

# SCHOOL VOUCHERS AND THE CONSTITUTION — PERMISSIBLE, IMPERMISSIBLE, OR REQUIRED?

Gary J. Simson†

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## INTRODUCTION

When Ginny Edwards, the editor-in-chief of this journal, stopped by my office and asked me to be a commentator on Steve Shiffrin's paper<sup>1</sup> at the conference that the journal was organizing, I was somewhat taken aback. Wasn't she aware that this might put me in a rather awkward position? After all, Shiffrin and I have been constitutional law colleagues at Cornell for fifteen years. Seeing my hesitation, she quickly added, "Professor Shiffrin suggested I ask you. He said that you'll probably disagree with most of it but that that's fine because he thinks it

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† Associate Dean for Academic Affairs and Professor of Law, Cornell Law School. Except for Part IV-B, which addresses the Supreme Court's June 2002 voucher decision, this Article is based on my oral remarks at the journal's April 2002 conference. I am grateful to Risa Lieberwitz and Rosalind Simson for many helpful comments.

<sup>1</sup> Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503 (2002).

would be good to get a different opinion.” Reassured, and admiring of my colleague’s characteristic openness to dissent,<sup>2</sup> I happily agreed to speak.

As it turns out, I do have some disagreements with, or at least reservations about, Shiffrin’s paper, but they are minor by comparison with my overall admiration for the piece. It examines a wide array of issues with great skill and openmindedness. It is wonderfully scholarly, addressing a great many other people’s work. It is also provocative in the best sense of the word. It has made me rethink some ideas that I had held and has made me want to think further about various ideas to which I had not previously given much thought.

Shiffrin spends a considerable amount of time addressing the validity of the Supreme Court’s 1925 decision in *Pierce v. Society of Sisters*,<sup>3</sup> which held on due process grounds that the state cannot compel parents to send their children to public school. He looks so closely at *Pierce* on the view that the strength of the case for vouchers substantially depends on the strength of the case for compulsory public education.<sup>4</sup> He argues that *Pierce* is wrongly decided with regard to children of high school age and maintains that “analysis of the case for compulsory public education leads to support of a strong presumption *against* vouchers, at least at the high school level.”<sup>5</sup> He concedes that *Pierce* is rightly decided with regard to children in elementary and middle schools.<sup>6</sup> He suggests, however, that vouchers are generally, though not always, ill-advised even in that context<sup>7</sup> and disclaims any constitutional obligation of government to provide vouchers at any educational level.<sup>8</sup>

I fully agree with Shiffrin on the importance of *Pierce* to the voucher question. I also think he does a tremendous job of presenting the governmental justification for compulsory public school education.<sup>9</sup> I am inclined to think, however, that his conclusion that *Pierce* is half-right has greater implications for the voucher question than he suggests. In particular, as I will explain in Part I, I think a strong argument can be made that if, as Shiffrin concedes, the state cannot force parents to send their children to public elementary and middle schools, then it also cannot force them to send their children to *any* school at that level unless it provides poor parents with the funding needed to send their children to

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<sup>2</sup> See STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

<sup>3</sup> 268 U.S. 510 (1925).

<sup>4</sup> Shiffrin, *supra* note 1, at 505, 532.

<sup>5</sup> *Id.* at 505.

<sup>6</sup> *Id.* at 523–24.

<sup>7</sup> *Id.* at 536–41.

<sup>8</sup> *Id.* at 533–36.

<sup>9</sup> See *id.* at 513–23.

private schools. If such an argument can be persuasively made, it becomes especially important to examine some aspects of *Pierce* that Shiffrin does not consider in any detail. In that regard, I will suggest in Part II that *Pierce* is perhaps best viewed as not half-right, but simply wrong.

As discussed in Part II, some of my difficulties with *Pierce* go to the constitutional stature of the parental right that the Court found to be violated. Those difficulties are not present where the objection to compulsory public education is religiously based, because then the Free Exercise Clause<sup>10</sup> — a guarantee of undoubted constitutional stature — is the basis for the individual right at issue. I suggest in Part III, however, that for other reasons, the holding in *Pierce* may be wrong even if limited to the context of religiously based objections to compulsory attendance in public schools.

At the time of the conference on which this symposium is based, the Supreme Court had heard, but not yet decided, *Zelman v. Simmons-Harris*<sup>11</sup> — the challenge under the Establishment Clause<sup>12</sup> to Ohio's voucher program. As the final part of my talk, I discussed the Supreme Court's less than consistent case law on aid to parochial schools and how the Court was apt to apply it in *Zelman*. With the Court's now having decided *Zelman*, I will discuss instead in Part IV the approach actually taken by the Court.

Even if the Court had upheld the Ohio program on narrow grounds, *Zelman* would have been an important decision simply by virtue of being the high court's first decision on an issue of major political and societal significance. The Court's decision in *Zelman* upholding the program, however, hardly rests on narrow grounds. For better or worse — and in my view it is decidedly for worse — the Court's opinion in *Zelman* was written in a manner that instantly established *Zelman* as a decision of great importance, one with broad implications for aid to parochial schools in particular and government financial support to religion in general. After discussing briefly Shiffrin's approach to Establishment Clause constraints, I will focus in Part IV on making clear what I see as *Zelman*'s principal flaws.

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<sup>10</sup> U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion]”). The Free Exercise Clause has long been held to apply to state and local government by virtue of the Fourteenth Amendment's Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>11</sup> 122 S. Ct. 2460 (2002).

<sup>12</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion”). In *Everson v. Board of Education*, 330 U.S. 1, 8 (1947), the Supreme Court held the clause binding on state and local government as a matter of Fourteenth Amendment due process.

I. IMPLICATIONS OF *PIERCE* FOR THE VOUCHER DEBATE

According to *Pierce*, parents have a constitutional right not to send their children to public schools if they so choose. *Pierce* does not deny that the state can require parents to send their children to some school until a specified age, but it clearly holds that parents must be allowed to satisfy a compulsory education requirement by sending their children to duly accredited nonpublic schools. Assume, however, that parents object to sending their child to public school but lack the financial resources to send the child to private school. Can the state, consistent with *Pierce*, enforce its compulsory education laws against those parents and require the parents to send their child to the only school that they can afford — the free public school?<sup>13</sup>

I have great difficulty seeing why this does not violate the parental right recognized in *Pierce*. Even assuming that the state has done nothing to cause the parents to be poor and even assuming, as the Supreme Court regularly has done,<sup>14</sup> that the government has no general constitutional obligation to make poor people any less poor, the state should be held accountable for the special compulsory effect that its imposition of a general compulsory education requirement has on the poor. It does not require a broad or creative definition of state action to say that the state, by imposing such a requirement on rich and poor alike, seriously burdens poor parents' right under *Pierce* to decide whether or not to send their children to public school. The state has structured parental options in a way that makes parents' ability to pay critically relevant to their ability to make a free choice.

