination from *Rust*, where the government used private speakers to transmit specific information about its own program,[172] and *Regan*, where the government merely gave preferential treatment to certain speakers, not to the content or messages of those groups' speech.[173]

## V. The Maine Tuitioning Program: The New Front Line of the School Voucher Debate

When the *Zelman v. Simmons-Harris* opinion was announced, people began to speculate that Maine's tuitioning program would be one of the first challenged under the U.S. Supreme Court's new Establishment Clause holding.[174] In response, the Maine Attorney General issued a letter to the Maine Department of Education Commissioner stating that *Zelman* did not address the particular issue presented by Maine's law, and therefore the Maine tuitioning program should continue to exclude sectarian schools.[175] Disagreeing with the Maine Attorney General's opinion, the Institute for Justice announced the first lawsuit against the Maine program, on behalf of six Maine families who were denied aid to send their children to religious schools, on

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[169] 515 U.S. at 837.

[170] *See id.* at 824–25.

[171] *See id.* at 834.

[172] *See id.* at 833. In *Legal Services Corp. v. Velazquez*, decided by the U.S. Supreme Court in 2001, the Court provided further insight into the government-as-speaker exception when it struck down several restrictions on the activities of lawyers receiving monies from the Legal Services Corporation (the "LSC"). *See* 531 U.S. at 542, 549. The Court found that, although the LSC program differed from the program at issue in *Rosenberger* in that its purpose was not to "encourage a diversity of views," the "salient point" was that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message. *See id.* at 542.

[173] *See Rosenberger*, 515 U.S. at 834.

[174] *See, e.g.*, David Connerty-Martin, *Experts: Supreme Court School Voucher Ruling Portends Maine Changes*, Portland Press Herald, June 28, 2002, at A3.

[175] *See* Letter from Att'y Gen. G. Steven Rowe, to J. Duke Albanese, Comm'r, Me. Dep't of Educ., http://www.state.me.us/education/Press%20Releases/vouchers/AGopinionvoucher.htm (July 12, 2002).

September 18, 2002.[176] A second lawsuit was filed in federal court by the American Center for Law and Justice on behalf of several additional families in Maine on October 18, 2002.[177]

### A. *A Brief History of the Maine Tuitioning Program*

Maine, because of its large number of rural townships, has a program called "tuitioning" which allows parents of children residing in townships that do not have their own schools to send their children to public or non-sectarian private schools outside the township.[178] Some form of a tuitioning program has been in effect in Maine since 1873.[179]

The origin of the tuitioning program in Maine can be traced to two early characteristics of this rural state: first, Maine, along with the rest of New England, had a tradition of placing responsibility for political affairs at the local level[180] and, second, Maine's subscription to a Protestant emphasis on education as a means of human development.[181] These two factors compelled local townships, even before the modern concept of public schools emerged, to establish small academies to educate local children.[182] These small private schools were private only in the sense that the town contracted with the individual schoolmaster to run a school where, due to rural location, a school might not otherwise exist.[183] Furthermore, local townships did not offer these schools as an alternative to state-funded schools, but rather they were the only means of bringing a school to remote or rural ar-

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[176] *See* Media Advisory, Institute for Justice, Press Conference Announces Lawsuit Challenging Maine Law Barring Religious Options from Statewide School Choice Program, http://www.ij.org/media/school_choice/maine/9_17_02ma.shtml (Sept. 17, 2002) [hereinafter Media Advisory].

[177] *See* Press Release, The American Center for Law and Justice, ACLJ Files Suit Against Maine Dept. of Educ. for Discriminating Against Religious Schools by Denying Tuition Payments, http://www.aclj.org/news/pressreleases/021018_maine_school.asp (Oct. 18, 2002) [hereinafter Press Release]. On August 8, 2003, a magistrate issued a Recommended Decision on Cross Motions for Summary Judgment, recommending that summary judgment be granted in favor of the defendant school district. *See* Eulitt v. Me. Dep't of Educ., No. Civ. 02-162-B-W, 2003 WL 21909790 (D. Me. Aug. 8, 2003) (magistrate recommendation). The magistrate's recommendation is discussed *infra*, at notes 205, 215, and 226.

