12-1-2003

Why a State Exclusion of Religious Schools from School Choice Programs is Unconstitutional

Thomas C. Berg

Follow this and additional works at: http://scholarship.law.unc.edu/falr

Part of the First Amendment Commons

Recommended Citation

Thomas C. Berg, Why a State Exclusion of Religious Schools from School Choice Programs is Unconstitutional, 2 First Amend. L. Rev. 23 (2003).

Available at: http://scholarship.law.unc.edu/falr/vol2/iss1/3

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in First Amendment Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
WHY A STATE EXCLUSION OF RELIGIOUS SCHOOLS FROM SCHOOL CHOICE PROGRAMS IS UNCONSTITUTIONAL

THOMAS C. BERG*

For this symposium on state "Blaine Amendments," I will focus on perhaps the most prominent current question concerning these state constitutional provisions: their effect on programs providing tuition vouchers or scholarships to parents of K-12 children for use at a school of the parents' choice. The U.S. Supreme Court, in Zelman v. Simmons-Harris,¹ held that a properly designed school choice program including religiously affiliated schools is consistent with the First Amendment's Establishment Clause.² But a number of state constitutional provisions will likely be read to be more restrictive and to forbid the inclusion of religious schools in a choice program. For example, a number of state provisions bar any state aid to support or benefit any sectarian school,³ or "any school... controlled by any church, sectarian or religious denomination."⁴ These provisions will be used in political debate to block the passage of school choice programs, or to

*Professor of Law, University of St. Thomas School of Law (Minnesota). Thanks to Melissa Rogers for inviting me to participate in the Pew Forum on Religion and Public Life's symposium, Separation of Church and States An Examination of State Constitutional Limits on Government Funding for Religious Institutions, one of her many excellent efforts in organizing civil discussions of religious freedom issues among persons of differing perspectives.

¹ 536 U.S. 639 (2002).
² Id. at 653.
³ S.D. CONST. art. VI, § 3 ("No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.").
exclude religious schools from any program that passes, and they will serve as the basis for legal challenges to enacted programs that include religious schools.

This article sets forth the case that such an exclusion of religious schools is unconstitutional under the First Amendment, in particular the Free Exercise Clause. To deny an educational benefit to an otherwise eligible child because the family chooses to use the benefit for a religiously informed education is to impose an unconstitutional condition on rights of religious activity and expression.\(^5\)

In addition to setting forth this case, I wish to make some other points. First, I want to emphasize that the case for including religious schools equally in voucher programs does not ultimately rest on a principle of treating religion the same as other ideas and activities. The Establishment and Free Exercise Clauses treat religion as a distinctive category of activity and allow for special measures to limit government action with respect to religion. Rather, the equal inclusion of religious schools in a choice program rests more fundamentally on the value of individual choice: that government should, as much as possible, minimize the incentives it creates for families to choose religious schools, or not choose them, as opposed to the alternatives.\(^6\)

Finally, the article briefly rebuts some of the common arguments for excluding religious-school choices from educational aid programs.\(^7\) I argue that most of the concerns that arise from including religious schools—social divisiveness, intrusions on religious autonomy—are also present, perhaps even more seriously, when religious schools are excluded.


\(^6\) See infra Part I.B.

\(^7\) See infra Part II.
I. THE PRIMA FACIE CASE AGAINST EXCLUDING RELIGIOUS-SCHOOL CHOICES

A. The Precedents: No Discrimination Against Religious Activity and Expression

In terms of precedent, the primary argument against excluding religious schools from a school choice program is that the exclusion constitutes discrimination against religious activity and expression, and such discrimination is strongly presumed invalid.

Under the Free Exercise Clause, the bedrock rule is that the religious activity of private individuals and groups may not be singled out for a disability. While religious exercise may seldom be constitutionally entitled to special accommodation, under the rule of Employment Division v. Smith, religious exercise is strongly protected against being singled out for unfavorable legal treatment. The leading decision is Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, which struck down laws that prohibited the killing of animals solely for reasons of ritual sacrifice.

The presumption that discrimination against religion is invalid extends beyond cases of discriminatory coercive regulation, to cases involving the discriminatory denial of benefits. The most relevant decision is McDaniel v. Paty, which held that Tennessee violated free exercise rights by singling out clergy as an occupation for exclusion from service in the state legislature. Justice Brennan, in an influential concurring opinion, emphasized that the state could not assume that clergy would be more dangerous and destructive forces in the legislature than would other persons: the First Amendment, he said, does not permit "treat[ing] religion, and those who teach or practice it... as subversive of American ideals

8. 494 U.S. 872, 879 (1990) (holding that government restrictions which only incidentally affect religious practice are constitutional).
10. Id. at 545–47.
12. Id. at 629.
and therefore subject to unique disabilities.”¹³ For the same reasons, a state cannot single out religious schools, as a class, for exclusion from participation in a school choice program.¹⁴