Under this view, to respect the constitutional right recognized in *Pierce*, the state must either (a) establish an exemption from compulsory education laws for parents who cannot afford to pay for private school education or (b) provide them with vouchers to cover the costs of private school. The state may well find the former option very troubling. Even,

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<sup>13</sup> For the sake of simplicity and clarity in analysis, I do not discuss in the text the significance of a state's making available to parents a homeschooling option. In my view, such an option does not materially change the inquiry. Although it allows some poor parents to escape the compulsion to send their child to public school, it is unavailable as a practical matter to many others due to the parents' lack of adequate education to provide such schooling in a reasonably effective way or their lack of financial resources to allow for one parent to devote adequate time to this enterprise. For a brief but informative discussion of homeschooling and a list of sources, see NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *HOMESCHOOLING IN THE UNITED STATES: 1999* (2001). According to this study, 1.7% of U.S. students, ages 5–17, with a grade equivalent of K–12, were being homeschooled in spring 1999. *Id.* at 3.

<sup>14</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970). For a powerful challenge to this assumption, see Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

however, if it does not, a good argument can be made that that option does not do justice to *Pierce* and should not be open to states.

Such an argument would proceed as follows: In a society with compulsory education laws, the overwhelming majority of children will be educated in public schools or, if their parents can afford it and so desire, in private schools. Aware of this situation and eager not to put their children at great disadvantage, poor parents who object to public school education would feel enormous pressure to send their children to public schools rather than take advantage of any exemption from compulsory education laws that the state might make available. Realistically, then, respect for the right in *Pierce* cannot be accomplished by exempting poor parents from compulsory education laws. Rather, it calls for state funding for nonpublic education for any children whose parents do not wish to send them to public school but cannot afford private school.

One way to avoid this conclusion is to argue by analogy to the Supreme Court's abortion funding cases,<sup>15</sup> which hold that by covering the costs of childbirth but not abortion for poor women, the government does not substantially burden poor women's fundamental right under *Roe v. Wade*<sup>16</sup> to decide whether or not to have an abortion. I think the analogy, which Shiffrin briefly addresses and finds unpersuasive,<sup>17</sup> is quite apt. The rights in *Pierce* and *Roe* are both what the Court has called "privacy" rights — rights of individual autonomy, rights to make certain decisions affecting one's life free from governmental interference.<sup>18</sup> If poor women's decisions whether or not to have an abortion are not, as the Court has held, substantially burdened by a state's funding childbirth but not abortion, then it seems to follow that poor parents' decisions whether or not to send their children to public school are not substantially burdened by a state's paying for their children to attend public but not private school.

I do not rely on this analogy, however, to avoid the conclusion that *Pierce* obligates the state to pay for nonpublic education for poor children whose parents desire it. I do not do so because I am strongly persuaded, and have argued in print,<sup>19</sup> that the Court's abortion funding

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<sup>15</sup> *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>16</sup> 410 U.S. 113 (1973).

<sup>17</sup> See Shiffrin, *supra* note 1, at 534–35.

<sup>18</sup> See *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

<sup>19</sup> Gary J. Simson, *Abortion, Poverty, and the Equal Protection of the Laws*, 13 GA. L. REV. 505 (1979).

decisions are wrong and fail to give the personal autonomy right in *Roe* its due.<sup>20</sup>

## II. REASSESSING *PIERCE*

If *Pierce* has the implications that I have suggested for state funding of nonpublic education, it becomes particularly important to examine whether *Pierce* is correctly decided. Indeed, under my analysis, even if, as Shiffrin suggests, *Pierce* is only correctly decided for elementary and middle school students, the stakes are very high. If, however, *Pierce* is wrongly decided and parents constitutionally can be required to send their children to public school, the parental right at issue in *Pierce* does not arguably give rise to a constitutional obligation on the part of the state to provide vouchers for the poor.

In assessing *Pierce*, Shiffrin quickly concedes the constitutional stature of the parental right found decisive by the *Pierce* Court. “Of course,” he maintains, “parents and guardians have a right to direct the upbringing and education of children under their control.”<sup>21</sup> He argues that the state is justified in qualifying that right in certain ways — e.g., by requiring all children to go to school to a certain age<sup>22</sup> — but he never questions the constitutional stature of the right. He also does not examine closely whether the compulsory public education law invalidated in *Pierce* substantially burdened the parental right at issue. He suggests in passing that in applying the law at the high school level, the state may not substantially burden the parental right,<sup>23</sup> but the focus of his analysis of *Pierce* is the force of the state’s justification.<sup>24</sup>

I would like to question *Pierce*’s two assumptions that (a) the parental right at issue has constitutional stature — i.e., it properly qualifies as a “fundamental” right, and (b) the right at issue is substantially burdened by compulsory public education laws. If either of those assumptions is wrong, then *Pierce* is wrongly decided under the Supreme Court’s long-standing view of the requisite governmental justification for claimed due process violations. Under that view, the government needs only a rational basis for laws that do not substantially burden a fundamental right;<sup>25</sup> and as Shiffrin’s exposition of the justification for compulsory

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<sup>20</sup> For detailed discussion of the relationship between the constitutional arguments pertaining to funding abortion and funding parochial school education, see Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991).

<sup>21</sup> Shiffrin, *supra* note 1, at 507.

<sup>22</sup> *Id.* at 507–08.

<sup>23</sup> *Id.* at 508.

<sup>24</sup> *Id.* at 513–25.

<sup>25</sup> See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

education laws makes clear, the state had far more than a rational basis for the law challenged in *Pierce*.

Before turning to the validity of these two assumptions, I should point out that my analysis of both assumptions and the first in particular is significantly influenced by a superb article published ten years ago by the author of the lead article for this symposium, Barbara Bennett Woodhouse.<sup>26</sup> Although my approach to, and conclusions about, *Pierce* differ from hers in various respects that I will not attempt to detail here,<sup>27</sup> I, like many others writing in this area, am clearly very much in her debt.

#### A. NATURE OF THE PARENTAL RIGHT IN *PIERCE*

Although the Supreme Court in modern fundamental rights cases like *Griswold v. Connecticut*<sup>28</sup> and *Roe v. Wade*<sup>29</sup> regularly cites *Pierce* approvingly for its holding that parents' right to direct their children's upbringing and education is fundamental,<sup>30</sup> it is important to remember that *Pierce* is a product of the *Lochner*-era Court<sup>31</sup> and written by one of the Justices, McReynolds, most firmly wedded to the now-discredited *Lochner* approach. In fact, McReynolds was not only one of the most conservative Justices ever to sit on the Court<sup>32</sup> but also a notorious bigot. He was unabashedly anti-Semitic, always shunning Brandeis, as well as a racist and misogynist.<sup>33</sup> The author of *Pierce* could not possibly be mistaken, publicly or privately, for a champion of civil liberties.

At the risk of oversimplification, it can be said that one of the hallmarks of the *Lochner*-era Court was its inattention to constitutional text, history, and structure in determining which individual interests were owed special deference by government.<sup>34</sup> Again, broadly speaking, that Court wittingly or unwittingly committed the cardinal sin of reading its own value preferences into the Constitution rather than striving to ascer-

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<sup>26</sup> Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

<sup>27</sup> Among other things, as made clear in a more recent article, Woodhouse ultimately concludes that *Pierce* reached the proper result. See Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 479, 482 (2001).

<sup>28</sup> 381 U.S. 479 (1965).

<sup>29</sup> 410 U.S. 113 (1973).