[178] *See* Hammons, *supra* note 24, at 5; *see also* Frank Heller, *Lessons from Maine, Education Vouchers for Students Since 1873*, *in* BRIEFING PAPERS No. 66 (Cato Inst., Washington, D.C.), Sept. 10, 2001, at 2.

[179] Hammons, *supra* note 24, at 5.

[180] *See id.* at 6; *see also* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 54 (1988).

[181] Hammons, *supra* note 24, at 6; *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 302 (J.P. Mayer ed., Harper Perennial: New York 2000) (1835).

[182] Hammons, *supra* note 24, at 7.

[183] *Id.*

eas.[184] Thus, the organizational structure of the Maine school system was designed around the concept of local township control.[185] This is in contrast to most other states, where the organization of school systems developed at the county level.[186]

In the nineteenth century, as Maine moved toward compulsory education, many smaller towns found it less expensive to send students to existing private academies rather than to build public schools.[187] In 1873, Maine passed the Free High School Act, which encouraged towns to offer free secondary education to its students, rather than requiring payment as most private academies did.[188] The Free High School Act provided towns with three options, including creating free high schools, making arrangements with a private academy to offer education for free, or paying tuition for students to attend a private academy.[189] Many towns chose the third option.[190]

For most of the 130 years the Maine tuitioning program has been in effect, there was no prohibition against government tuitioning a student to a sectarian school.[191] This changed in 1981 when Maine amended its tuitioning statute to exclude aid to sectarian schools.[192] This exclusion led to a set of legal challenges to the Maine tuitioning program.[193]

### B. Bagley v. Raymond School Department: *Challenging the Tuitioning Program in Maine's Highest State Court*

The first legal challenge to the amended Maine tuitioning program was decided in 1999 by the Supreme Judicial Court of Maine in *Bagley v. Raymond School Department*.[194] In *Bagley*, five families from the town of Raymond, which does not have a high school and instead provides secondary education through Maine's tuitioning program, brought suit because they were denied tuition to send their sons to a Catholic high school in Portland, Maine.[195] The Supreme Judicial Court of Maine upheld the statute against challenges under the Free

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[184] *Id.*
[185] *Id.* (quoting Mike Kucsma at the Maine Department of Education).
[186] *See id.*
[187] Hammons, *supra* note 24, at 7.
[188] *Id.* at 8.
[189] *Id.*
[190] *Id.*
[191] *See id.* at 9.
[192] *See* ME. REV. STAT. ANN. tit. 20-A, § 5204(3), (4) (West 2002).
[193] *See infra* notes 194–223 and accompanying text.
[194] *See* 728 A.2d 127 (Me. 1999).
[195] *Id.* at 131.

Exercise, Establishment, Equal Protection, and Free Speech Clauses of the federal Constitution.[196]

The families in *Bagley* first contended that the Maine "tuition program violated the Free Exercise Clause by burdening their fundamental right to send their children to religious schools."[197] The court noted that "'[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies that burden.'"[198] The court thus found that the families must "'initially demonstrate: (1) that the activity burdened by the regulation is motivated by a sincerely held religious belief; and (2) that the challenged regulation restrains the free exercise of that religious belief.'"[199]

In analyzing the first requirement, the court found that only one of the five families in the suit had stated religion was a motivation for sending their child to Catholic school.[200] Further, despite only limited evidence in the record demonstrating that obtaining a Catholic education for this family's son was central to their religious beliefs, the court assumed the sufficiency of the evidence, and still could not find that any substantial burden had been imposed on those beliefs.[201] The court noted that it was well-established that there was no substantial burden placed on an individual's free exercise of religion where a law or policy merely operated to make the practice of the individual's religious beliefs more expensive.[202] Thus, "'[t]he fact that the government cannot exact from a citizen a surrender of one iota of [her] religious scruples does not mean that [she] can demand of government a sum of money, the better to exercise them.'"[203]

Continuing its free exercise inquiry, the court also noted that the Maine statute did not prohibit the parents from sending their children to the religious school of their choice.[204] Thus, the court determined, the statute made them "no more impaired in their efforts to

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[196] *Id.* at 147. Note that the statute was also challenged under the Maine Constitution, but because neither party contended that the Maine Constitution affords greater protection than the federal Constitution, the court collapsed the challenges into one inquiry under the federal Constitution. *See id.* at 132.