<sup>30</sup> See *Roe*, 410 U.S. at 152-53; *Griswold*, 381 U.S. at 482-84.

<sup>31</sup> Though only a single case, *Lochner v. New York*, 198 U.S. 45 (1905), enjoys the dubious distinction of having its name commonly used to denote a three-decade-long era of generally discredited substantive due process thinking in the Supreme Court.

<sup>32</sup> See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 132-35 (rev. ed. 1999).

<sup>33</sup> See *id.* at 133-34.

<sup>34</sup> For general discussion of the *Lochner*-era Court, see KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 463-69 (14th ed. 2001); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1343-61 (3d ed. 2000).

tain which values the framers of the Constitution sought to give special protected status. With considerable frequency, the Court of that era struck down laws in the economic arena that sought to protect the weak from the strong.<sup>35</sup> As between laissez faire and what might be called state paternalism, it is clear where the Court's sympathies lay because the Justices translated their policy preferences into constitutional law.

Under the circumstances, it is not hard to see why the Court of that era would be so protective of parents' right to direct their children's upbringing and education. In effect, that Court so persuaded of the importance of traditional power structures and so attached to what it perceived to be the natural order of things was appalled at the thought of the state's applying its paternalism to the American family itself — taking away from parents, in the name of children's well-being and the greater societal good, decisions such as where to send their children to school. Traditionally, children were regarded as parental property,<sup>36</sup> and the *Lochner*-era Court not surprisingly took it upon itself to defend that traditional conception.

In cases like *Griswold*, the Court has likened the right in *Pierce* to other "privacy" rights recognized by the Court.<sup>37</sup> In my view, however, the analogy fails. Although Justice Douglas, writing for the Court in *Griswold*, would have done everyone a favor if he had explained the fundamental nature of the privacy interest in that case — essentially an interest in deciding whether or not to bear children — without relying on terms like "penumbras" and "emanations,"<sup>38</sup> I do think the Court's decisions to recognize fundamental privacy interests in cases like *Griswold*, *Roe*, and the earlier classic, *Skinner v. Oklahoma*,<sup>39</sup> are supportable and sound.<sup>40</sup> Those cases recognize a right of personal autonomy in matters

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<sup>35</sup> See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915).

<sup>36</sup> See Woodhouse, *supra* note 26, at 1036–50.

<sup>37</sup> See *Griswold*, 381 U.S. at 482–84.

<sup>38</sup> *Id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

<sup>39</sup> 316 U.S. 535 (1942) (finding deprivation of the "fundamental" right to procreate, announcing the need for "strict scrutiny," and invalidating a statute requiring sterilization of anyone convicted of three felonies involving moral turpitude). For discussion of *Skinner*'s forward-looking nature, see Kenneth L. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 UCLA L. REV. 716, 732–36 (1969).

<sup>40</sup> This is obviously not the place to attempt to mount a defense of the fundamentality of the interests in these cases. The matter of course has been quite controversial. For a sampling of the relevant commentary, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765 (1973).

central to the direction and tenor of one's life. The parental right to direct children's upbringing and education is very different because it entails dictating another person's autonomy rather than simply exercising one's own. The brunt of the decision being made falls not on the right-holder but on another individual, the child, deemed to be in the right-holder's control. In short, although it is not surprising that the *Lochner*-era Court would recognize the parental right as having constitutional stature, there is good reason to question whether that right merits such recognition.<sup>41</sup>

This is not to say that states should never respect parents' interest in directing their children's upbringing and education. There are often good policy reasons to do so.<sup>42</sup> Rather, the point is that if there is no fundamental right at stake, states are free not to respect this interest. So understood, the parental right at issue in *Pierce* does not arguably entail a constitutional obligation on the part of the government to fund nonpublic education for the poor.

#### B. MAGNITUDE OF THE BURDEN

Even assuming for purposes of argument that parents have a fundamental right to direct their children's upbringing and education, the question remains whether the right is substantially burdened by a compulsory public school requirement. Are parents really substantially impeded in shaping their children's values and future direction if they must send the children to public school? I suggest that they are not and that, as a result, the right at issue in *Pierce*, even if properly treated as fundamental, does not arguably support a constitutional claim to vouchers for the poor.

If public schools were in the business of overwhelming young minds with dominating, one-sided instruction, concern about substantial interference with the parental right would be well-founded. As Shiffrin suggests, however, this image of public schools appears to have little to do with reality.<sup>43</sup> In *Brown v. Board of Education*,<sup>44</sup> the Supreme Court very rightly and perceptively spoke of segregated schools' affecting minority children's "hearts and minds in a way unlikely ever to be un-

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<sup>41</sup> Justice Scalia has also questioned the constitutional stature of this right, but he has done so on a theory that casts doubt on the fundamentality of any right not spelled out in the constitutional text. See *Troxel v. Granville*, 530 U.S. 57, 91–93 (2000). Under that theory, he previously argued against the fundamentality of the privacy right in *Roe*. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 979–80 (1992) (Scalia, J., concurring in part and dissenting in part).

<sup>42</sup> For example, in discussing the constitutional case against compulsory public education in the pre-high school years, Shiffrin articulates a number of considerations that sensibly could be invoked by a lawmaker as policy reasons for siding with the parental interest in that context. Shiffrin, *supra* note 1, at 523–24.

<sup>43</sup> See *id.* at 509–12.

<sup>44</sup> 347 U.S. 483 (1954).

done,”<sup>45</sup> but, as a general matter, public education is not nearly so powerful an influence on children’s thinking.

To the extent that parents experience difficulties in shaping their children’s values and future direction, the public schools are probably the least of their problems. Television, movies, music, the Internet, and other pervasive social and cultural influences — along with shortcomings in parents’ methods of imparting values and direction to their children — are far more likely to blame. To charge public schools with substantially impeding parents’ efforts in this regard seems a serious exaggeration.

### III. *PIERCE* AS LIMITED TO RELIGION-BASED OBJECTIONS

Parents who object to compulsory public school education on religious grounds stand on stronger footing than ones relying solely on the generalized parental right recognized in *Pierce* because the Free Exercise Clause lends special authority to such constitutional claims. Here, unlike the *Pierce* right as generally framed, there can be no doubt that we are dealing with a right of constitutional stature. The Free Exercise Clause is spelled out in the First Amendment.<sup>46</sup> The question remains, however, whether this right is substantially burdened by a requirement that children attend public school.<sup>47</sup> If not, then *Pierce* is not correctly decided even in this limited context, and the right at issue does not arguably give

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<sup>45</sup> *Id.* at 494.

<sup>46</sup> In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court expressly linked the right to send one’s child to a parochial school to the Free Exercise Clause:

It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It is also true that a state law interfering with a parent’s right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause.

*Id.* at 788.

<sup>47</sup> Under *Employment Division v. Smith*, 494 U.S. 872 (1990), the existence of a substantial burden on free exercise is typically not sufficient to trigger more than rational basis review of a claim for a free exercise exemption from a generally applicable law. In my discussion in the text here of the possibility of a substantial free exercise burden, I am assuming that such a burden in this context would call for the demanding “strict scrutiny” standard of review. I so assume for the following two reasons, the first of which would presumably be acceptable to the current Court and the second of which is persuasive to me: (1) Because a claim for a free exercise exemption from a compulsory education law implicates both free exercise and another constitutional right (the parental right to direct children’s upbringing and education), it falls within the *Smith* Court’s “hybrid” claim exception (*see id.* at 881–82) and therefore triggers strict scrutiny if a substantial burden can be proved. (2) *Smith* is wrongly decided, and as the Court had held for years prior to *Smith*, a substantial burden on free exercise should be deemed sufficient to trigger strict scrutiny. For more on this second point, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 308 (1991); Gary J. Simson, *Endangering Religious Liberty*, 84 CAL. L. REV. 441, 442–45 (1996).

rise to a constitutional obligation on government to provide vouchers for parochial school education.

A threshold question is whose right are we talking about: the parents' right to direct the children's religious upbringing, as Shiffrin assumes when he discusses this matter,<sup>48</sup> or the children's free exercise rights? For purposes of this discussion I will assume that both are relevant, though I have reservations about the first of these rights — a parental right that seems to replicate the child-as-property thinking of the *Lochner/Pierce* Court.

Under the Supreme Court's longtime approach to free exercise, a substantial burden exists only if the state is forcing the claimant either to do something forbidden by his or her religion or to refrain from doing something mandated by his or her religion.<sup>49</sup> Even if public schools, by exposing children to certain ideas that conflict with religious precepts, make it harder for parents to instill their religious beliefs in their children or for children to sustain those beliefs, does that amount to a substantial burden on parents' or children's religious exercise? In terms of the concept of "substantial burden" reflected in Supreme Court precedent, I seriously doubt that it does.<sup>50</sup>

The main support for saying that it does is *Wisconsin v. Yoder*,<sup>51</sup> the 1972 Supreme Court decision holding that the Amish are substantially and unconstitutionally burdened by laws requiring them to send their children to school past eighth grade. *Yoder*, however, seems to stand for a much narrower conception of substantial burden than needed to find a substantial burden in the context at hand. In treating exposure to divergent ideas as imposing a substantial burden on Amish free exercise, the Court in *Yoder* characterized such exposure as almost inevitably devastating to the survival of the entire faith.<sup>52</sup>

Even if compulsory public education does not substantially burden free exercise by exposing children to ideas contrary to their religion's precepts, it can be argued that it substantially burdens free exercise in a different way — by providing secular instruction in isolation from relig-

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<sup>48</sup> See Shiffrin, *supra* note 1, at 528–31.

<sup>49</sup> See, e.g., *Hernandez v. Comm'r*, 490 U.S. 680, 698–99 (1989); *Thomas v. Review Bd.*, 450 U.S. 707, 716–18 (1981).

<sup>50</sup> Cf. Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN'S STUD. 265, 273–74 (2000) (discussing the nature of the free exercise burden imposed by sex education requirements).

<sup>51</sup> 406 U.S. 205 (1972).

<sup>52</sup> See *id.* at 218 ("compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today"); *id.* at 219 ("enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs"); Simson & Sussman, *supra* note 50, at 274–75 (discussing *Yoder*).

ious precepts. Proponents of parochial school education maintain that acquiring secular knowledge without a religious backdrop is harmful to children's proper religious development. In their view, it is vital that religion infuse the secular learning experience.<sup>53</sup> But the question remains whether any such burden could be largely, if not entirely, avoided by parents providing the religious context to public school learning through religious instruction at home and in their places of worship. I suggest that it could and that therefore any burden of this sort is insubstantial.

I perhaps should make clear that I do not deny the possibility that compulsory public education could impose a substantial free exercise burden on adherents of a particular religion. If the Court's rendition in *Yoder* of the repercussions for the Amish religion of a compulsory schooling requirement may be taken as accurate, a compulsory *public* schooling requirement surely would impose a substantial burden on Amish free exercise as well; and it is conceivable that adherents of one or more other religions may be able to show a comparable incompatibility between public school attendance and adherence to the precepts of their faith. I am skeptical, however, that compulsory public education *generally* imposes a substantial burden on free exercise and that the Free Exercise Clause therefore *generally* requires the state to allow any parents who object on religious grounds to public school education to send their children to parochial school. For *Pierce* to be correctly decided as applied to parents who wish to send their children to parochial rather than public school, these general propositions would need to be true.

#### IV. THE ESTABLISHMENT CLAUSE AND VOUCHERS FOR PAROCHIAL SCHOOLS

Let us assume, then, that there is no constitutional obligation to fund nonpublic education but the state wishes to do so as a policy matter. What constraints does the Establishment Clause place on vouchers for parochial school education? After discussing briefly my relatively minor disagreements with Shiffrin on this question, I turn to my much more substantial disagreements with the resolution recently provided by the Supreme Court.

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<sup>53</sup> See HAROLD A. BUETOW, *THE CATHOLIC SCHOOL: ITS ROOTS, IDENTITY, AND FUTURE* 102, 108–10 (1988); James C. Carper, *The Christian Day School*, in *RELIGIOUS SCHOOLING IN AMERICA* 110, 113–14 (James C. Carper & Thomas C. Hunt eds. 1984); Thomas C. Hunt & Norlene M. Kunkel, *Catholic Schools: The Nation's Largest Alternative School System*, in *id.* 1, 14–16.

## A. SHIFFRIN'S ANALYSIS

Shiffrin and I come out very much on the same side of the spectrum on this issue. The only real difference is that while he leaves room for the possibility that on rare occasions vouchers for religious schools might comply with the Establishment Clause,<sup>54</sup> I seriously doubt that I would ever regard them as valid. Moreover, as a practical matter, this small difference may be even less than it appears because I am not at all sure that the conditions that he describes for upholding vouchers for religious schools<sup>55</sup> would ever exist.

Methodologically, we approach the issue of aid to parochial schools somewhat differently. He identifies various "concerns" with government funding of religion.<sup>56</sup> Using a balancing test, he would attempt to assess case-by-case the extent to which the particular concerns come into play and are countered by governmental interests.<sup>57</sup> I agree that government funding of religion raises a host of concerns, but I do not think that it is necessary or appropriate to try to gauge case-by-case the extent to which each of the concerns is implicated. Rather, as I explained in detail in an article setting forth a general Establishment Clause approach,<sup>58</sup> I believe that any law that would not have been adopted but for a purpose of subsidizing religion should be struck down<sup>59</sup> and that any law that has a substantial effect of subsidizing religion should also be struck down unless that effect was obviously unintended.<sup>60</sup> Suffice it to say that under my view, it is a close question whether such aid to parochial schools as fund-

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<sup>54</sup> Shiffrin, *supra* note 1, at 550.

<sup>55</sup> According to Shiffrin:

What the state would need to show is that the public schools were failing poor children, that measures less restrictive of Establishment Clause values would not be effective, that vouchers would substantially help children overall (or that vouchers offered a reasonable prospect of success), and that some impingement on Establishment Clause values was justified at least for a trial period.

*Id.*

<sup>56</sup> *Id.* at 543–44.

<sup>57</sup> *Id.* at 541–50.

<sup>58</sup> Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987).

<sup>59</sup> *See id.* at 908–11.