[197] *Id.* at 133.

[198] *Id.* (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

[199] *Bagley*, 728 A.2d at 133 (quoting Blount v. Dep't of Educ. & Cultural Servs., 551 A.2d 1377, 1379 (Me. 1988)).

[200] *Id.* at 134.

[201] *Id.*

[202] *Id.*

[203] *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)) (alterations retained).

[204] *See Bagley*, 728 A.2d at 135.

seek a religious education for their sons than parents of children in Maine school districts that provide only a free nonreligious education in public schools."[205]

The court next evaluated the plaintiffs' Establishment Clause claim and similarly found it without merit.[206] Although this case predates the U.S. Supreme Court's recent *Zelman* decision,[207] the Supreme Judicial Court of Maine did note that the Establishment Clause had "no role in requiring government assistance to make the practice of religion more available or easier."[208] Thus, the court found no support for the proposition that the Establishment Clause prevented a state from refusing to fund religious schools.[209]

Lastly, the five Maine families raised an Equal Protection claim, asserting that they were denied equal protection of the laws because the school they chose was excluded from the program solely because of its religious affiliation.[210] The court first implied that there was a possible standing issue because the parents, in essence, claimed that the excluded religious high school was treated differently because it was a religious school, not that the parents were treated differently because they were Catholic.[211] The court, however, assumed arguendo "that the parents' lack of opportunity to have the State pay the tuition for their children to attend a private religious school result[ed] in *their own* disparate treatment on the basis of their religion."[212] Next, the court applied strict scrutiny to the Maine statute, and stated that the question it had to answer was "whether, having decided to create a tuition program that allow[ed] parents to choose private schools, [Maine could] exclude private religious schools from receipt of state funds."[213]

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[205] *Id.* The court here is referring to the fact that the Maine tuitioning program only applies to families residing in school districts that do not operate their own public schools. Note that the dissent, in its Equal Protection inquiry, implicitly objects to the majority's use of all children in Maine as the denominator, and instead concludes the proper inquiry focuses on all students residing in the same school district. *See id.* at 148 (Clifford, J., dissenting). The magistrate's recommendation in the current federal challenge to the Maine tuitioning program, *Eulitt v. Maine Department of Education*, follows this same reasoning, stating that the parents challenging the statute "can point to no similarly situated parents who have been granted [the entitlement to send their children to a religious school to receive a religious education] by the Town of Minot or the State of Maine." *See* 2003 WL 21909790, at *4 n.4 (magistrate recommendation).

[206] *See Bagley*, 728 A.2d at 135.

[207] *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[208] *Bagley*, 728 A.2d at 135–36.

[209] *Id.* at 136.

[210] *See id.*

[211] *See id.*

[212] *Id.*

[213] *Bagley*, 728 A.2d at 137–38.

The court then turned to the issue of whether the exclusion of religious schools from the Maine tuitioning program served a compelling state interest and was narrowly tailored to achieve that end.[214] The government stated that its only justification for the statute was compliance with the Establishment Clause and the court found this sufficiently compelling to uphold the statute.[215]

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[214] *See id.* at 138. In determining that the Maine statute was narrowly tailored, the *Bagley* majority merely stated that, "[w]hile it may be possible for the Legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children, the current program could not be easily tailored to include religious schools without addressing significant problems of entanglement or the advancement of religion." *See id.* at 147. The dissent in *Bagley*, however, reasoned that the *complete and total exclusion* of religious schools was not necessary to accomplish the goal of the tuition program. *See id.* at 149 (Clifford, J., dissenting). Judge Clifford stated that "[a] tuition program with similar or greater restrictions and conditions could be fashioned within the framework of the current statute with very little effort on the part of the State. Tuition in less substantial amounts could be authorized to benefit parents of children in religious schools. The tuition aid could be directed through the parents to avoid restrictions on direct aid; and . . . the State could adopt reasonable conditions and restrictions on the use of the State aid, insuring that the moneys would not be used to directly subsidize the religious functions of the schools, avoiding both direct aid of religion and excessive entanglement of the State in religion." *Id.* at 150 (Clifford, J., dissenting).