<sup>60</sup> *See id.* at 917–24. To provide some concreteness to my exception for "obviously unintended" substantial effects of subsidizing religion, I have suggested that a substantial effect of subsidizing religion be found to fit within the exception only if "the law having such effect is necessary to serve a substantial governmental interest." *Id.* at 923. In characterizing my proposed Establishment Clause approach as offering some support for the type of balancing in this area that he advocates, Shiffrin points to this necessary-to-serve-a-substantial-governmental-interest language in my approach. Shiffrin, *supra* note 1, at 542 n.173. Given the function that this formulation fulfills in my approach, however, I am inclined to doubt that it provides the support for balancing that Shiffrin suggests.

ing basic health services in the schools oversteps Establishment Clause bounds,<sup>61</sup> and vouchers for parochial schools are well beyond the line.<sup>62</sup>

## B. THE VIEW FROM THE COURT

The Ohio program that the Court in *Zelman v. Simmons-Harris*<sup>63</sup> sustained by a 5-4 vote makes tuition aid available to parents of children in kindergarten through eighth grade in the Cleveland school district<sup>64</sup> — a district that a federal court had placed under state control because of gross inadequacies in its public schools.<sup>65</sup> Low-income families earning under double the poverty line are given priority to such aid and are eligible to receive checks from the state for 90% of private school tuition up to \$2250, which they would then endorse over to the private school, religious or secular, of their choice. To participate in the program, a private school must agree to charge such families no more than \$2500. To the extent that higher-income families receive aid, they are eligible for 75% of tuition up to \$1875, and the state puts no cap on the tuition that they may be charged.<sup>66</sup>

In his opinion for the Court rejecting an Establishment Clause attack, Chief Justice Rehnquist underlined the program's neutrality and dependence on private choice:

[T]he Ohio program is entirely neutral with regard to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.<sup>67</sup>

As the Chief Justice explained, this neutrality and dependence on private choice are crucial because they negate any reasonable inference that the

<sup>61</sup> See Simson, *supra* note 58, at 920–21, 931–32. The Supreme Court has long treated states' funding of basic health services in parochial schools (in common with public schools) as constitutionally noncontroversial. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 242 & n.10 (1977).

<sup>62</sup> See Simson, *supra* note 47, at 485–91 (criticizing a proposed Establishment Clause approach to parochial school aid that in effect would legitimate any voucher plan ever likely to be adopted); see also Simson, *supra* note 58, at 924–32 (analyzing the validity of various forms of aid).

<sup>63</sup> 122 S. Ct. 2460 (2002).

<sup>64</sup> OHIO REV. CODE ANN. §§ 3313.974–979 (Anderson 1999 & Supp. 2000).

<sup>65</sup> The statute does not limit the program's coverage to the Cleveland school district by name. However, that has been the practical effect of its specification that the program applies only to Ohio school districts "under federal court order requiring supervision and operational management of the district by the state superintendent." *Id.* § 3313.975(A).

<sup>66</sup> The program also includes funding for tutorial assistance for public school students.

<sup>67</sup> *Zelman*, 122 S. Ct. at 2473.

state is endorsing religion. Very simply, “no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.”<sup>68</sup>

Indeed, according to the Chief Justice, a charge of endorsement is especially implausible with this particular “neutral program of private choice.” As the Chief Justice explained, a court, in deciding whether government action sends a message of endorsing religion, is expected to adopt the perspective of a reasonable observer acquainted with the history and context of the challenged action;<sup>69</sup> and “[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.”<sup>70</sup>

Notably, in upholding the Ohio program, the Chief Justice made no attempt to tie its constitutionality to the special circumstances of the Cleveland school district. In addition, he gave no indication that the Court would have any greater difficulty approving a voucher program offering substantially more generous tuition awards or making tuition awards more readily available to higher-income families.

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<sup>68</sup> *Id.* at 2468.

<sup>69</sup> *Id.* at 2468–69.

<sup>70</sup> *Id.* at 2469. The Court in *Zelman* arguably applied a less stringent test than endorsement — one more permissive of state action favoring religion. At one point in his opinion the Chief Justice appears to suggest that proof that the state is sending a message to parents and children that they should choose a religious school over a secular one would not suffice to show an Establishment Clause violation. According to the Chief Justice, “The Establishment Clause question is whether Ohio is *coercing* parents into sending their children to religious schools.” *Id.* (emphasis added).

Given that in other contexts the Chief Justice has indicated discontent with an endorsement test and a preference for a coercion one, *see, e.g.,* *Allegheny Cty. v. ACLU*, 492 U.S. 573, 659–63, 668–77 (1989) (Kennedy, J., joined by Rehnquist, C.J., & White & Scalia, JJ., concurring in part & dissenting in part), it is hardly inconceivable that he would prefer a coercion test here. It is also quite conceivable that he could secure Justices Kennedy, Scalia, and Thomas’s votes for applying such a test. In light, however, of the various references elsewhere in the Chief Justice’s opinion to endorsement and the fact that in a concurring opinion Justice O’Connor, whose vote was needed for the Chief Justice’s opinion to be an opinion of the Court, expressly characterizes “the basic inquiry” in terms of the endorsement test that she has championed on the Court, *see Zelman*, 122 S. Ct. at 2476 (O’Connor, J., concurring), it seems most reasonable to interpret the majority opinion as applying an endorsement test rather than something less.

For discussion and critical analysis of the endorsement test, *see* JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY* 27–34 (1995); Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 370–75; William P. Marshall, “*We Know It When We See It*”: *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Simson, *supra* note 47, at 462–81. For a detailed application of the test to an educational issue quite different from the one in *Zelman*, *see* Simson & Sussman, *supra* note 50, at 283–97.

1. *Endorsement or No Endorsement?: Reassessing the Court's Answer*

If, as the Court assumes in *Zelman*, the Ohio program's constitutionality turns on the existence or nonexistence of endorsement, there is good reason to question the Court's conclusion that the program should stand. The program is not as neutral toward religion as the Chief Justice maintains. Even though it may appear neutral on its face, it in fact strongly skews the choice of children and parents contemplating private school toward religious, rather than secular, private education.

In the 1999–2000 school year — the most recent one for which the Court had data in the record — 96.6% of voucher recipients attended religious schools.<sup>71</sup> It hardly seems extravagant to assume that a reasonable observer acquainted with the history and context of the Ohio program would be aware of this distinctly disproportionate impact in favor of religion. After all, with an innovative and controversial program of such importance to Cleveland's children, a reasonably informed observer ought to be aware of this and other prominent features of the program in actual operation.

But would a reasonable observer be justified, based on the 96.6% figure alone, in perceiving the Ohio program as sending a message of state endorsement of religion? Probably not, but there is more in the history and context of the Ohio program militating in favor of a finding of endorsement than this statistic alone — most notably, relative tuition charges in Cleveland's sectarian and secular private schools. As discussed below, in light of those relative charges and their implications for the operation of the program, a reasonable observer would conclude that the program's disproportionate impact in favor of religion was far from an accident and, indeed, almost certainly was very knowingly produced by the lawmakers who drafted and adopted the program.

Tuition is typically comfortably below \$2500 at Cleveland's parochial schools and well above \$2500 at its secular private schools.<sup>72</sup> As a result, the program's requirement that participating schools must abide by a \$2500 tuition cap for low-income students receiving tuition through the program could not help but deter secular, but not religious, private schools from admitting a substantial number of low-income students.<sup>73</sup> Moreover, to the extent that higher-income students receive tuition awards, those students would have a substantial monetary incentive to use them at parochial rather than secular private schools. The program places no cap on private school tuition for higher-income students; and

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<sup>71</sup> See *Zelman*, 122 S. Ct. at 2494 (Souter, J., dissenting) (citing Appendix).

<sup>72</sup> *Id.* at 2495 (Souter, J., dissenting).

<sup>73</sup> See *id.*

the award of 75% of tuition up to \$1875 would go a long way toward paying parochial school tuition, but be only a modest proportion of the sum needed for nonsectarian private school tuition.

Given the innovation, controversiality, and social importance of the Ohio program, it seems appropriate to charge the reasonable observer with knowledge of a matter of such obvious significance to the operation of the program as the secular/sectarian private school tuition differential. Indeed, it seems particularly appropriate to make this assumption because the differential in the Cleveland area is one that anyone at all knowledgeable about secular and sectarian private school tuitions across the nation would expect to find.<sup>74</sup> Furthermore, a reasonable observer informed about this differential would surely be justified in assuming a similar level of knowledge on the part of the lawmakers who adopted the Ohio program. To assume that the lawmakers adopted the program oblivious to this basic fact crucial to the operation of the program would be tantamount to assuming that they exercise their lawmaking authority with little regard for the public trust that they hold.

In short, a reasonable observer would view the Ohio program as one that inevitably would produce a highly disproportionate impact in favor of religion, and he or she would assume that the lawmakers who drafted and adopted the program could not help but know that the program would produce such an impact. Under the circumstances, a reasonable observer would be amply justified in perceiving the program as sending a message of government endorsement of religion.

In finding no endorsement, the Chief Justice did not deny that almost all the tuition awards were being used for sectarian, rather than secular, private schools. Relying principally, however, on the Court's rejection in some prior parochial aid cases of similar appeals to take into account a law's actual operation, he maintained that such evidence was irrelevant.<sup>75</sup> Simply as a matter of precedent, the Chief Justice's tack is not without support. Nonetheless, if, as the Chief Justice himself recognized in *Zelman*, "history and context" are central to a proper application of the endorsement test,<sup>76</sup> his insistence in *Zelman* on applying the test in a factual vacuum and his ultimate conclusion of no endorsement seem unsound.

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<sup>74</sup> See *id.* at 2495 n.15 (citing statistics in a national study). As Justice Souter notes, the disparity in tuition charges is "explained in part by the lower teaching expenses of the religious schools and general support by the parishes that run them." *Id.*

<sup>75</sup> See *id.* at 2470 ("Respondents and Justice Souter claim that . . . we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. . . . We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools.").

<sup>76</sup> *Id.* at 2468-69.

## 2. *Beyond Endorsement: Reassessing the Court's Question*

Even assuming, for purposes of argument, that the Court was right to find that the Ohio program does not endorse religion, a more fundamental objection to the Court's analysis remains. By framing the relevant inquiry in terms of endorsement, the Court takes much too narrow a view of the possible constitutional difficulties presented by this or any other law providing state financial support to religion.

As the dissenting opinions in *Zelman* make clear, endorsement is only one of various reasons why state funding of religion is constitutionally problematic. Most obviously, it coerces individual taxpayers to support religions and religious beliefs with which they may deeply disagree,<sup>77</sup> it tends to have a corrupting effect on the religion that it subsidizes,<sup>78</sup> and it fosters social conflict along religious lines.<sup>79</sup> Under the Court's approach in *Zelman*, however, none of these other reasons counts. Funding that is problematic for one or more of these reasons is immunized from Establishment Clause attack unless endorsement can be shown, which it frequently cannot.<sup>80</sup>

Consider, for example, the constitutionality of the following forms of parochial school aid that have come before the Supreme Court on one or more occasions: reimbursing parents the cost of their children's bus transportation to and from school,<sup>81</sup> loaning the schools computers and other instructional equipment,<sup>82</sup> and making remedial education and guidance counseling available to children after school on school premises.<sup>83</sup> If endorsement were the only relevant question, the Court could have upheld the validity of these various forms of aid with a minimum of effort and explanation. After all, if the state provides free bus transportation for children who attend public school, ensures that public schools

<sup>77</sup> See *id.* at 2499 & n.22 (Souter, J., dissenting); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 208–14 (1992).

<sup>78</sup> See *Zelman*, 122 S. Ct. at 2499 (Souter, J., dissenting); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1179–82 (1988).

<sup>79</sup> See *Zelman*, 122 S. Ct. at 2485 (Stevens, J., dissenting); *id.* at 2501 (Souter, J., dissenting); *id.* at 2502–05 (Breyer, J., dissenting); Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691–92 (1969).

<sup>80</sup> To avoid possible misunderstanding, I perhaps should underline that endorsement is in my view a sound and entirely appropriate test in school prayer, religious display, and other cases in which government funding is not at issue. See Simson, *supra* note 47, at 462–81. My point here is simply that it is a highly underinclusive measure of unconstitutionality in cases involving state financial support.

<sup>81</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>82</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000); *Wolman v. Walter*, 433 U.S. 229, 248–51 (1977), *overruled by Mitchell, supra*; *Meek v. Pittenger*, 421 U.S. 349, 362–66 (1975), *overruled by Mitchell, supra*.

<sup>83</sup> *Agostini v. Felton*, 521 U.S. 203 (1997); *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by Agostini, supra*; *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985), *overruled in part by Agostini, supra*.

have computers and other necessary instructional equipment, and makes remedial education and guidance counseling available for free on premises to children in public school, can it fairly be charged with endorsement of religion if it provides comparable aid evenhandedly to sectarian and nonsectarian private education? Unless the state aid sends a message that one religion is preferred to another or that religion is preferred to nonreligion, endorsement does not exist; and none of these forms of state aid appears to be sending any such message.<sup>84</sup>

The Justices labored over these cases, however, often dividing sharply on the question of constitutionality or deciding it against the state, because all or at least most of them were proceeding on the assumption that state funding of religion is constitutionally problematic even when it does not entail any preference for religion.<sup>85</sup> Implicitly, if not explicitly, the Justices recognized that the coercion to support another's religion, and the serious invasion of freedom of conscience that such coercion entails, do not go away simply because the state also coerces taxpayers to support a nonreligious cause — public education. By the same token, they expressly or tacitly acknowledged that state financial support could have a corrupting influence on the aided religion and lead to serious social conflict even if the aid comes in a form that does not amount to an endorsement of religion.

In 1971 the Court in *Lemon v. Kurtzman*<sup>86</sup> identified “three main evils against which the Establishment Clause was intended to afford protection”<sup>87</sup> and described the Court's task in Establishment Clause cases as “draw[ing] lines with reference to” those evils.<sup>88</sup> “[S]ponsorship” (i.e., endorsement) and “financial support” were two of the three evils named.<sup>89</sup> By listing “financial support” as an evil that needs to be considered separately from endorsement in order to give the Establishment

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<sup>84</sup> In my view, this conclusion readily follows whether one applies the endorsement test as the *Zelman* Court applies it or in the more rigorous manner in which I apply it in maintaining that the Ohio program in *Zelman* sends a preferential message.