[215] *Id.* at 138. This simple concession may prove fatal for Maine in the two present challenges to the tuitioning program. The court in *Bagley* went on to say that if the State's justification is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny. *See id.* at 138. Now, after *Zelman*, one can argue that the State and the *Bagley* court did have an erroneous understanding of the Establishment Clause. *See supra* notes 53–73 and accompanying text.

The magistrate in *Eulitt*, however, was not concerned with this concession, stating:

> In any event, *Strout* [*v. Albanese*] does not determine the instant litigation because the State now advances several legitimate, alternative justifications for precluding private sectarian schools from receiving public tuition dollars that were not pressed in *Strout*:
> (1) "A publicly funded education system works best when that education is one of diversity and assimilation, and not a 'separate and sectarian' one."
> (2) "Public funds should pay for religiously neutral rather than a religious education."
> (3) The State cannot reasonably oversee all aspects of a sectarian school's curriculum because to do so would result in religious entanglements.
> (4) "Religious schools can, and reserve the right to, discriminate in favor of those of their own religion, and this state should not fund discrimination."
> (5) There exists no exigency such as in *Zelman* that would reasonably require the State to depend upon sectarian schools to help provide all Maine children with a free public education.

2003 WL 21909790, at *2–3 (magistrate recommendation).

### C. Strout v. Albanese: *A Second Challenge to the Maine Tuitioning Program in Federal Court*

A second challenge to the Maine tuitioning program was decided by the U.S. Court of Appeals for the First Circuit in 1999 in *Strout v. Albanese*.[216] A group of parents who were denied tuitioning funds for use at sectarian schools brought suit in federal court.[217] The First Circuit Court of Appeals decided that Maine was not constitutionally required to extend subsidies to sectarian schools under the Establishment, Equal Protection, Free Exercise, Due Process, and Free Speech Clauses of the U.S. Constitution.[218]

In the *Strout* court's Establishment Clause analysis, it found that there was "*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."[219] In its equal protection analysis, the court cited *Bagley*, and concluded that "the State's compelling interest in avoiding an Establishment Clause violation require[d] that the State exclude sectarian schools from the tuition program."[220] The court further found that the Maine program did not violate the Free Exercise Clause because the statute did not prevent attendance at a religious school, and the parents failed to prove that attendance at a religious school was a central tenet or practice of their faith.[221] Lastly, the court rejected the families' due process and free speech claims, because although the families had "a fundamental right to direct the upbringing and education of their children . . . . that fundamental right [did] not require the state to pay directly for a sectarian education."[222] Thus, the court concluded that the Maine tuitioning program was constitutional.[223]

## VI. Analysis: Two New Challenges to the Maine Tuitioning Program

Now, after *Zelman v. Simmons-Harris*, the Maine tuitioning program is once again the focus of two new legal challenges.[224] Maine

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[216] *See* 178 F.3d 57 (1st Cir. 1999).

[217] *Id.* at 59.

[218] *Id.* at 60–66.

[219] *Id.* at 64.

[220] *Id.*

[221] *Strout*, 178 F.3d at 65 (applying the free exercise test announced in *Hernandez v. Commissioner*, 490 U.S. at 699, which asks whether the government has placed a substantial burden on the observation of a central belief or practice).

[222] *Id.* at 66 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)).