<sup>85</sup> In one of these cases, *Mitchell v. Helms*, four Justices (the Chief Justice and Justices Kennedy, Scalia, and Thomas) appeared to indicate their willingness to approve any form of nonpreferential aid. See *Mitchell*, 530 U.S. at 809–14 (plurality opinion of Thomas, J.). Justice O'Connor wrote separately to distance herself from that view. See *id.* at 837–41 (O'Connor, J., concurring) (criticizing the plurality opinion as appearing to validate, without more, any form of aid deemed to be neutral). She seemed to indicate, however, that she would have no problem with the plurality's position if the case at hand involved private choice rather than direct aid to religious schools. See *id.* at 841–44. When she was ultimately presented in *Zelman* with such an indirect aid case, the possibility foreshadowed by her *Mitchell* concurrence became a reality.

<sup>86</sup> 403 U.S. 602 (1971).

<sup>87</sup> *Id.* at 612.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* The third evil named was “active involvement of the sovereign in religious activity.” *Id.* For discussion of its historical roots and current applicability, see Simson, *supra* note 58, at 916–17.

Clause its due, the Court in *Lemon* made clear its understanding that financial support of religion is constitutionally problematic regardless of whether it takes the form of endorsement. The Court in *Zelman* clearly rejects that understanding.

Whether this rejection encompasses all financial support cases remains to be seen. The Chief Justice's opinion for the Court in *Zelman* distinguishes the case at hand from ones involving aid "directly to religious schools."<sup>90</sup> In addition, Justice O'Connor, whose vote was essential for upholding the voucher plan and for making the Chief Justice's opinion an opinion of the Court, underlines in her concurring opinion that *Zelman* is an "indirect aid" case.<sup>91</sup> For the time being, then, it appears that in direct aid cases the Court is willing to recognize Establishment Clause problems even where endorsement does not exist. This different attitude in direct aid cases, however, seems to have little practical significance for the validity of parochial school aid, because legislatures intent on providing such aid have much less need after *Zelman* to resort to direct aid. By using the indirect means of vouchers, they can provide massive assistance to parochial schools while running virtually no risk of judicial invalidation.<sup>92</sup>

### 3. *Zelman in Perspective*

Over the years, the Court in numerous direct and indirect parochial school aid cases has decided constitutionality by asking whether the aid is limited to secular aspects of the parochial school operation or instead

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<sup>90</sup> *Zelman*, 122 S. Ct. at 2465.

<sup>91</sup> *Id.* at 2476 (O'Connor, J., concurring). It seems fairly clear from *Mitchell v. Helms*, 530 U.S. 793 (2000), discussed *supra* note 85, that the only one of the Justices in the *Zelman* majority who really cares about this direct/indirect distinction is Justice O'Connor. In *Mitchell* she took the position that, though inconsistent with the Establishment Clause in direct aid cases, actual diversion to religious uses is acceptable in indirect aid cases because indirect aid is most closely "akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution." 530 U.S. at 841 (O'Connor, J., concurring). This is not the place to pursue in detail the persuasiveness of this analogy. For present purposes, suffice it to say that I have very little difficulty charging the state with funding religion when it offers families aid on condition that they use it to cover the costs of a nonpublic education, but that I see virtually no reason to charge the state with funding religion when it pays employees money that they have earned and that they are therefore entitled to spend on whatever necessities, causes, diversions, etc. they please. For general discussion of the issue, see Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167 (2000).

<sup>92</sup> To the extent that legislatures continue, for political or practical reasons, to resort to direct aid rather than (or perhaps in addition to) vouchers, the approach most likely to be applied by a majority of the Court would be the one discussed in the text that immediately follows. See *infra* text accompanying notes 93–97.

extends to aspects of the school's religious mission.<sup>93</sup> Under this approach the Court has long been accepting of such aid as providing for children's bus transportation to and from parochial school,<sup>94</sup> but it has invalidated such aid as maintenance and repair grants that the parochial schools would be free to spend on the upkeep of facilities used in whole or in part for religious instruction or prayer.<sup>95</sup> For some time the Court applied this approach with a presumption that teachers working in the "pervasively sectarian" environment of a parochial school would be apt, subconsciously if not consciously, to use instructional aid of a seemingly secular nature for religious purposes.<sup>96</sup> In recent years, however, the Court has abandoned this presumption, and a majority would exist to strike down aid under this approach only if actual diversion to religious purposes could be proven.<sup>97</sup>

Under the above approach, even if applied as invalidating aid only where actual diversion could be proven, the Ohio program in *Zelman*

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<sup>93</sup> See, e.g., *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 386–87 (1985); *Wolman v. Walter*, 433 U.S. 229, 252–54 (1977); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 781–83 (1973).

<sup>94</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). The Court in *Everson* analogized providing parochial schools with free bus transportation to providing them with "such general government services as ordinary police and fire protection" — services "so separate and so indisputably marked off from the [schools'] religious function." *Id.* at 17–18. See also *Meek v. Pittenger*, 421 U.S. 349, 364 (1975) ("It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities — secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school.").

<sup>95</sup> See *Nyquist*, 413 U.S. at 774–80.

<sup>96</sup> See, e.g., *Meek*, 421 U.S. at 367–72, *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997) (invalidating a law funding remedial instruction, guidance counseling, and other "auxiliary services" of a "secular, neutral, non-ideological" nature to be provided on parochial school premises by teachers and counselors employed by the public school system); *Meek*, 421 U.S. at 362–66, *overruled by* *Mitchell*, *supra* (invalidating a law authorizing the loan to parochial schools of maps, charts, laboratory equipment, and other "instructional materials and equipment" of a "secular, neutral, non-ideological" nature). *Board of Education v. Allen*, 392 U.S. 236 (1968), upholding a law authorizing the loan to parochial school students of nonreligious textbooks for use in secular subjects, predated the cases applying the presumption described in the above text. The Court in *Allen* assumed that "the processes of secular and religious training [in parochial schools] are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Id.* at 248. Although the Court in later cases applying the described presumption routinely invoked *Allen* to uphold textbook loan provisions in challenged aid programs, see, e.g., *Wolman*, 433 U.S. at 236–38; *Meek*, 421 U.S. at 359–62, the reasoning and result in *Allen* were plainly in tension with the Court's prevailing approach and, in particular, with the Court's invalidation (noted above) in *Meek* of the loan of instructional materials. While some Justices called for overruling *Allen*, see, e.g., *Mueller v. Allen*, 463 U.S. 388, 414–15 (1983) (Marshall, J., dissenting), the Court ultimately resolved this tension in favor of the reasoning and result in *Allen* by the overrulings noted above. See *Mitchell*, 530 U.S. at 849–52 (O'Connor, J., concurring) (discussing *Meek* and *Allen*).