[223] *Id.*

[224] *See* Media Advisory, *supra* note 176; Press Release, *supra* note 177. There was also an unsuccessful legislative challenge to the Maine tuitioning program after *Zelman*. *See* An Act

presents a unique and ironic starting point for the first voucher program challenges after *Zelman*.[225] Maine's program is unique because it does not have any of the typical voucher program characteristics that blur the line between policy and legality.[226] This is because Maine's tuitioning program, unlike the most common voucher programs, was not enacted to help low-income families escape failing public school systems.[227] Instead, the program is used simply to educate children who reside in townships that do not have their own schools.[228] Thus, voucher supporters cannot argue that the program enables low-income families to have equal opportunity to choose the best education for their children, nor can voucher opponents argue that the program depletes the local public school of valuable resources.[229]

Maine, as the focus of the first two post-*Zelman* challenges, is also an ironic choice because Congressman Blaine, of the infamous Blaine Amendments, was from Maine.[230] And, though voucher scholars contend that the Blaine Amendments will pose a substantial barrier to school voucher programs after *Zelman*, Maine is one of only three states that have neither a Blaine Amendment nor a compelled support clause.[231] Furthermore, the Supreme Judicial Court of Maine held that Maine's establishment clause was no more restrictive than the federal Establishment Clause.[232] Thus, whether the Maine tuition-

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to Eliminate Discrimination Against Parents Who Want to Send Their Children to Religious Schools, L.D. 182 (H.P. 141), 121st Leg., 1st Reg. Sess. (Me. 2003).

[225] *See infra* notes 226–234 and accompanying text.

[226] *See supra* notes 25–35 and accompanying text. This unique characteristic of the Maine tuitioning program is discussed in the magistrate's recommendation in *Eulitt v. Maine Department of Education*. *See* No. Civ. 02-162-B-W, 2003 WL 21909790, at *3 (D. Me. Aug. 8, 2003) (magistrate recommendation). There, the magistrate acknowledged the Department of Education's justification that "[t]here exists no exigency such as in *Zelman* that would reasonably require the State to depend upon sectarian schools to help provide all Maine children with a free public education." *See id.* (magistrate recommendation). Furthermore, the magistrate found support in the *Zelman* opinion itself, quoting the *Zelman* majority: "'[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.'" *Id.* (magistrate recommendation) (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002)) (alteration retained).

[227] *See supra* notes 26–35 and accompanying text.

[228] *See* Hammons, *supra* note 24, at 5; *see also* Heller, *supra* note 178.

[229] *See supra* notes 26–35 and accompanying text.

[230] *See supra* note 42 and accompanying text.

[231] *See supra* note 50 and accompanying text. That the exclusion of sectarian schools from the Maine tuitioning program cannot be traced back to the anti-Catholic animus of the Blaine Amendments weakens any Equal Protection challenge to the program. *Cf.* Washington v. Davis, 426 U.S. 229, 239–41 (1978) (law must reflect a racially discriminatory purpose to violate Equal Protection Clause).

[232] *See* Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 132 (Me. 1999).

ing program survives challenge will depend purely on federal constitutional arguments.[233] As described above, these arguments may include challenges under the Free Speech and Free Exercise Clauses of the federal Constitution.[234]

### A. *Free Exercise Challenges to the Maine Tuitioning Program*

In applying the U.S. Supreme Court's free exercise jurisprudence to the Maine tuitioning program, it must first be noted that the Maine statute is not neutral on its face because it explicitly excludes sectarian schools.[235] Thus, any challenge to the program already satisfies the threshold requirement of *Employment Division v. Smith*, which requires a showing that the law is not neutral and is not of general applicability.[236] Though the neutrality element of a free exercise challenge is already met, the Maine program will still survive a free exercise challenge because sending children to sectarian schools is not central to any religious beliefs.[237] Furthermore, there is no requirement for a state to make the exercise of religious beliefs less expensive.[238]

#### 1. A Free Exercise Challenge to the Maine Tuitioning Program Will Fail Because a Sectarian Education Is Not Central to the Catholic Faith

A free exercise challenge to the exclusion of sectarian schools from the Maine tuitioning program will fail because a sectarian education is merely a matter of personal preference, not a belief of deep religious conviction, shared by an organized group, and intimately related to daily living.[239] As seen in the U.S. Supreme Court's discussion in *Wisconsin v. Yoder*, a way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations—the

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[233] *See id.*

[234] *See supra* notes 74–173 and accompanying text. Many of the constitutional questions presented by the Maine tuitioning program may be resolved next term when the U.S. Supreme Court hears *Davey v. Locke* on appeal from the Ninth Circuit. *See* 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3589 (U.S. May 19, 2003) (No. 02-1315). For a discussion of the issues presented in *Davey*, see Derek D. Green, *Does Free Exercise Mean Free State Funding? In* Davey v. Locke, *The Ninth Circuit Undervalued Washington's Vision of Religious Liberty*, 78 WASH. L. REV. 653, 670–88 (2003).

[235] *See* ME. REV. STAT. ANN. tit. 20-A, § 5204(3), (4) (West 2002); *Bagley*, 728 A.2d at 132 n.10.

[236] *See* 494 U.S. 872, 878–79 (1990).

[237] *See supra* notes 99–107 and accompanying text.

[238] *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 605 (1961).

[239] *See* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

claims must be rooted in religious belief.[240] Challengers to the Maine program will have a difficult time producing expert testimony and sufficient evidence to prove that a religious education is central to their religious beliefs.[241] This is because most of the families challenging the Maine tuitioning program in the two current lawsuits send their children to Catholic schools, and education in a Catholic school is not a requirement of that religion.[242] As contrasted with the Amish in *Yoder*, a court should find that the choice of a Catholic education is more a matter of personal preference than one of deep religious conviction.[243]

### 2. A Free Exercise Challenge to the Maine Tuitioning Program Will Fail Because There Is No Fundamental Right at Issue

As noted in *Bagley v. Raymond School Department*, even if challengers to the Maine program are able to prove that a religious education is central to their religious beliefs, the Maine tuitioning program still does not violate the Free Exercise Clause because no fundamental right has been infringed.[244] The Maine tuitioning program does not require a child to attend a sectarian school, nor does the program prohibit a family from choosing to have their child educated at a sectarian school.[245] Instead, the program merely prevents parents who reside in tuitioning districts from receiving money to send their child to a sectarian school.[246] Moreover, as the Supreme Judicial Court of Maine stated in *Bagley*, "[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."[247] Thus, the Maine tuitioning program, even though it denies state funds for attendance at a sectarian school, is still constitutional because it does not place a substantial burden on the free exercise of religion.[248]

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[240] *See id.*

[241] *See supra* notes 99–107 and accompanying text.

[242] *See Vindicating the Supreme Court: Fighting for Parental Liberty by Stopping Religious Discrimination*, INST. FOR JUST. LITIG. BACKGROUNDER (Inst. for Justice, Washington, D.C.), http://www.ij.org/media/school_choice/maine/background.shtml (last visited Sept. 19, 2003); Press Release, *supra* note 177. A discussion of the tenets and integral religious practices of the Catholic faith is beyond the scope of this Note. Thus, this analysis relies on the presumption that Catholicism does not require an individual to live in a church community separate from world and worldly influence as does the Amish religion.

[243] *See* 406 U.S. at 216.

[244] *See* 728 A.2d at 134.

[245] *See id.* at 135.

[246] *See id.*

[247] *Id.* at 134 (internal citations omitted) (internal quotations omitted).

[248] *See id.* at 134–35.

### B. *Free Speech: Applying the Limited Public Forum and Government-as-Speaker Reasoning to the Maine Tuitioning Program*

The Maine tuitioning program also does not violate the Free Speech Clause because there is no affirmative duty for Maine to fund religious schools merely because it chooses to fund private schools.[249] As the U.S. Supreme Court held in *Rust v. Sullivan* and *Regan v. Taxation With Representation*, the denial of aid cannot be deemed a burden on the exercise of a fundamental right.[250]

#### 1. The Maine Tuitioning Program Compared with *Rust* and *Regan*: There Is No Affirmative Duty for Maine to Fund Sectarian Schools