<sup>97</sup> See *Mitchell*, 530 U.S. at 857–58 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 226–27.

could not survive Establishment Clause review. By subsidizing broadly the costs of a parochial school education that is both religious and secular, vouchers do not arguably fund only the schools' secular functions.<sup>98</sup>

In her concurring opinion in *Zelman*, Justice O'Connor maintains that the Court's decision is not "a dramatic break from the past."<sup>99</sup> Although the Court in *Zelman* did not apply the above approach that it had applied to a wide variety of parochial school aid in the past, and although the Court in *Zelman* reached a result clearly inconsistent with application of that approach, it is difficult to say that Justice O'Connor is wrong. Almost twenty years before *Zelman*, the Court in *Mueller v. Allen*<sup>100</sup> upheld a state income tax deduction that plainly funded parochial schools' religious as well as secular functions. The deduction (of up to \$500 or \$700, depending on the child's grade) covered tuition and other educational expenses. As in *Zelman*, the Court in an opinion by then-Justice Rehnquist justified its decision by focusing on neutrality and private choice rather than on diversion to religious uses.<sup>101</sup> In addition, in two later indirect aid cases, the Court followed a similar tack in upholding (1) a state's financing, as part of a general vocational rehabilitation assistance program for the blind, a blind student's training at a Christian college for a religious career<sup>102</sup> and (2) the federal government's funding, as part of an aid program for children with disabilities in public and non-public schools, sign-language interpreters for deaf children in parochial schools.<sup>103</sup>

None of these three decisions involved government aid to religion remotely of the magnitude approved in *Zelman*. For that reason alone, one might have thought that there would not be five Justices willing to extend the approach in those cases to vouchers. In retrospect, however, perhaps the only real surprise is that it took the Chief Justice until now to

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<sup>98</sup> I regard the approach discussed in the above text as better than the one applied by the Court in *Zelman*. As is probably apparent, however, from my rendition of my proposed approach to Establishment Clause problems, *see supra* notes 58-61 and accompanying text, I also regard the approach under discussion as substantially less than ideal. Particularly in its recent incarnation calling for proof of actual diversion to religious purposes, the approach validates much aid that merits invalidation if the various reasons that make financial support of religion an independent Establishment Clause evil are given their due. The approach fails to come to grips with the fact that even if aid flows immediately to secular aspects of the parochial school operation, it ultimately subsidizes the entire operation, which includes at its heart religious education.

<sup>99</sup> *Zelman*, 122 S. Ct. at 2473 (O'Connor, J., concurring).

<sup>100</sup> 463 U.S. 388 (1983).

<sup>101</sup> *See id.* at 397-99.

<sup>102</sup> *See Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). As discussed in Simson, *supra* note 58, at 930-31, I believe that *Witters*, a unanimous decision, reached the appropriate result. I would reach that result, however, by a different route than the *Witters* Court.

<sup>103</sup> *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

muster a majority for the constitutionality of vouchers. For the most part, his opinion for the Court in *Mueller* in 1983 is a virtual blueprint for one upholding vouchers. To be sure, *Mueller* involved a tax deduction rather than a funding scheme, and the Court in *Mueller* did rely in part on the Court's tradition of deference to taxing statutes.<sup>104</sup> Functionally, however, the only material difference between the tax deduction in *Mueller* and the vouchers in *Zelman* is the amount of money placed in parents' hands.<sup>105</sup>

Whether or not *Zelman* marks a dramatic break from the past, however, it is at the very least the culmination of two decades of Supreme Court precedent affording less and less protection against financial support of religion and its various ill effects. In obvious exasperation, Justice Souter wrote in his *Zelman* dissent that "doctrinal bankruptcy has been reached,"<sup>106</sup> and I strongly agree. *Zelman* is not the first case to treat endorsement as the beginning and end of Establishment Clause analysis and, so doing, to give short shrift to the various other reasons why the drafters of the Establishment Clause saw state financial support of religion as an evil to be avoided. However, by giving lawmakers enormous latitude to fund not only parochial school education but a wide variety of other religious causes, *Zelman* seriously compounds the error of those prior decisions. With a little ingenuity, lawmakers can devise "neutral program[s] of private choice"<sup>107</sup> that, under *Zelman*, constitutionally funnel substantial aid to religious institutions and organizations besides parochial schools.

#### CONCLUSION: SCHOOL VOUCHERS AND THE BATTLES AHEAD

With the Court's approval of the Ohio program in *Zelman*, the battles in state legislatures over voucher programs are apt to multiply and intensify. In that regard, it is useful to keep in mind that *Zelman*'s inadequate attention to Establishment Clause values is an objection that can fairly be argued to lawmakers in policy terms. In calculating the costs and benefits of proposed voucher legislation, legislators very appropriately may count as costs the reasons that make vouchers that include

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<sup>104</sup> *Mueller*, 463 U.S. at 396.

<sup>105</sup> For commentary prior to *Zelman* suggesting the inevitability of Supreme Court approval of vouchers for parochial schools based on fundamental changes in recent years in political and social realities, see John C. Jeffries, Jr., & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001). See also Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771 (2001) (tracing the "change in trajectory" of the Supreme Court's parochial aid cases and discussing the broader forces behind it).

<sup>106</sup> *Zelman*, 122 S. Ct. at 2486 (Souter, J., dissenting).

<sup>107</sup> *Id.* at 2468.

parochial schools so constitutionally problematic — coercion to support another's religion, corrupting effect on the aided religion, and potential for social conflict along religious lines.

Voucher opponents would also do well to press their constitutional arguments more directly in state court. Every state constitution appears to have one or more provisions that bear on the validity of parochial school aid. Such provisions range from ones almost identical in wording to the Establishment Clause to ones that prohibit compelling individuals to support religion to ones specifically barring state funding of sectarian schools.<sup>108</sup> In interpreting such provisions, state courts very reasonably may decide that their state constitution calls for more than an endorsement test in this realm.<sup>109</sup>

Finally, voucher opponents are not the only ones who can be expected to look to the courts for assistance after *Zelman*. Having won the battle of persuading the Court that vouchers for parochial schools are constitutionally permissible, voucher proponents may well move on now in the courts to press the argument that vouchers are constitutionally required for the poor. If so, *Pierce* would, as I argued earlier,<sup>110</sup> appear to provide powerful support, and the importance of revisiting that decision would become all the more apparent.

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<sup>108</sup> See Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 631–34 & nn.32–47 (1985) (describing five basic types of provisions and citing the particular state constitutional provisions that fit under each type).

<sup>109</sup> About six weeks after *Zelman* was handed down, a Florida trial court struck down Florida's state-wide voucher plan under Article I, § 3 of the Florida Constitution, which provides that "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." *Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002). Several years earlier, the Vermont Supreme Court invalidated under its state constitution a voucher plan much more limited in scope. A school district with fewer than one hundred children of high school age did not have its own public high school. Instead, it covered the children's tuition costs at public high schools in other districts and approved private schools, with the choice of school left to the parents. In 1995 the district expanded the group of approved private schools to include sectarian ones, and the Vermont Supreme Court held this expansion to be in violation of Chapter I, Article 3 of the state constitution, which provides that no one "can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience." *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999). See also *Opinion of the Justices*, 616 A.2d 478 (N.H. 1992) (stating, in response to a request from the state senate for an advisory opinion, that a pending voucher bill would violate Part I, Article 6 of the state constitution, which provides that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination").

<sup>110</sup> See *supra* Part I.