The Maine tuitioning program is analogous to the Internal Revenue Service regulation upheld by the U.S. Supreme Court in *Regan* because, in both cases, the U.S. Constitution confers no affirmative duty on the government to fund the protected activities at issue.[251] In *Regan*, the U.S. Supreme Court held that the government was free not to subsidize lobbying, a right protected by the First Amendment, as extensively as it chose to subsidize other types of activities that nonprofit organizations undertake to promote the public welfare.[252] This was a constitutional choice by the government because the issue was not whether the nonprofit group must be permitted to lobby, but whether the government was required to provide it with public money to lobby.[253] Similarly, Maine can choose not to fund attendance at sectarian schools, even though it chooses to fund attendance at non-sectarian schools.[254] As in *Regan*, the issue here is not whether parents must be permitted to send their children to sectarian schools, but whether Maine is required to provide the parents with public money for tuition at sectarian schools.[255] A court should therefore find, as the U.S. Supreme Court did in *Regan*, that the denial of funds to exercise a fundamental right is not an infringement on that right.[256]

The exclusion of sectarian schools from the Maine tuitioning program is also analogous to the federal law upheld in *Rust*.[257] There,

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[249] *See* Rust v. Sullivan, 500 U.S. 173, 201 (1991); Regan v. Taxation With Representation, 461 U.S. 540, 549 (1983).

[250] *See Rust*, 500 U.S. at 178; *Regan*, 461 U.S. at 549.

[251] *See* 461 U.S. at 549.

[252] *See id.* at 550.

[253] *See id.* at 551.

[254] *See id.* at 550–51.

[255] *See id.*

[256] *See* 461 U.S. at 549.

[257] *See generally* 500 U.S. 173.

the U.S. Supreme Court held constitutional a law that barred the use of Title X funds to counsel pregnant women about abortion as a method of family planning.[258] The Court reasoned that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe on that right.[259] The Court also noted that "'[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.'"[260]

Under the *Rust* Court's reasoning, Maine is free to choose not to subsidize a parent's choice to send his or her child to a sectarian school merely because it subsidizes the alternative of public or non-sectarian private schools.[261] The denial of tuitioning funds for use at sectarian schools is merely a refusal on the part of the government to fund a protected activity.[262] Without more, this cannot be equated with the imposition of a penalty on that right.[263] Therefore, the court should conclude here, as the U.S. Supreme Court did in *Rust*, that there is no affirmative duty for Maine to provide aid for a parent choosing to send his or her child to a sectarian school.[264]

### 2. Applying the U.S. Supreme Court's Limited Public Forum Reasoning to the Maine Tuitioning Program

The exclusion of sectarian schools from Maine's tuitioning program does not implicate the U.S. Supreme Court's limited public forum reasoning.[265] One may attempt to argue that a school voucher program that permits aid to public and non-sectarian private schools but excludes religious schools from participation could be interpreted as a form of viewpoint discrimination.[266]

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[258] *See id.* at 177–78.

[259] *See id.* at 193; *see also* Harris v. McRae, 448 U.S. 297, 316 (1980) (upholding the subsidization of family planning services that will lead to conception and childbirth and that decline to promote or encourage abortion); Maher v. Roe, 432 U.S. 464, 480 (1977) (upholding a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions).

[260] *Rust*, 500 U.S. at 193 (quoting *Harris*, 448 U.S. at 317 n.19).

[261] *See id.*

[262] *See id.*

[263] *See id.*

[264] *See id.* at 201.

[265] *See supra* notes 114–152 and accompanying text.

[266] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 391–93 (1993); Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 252 (1990); Widmar v. Vincent, 454 U.S. 263, 269–70 (1981).

a. *The Case for Requiring Maine to Include Sectarian Schools in Its Tuitioning Program Under Limited Public Forum Reasoning*

Although in the school voucher context, the viewpoint discrimination is based on selective funding, not the use of facilities, cases involving a limited forum provide instruction for evaluating restrictions based on viewpoint in government subsidies.[267] By analogy to the constitutional restraints placed on the use of a limited public forum, even though a state or municipality is not required to offer private choices in fulfilling its obligation to provide public education to all children residing within its borders, when it does offer such a choice, it creates a type of limited public forum.[268] Therefore, the argument is that any restriction in such a program that prohibits use of this government aid for religiously affiliated schools resembles a restriction on the use of a limited public forum based on religious speech.[269]

A challenge to the exclusion of sectarian schools in the Maine program will likely rely on *Widmar v. Vincent* to require that this facially discriminatory program be necessary to serve a compelling state interest and be narrowly drawn to achieve that end.[270] Although the U.S. Supreme Court in *Widmar* stated that compliance with the Establishment Clause was deemed to be compelling,[271] one might claim that the exclusion of sectarian schools from the Maine tuitioning program is no longer required after *Zelman*, so such compliance can no longer be considered a compelling state interest.[272] This position is strengthened by the Supreme Judicial Court of Maine's decision in *Bagley*, where Maine did not dispute that its only justification for excluding religious schools from the tuition program was compliance with the Establishment Clause.[273]

b. *Why the Limited Public Forum Argument Fails as Applied to the Maine Tuitioning Program*

This reliance on the limited public forum doctrine and the *Zelman* opinion, however, is misplaced.[274] First, Maine is correct to determine that, even after *Zelman*, including sectarian schools in its tui-

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[267] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 544 (2001).

[268] *See, e.g., Good News Club*, 533 U.S. at 106–07; *Lamb's Chapel*, 508 U.S. at 391–93; *Mergens*, 496 U.S. at 252; *Widmar*, 454 U.S. at 269–70.

[269] *See, e.g., Good News Club*, 533 U.S. at 106–07; *Lamb's Chapel*, 508 U.S. at 391–93; *Mergens*, 496 U.S. at 252; *Widmar*, 454 U.S. at 269–70.

[270] *See* 454 U.S. at 267–68, 270.

[271] *See id.* at 271.

[272] *See supra* note 53 and accompanying text.

[273] *See* 728 A.2d at 138.

[274] *See supra* notes 267–273 and accompanying text.

tioning program would violate the Establishment Clause.[275] This is because the *Zelman* majority's approval only extends to programs in which aid reaches schools as a result of the independent choices of private individuals, as opposed to programs that provide aid directly to the schools.[276] The latter would be direct, unrestricted aid which could be used for religious purposes.[277] Under Maine's program, the public aid goes directly to the school.[278] Thus, the inclusion of sectarian schools in the Maine tuitioning program would still violate the Establishment Clause, even after *Zelman*.[279]

In addition, the U.S. Supreme Court has been careful to limit its limited public forum reasoning to situations in which the government does not itself speak.[280] In *Widmar*, the Court explicitly qualified its application of the limited public forum doctrine by stating that it did not "question the right of the University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[281] Thus, it is constitutionally permissible for Maine to decide not to include sectarian schools in fulfilling its obligation to educate its youth.[282]

Similarly, in *Board of Education of the Westside Community Schools v. Mergens*, the U.S. Supreme Court noted that there was a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.[283] Again, Maine here is merely enlisting non-sectarian private schools to help provide free education.[284]

## Conclusion

The exclusion of sectarian schools from the Maine tuitioning program is constitutional, even after the recent decision of the U.S. Supreme Court in *Zelman v. Simmons-Harris*. The *Zelman* decision merely held that a state could carefully tailor a school voucher program to include sectarian schools without violating the Establishment

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[275] *See Zelman*, 536 U.S. at 652.

[276] *See id.* at 662–63.

[277] *See id.*

[278] *See* Me. Rev. Stat. Ann. tit. 20-A, § 5810(2) (West 2002).

[279] *See* 536 U.S. at 662–63.

[280] *Mergens*, 496 U.S. at 250; *Widmar*, 454 U.S. at 276.

[281] 454 U.S. at 276 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

[282] *See id.*

[283] *See* 496 U.S. at 250.

[284] *See id.*

Clause. It did not say that states must include sectarian schools in tuitioning programs that include non-sectarian private schools.

The Maine tuitioning program does not meet the criteria outlined by the *Zelman* Court and, therefore, inclusion of sectarian schools in the program would violate the Establishment Clause. In addition, the Maine program does not violate the Free Exercise Clause because there is no fundamental right to public funding to attend a sectarian school. Lastly, Maine did not create a limited public forum by including non-sectarian private schools in its tuitioning program because the State was merely enlisting private schools to help fulfill its statutory duty to educate its children. Thus, the exclusion of sectarian schools from the Maine tuitioning program is constitutional.

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