The Ninth Circuit’s decision in Davey v. Locke,¹⁵ in which certiorari has now been granted, further supports the constitutional challenges to the exclusion of religious-school choices, and the case may well be the occasion for the Supreme Court to make clear that such exclusions are invalid.¹⁶ Davey struck down a Washington state program that offered scholarships to college students but excluded those pursuing a religion major from a religious perspective. By withdrawing the scholarship from an otherwise eligible student solely because he chose a program incorporating a religious orientation and religious instruction, the court held the state unconstitutionally conditioned a benefit on the recipient’s willingness to forego his free exercise rights. The rationale for the state support—“‘the benefit to the state [from] assuring the development of [students’] talents’”¹⁷—is present with the religious

¹³. Id. at 641 (Brennan, J., concurring in the judgment).
¹⁴. The Religion Clauses’ requirements of nondiscrimination and neutrality toward religion distinguishes the case of religious-school funding from the decisions in which the Court has allowed government to fund childbirth but not abortion. The Court has made clear that the right in Roe v. Wade, 403 U.S. 113 (1973), “protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy,” but “implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.” Maher v. Roe, 432 U.S. 464, 473–74 (1977); see also Planned Parenthood v. Casey, 505 U.S. 833, 872–74 (1992) (holding that the Constitution prohibits “undue burdens” on the abortion decision but “does not forbid a State...from expressing a preference for normal childbirth”). By contrast, the state must be neutral on religious questions; it may not express preferences about religion of the sort it expresses about abortion and childbirth. The state has no power “to make a value judgment favoring [nonreligion] over [religion], and to implement that judgment by the allocation of public funds.” Maher, 432 U.S. at 473–74. The goal of religious freedom is for the government to stay out of religious choices, not for it to influence those choices up to a point just short of imposing an “undue burden.”
¹⁵. 299 F.3d 748 (9th Cir. 2002), cert. granted, 123 S.Ct. 2075 (2003).
¹⁶. Id. at 760.
¹⁷. Id. at 756.
major as well, for certainly a religious major can help a student get a job and become a productive, taxpaying member of society. The state's denial thus "communicate[d] disfavor" toward, and discouraged the choice of, an education with "a defined level of intensity of involvement in protected religious activity;" just as the state in *McDaniel* unconstitutionally placed a disability on those who took their faith seriously enough "to impel [them] to join the ministry." The same arguments apply to the denial of K–12 scholarships, vouchers, or other tuition aid to families who choose religious schools. The selective denial discourages religious-school choices and, at least prima facie, communicates disfavor of them. The denial of the benefit also goes beyond simply refusing to fund religious teaching, which the state arguably may do in the exercise of its discretion over its funds. On this score, the exclusion is even less defensible than the exclusion of college theology majors in *Locke v. Davey*. Even more plainly than a theology major, a satisfactory K–12 education in math, English, and history in a religious school imparts secular knowledge and provides significant secular value to society—yet a state exclusion of religious schools withholds benefits even for that unquestionable educational contribution. The family is not merely denied assistance for religious teaching, but is penalized for choosing to pursue its child's basic K–12 education in a religious setting.

18. *Id.*
20. *Id.* at 631.
21. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (permitting government to prohibit the use of funds allocated to family-planning programs for abortion counseling and referrals, as long as those programs could engage in such speech in a separately funded program).
22. For elaboration of this argument, distinguishing voucher exclusions from permissible benefits denials as in *Rust v. Sullivan*, see Berg, *supra* note 5; Michael W. McConnell, *The Selective Funding Problem Abortion and Religious Schools*, 104 Harv. L. Rev. 989, 1017–18, 1046–47 (1991). *See also Davey*, 299 F.3d at 755 (distinguishing total denial of benefit to individual from *Rust*-type condition requiring individual to fund disfavored activity out of private sources).
The other major challenge to the exclusion of religious schools arises under the Free Speech Clause. A long series of decisions hold that to exclude religious groups or individuals from generally available benefits is an unconstitutional discrimination against speech because of its religious viewpoint. The decisions extend at least as far back as *Widmar v. Vincent*, more than twenty years ago, and culminate most recently in *Good News Club v. Milford Central School*. The decisions also include *Rosenberger v. Rector and Visitors of University of Virginia*, which applied the principle to viewpoint discrimination in affirmative government funding—holding that the university could not subsidize the operations of a wide range of student publications and then refuse such assistance to a magazine because of its religious editorial perspective.

Several propositions from these decisions support the argument that excluding religious schools from a choice program is presumptively unconstitutional. First, when the state provides benefits to a reasonably wide range of private groups, the exclusion of a group simply because of its religious affiliation is invalid. Most school choice programs do indeed provide benefits to a fairly wide group of schools, defined primarily by criteria of educational quality and not by some particular set of views that the state wishes to promote. The state may exclude a few views at the outer perimeter, as the Cleveland program in *Zelman* did, but for the most part, choice programs tend to accept a wide diversity of views. Indeed, the fundamental premise of *Zelman* is that the ideological views of schools participating in a voucher program are not adopted

23. 454 U.S. 263 (1981) (holding that in creating a generally open forum, a state university could not exclude religious speech from that forum without a compelling justification).
24. 533 U.S. 98 (2001) (holding that it is a violation of the Free Speech Clause to discriminate against a religious viewpoint even in a limited public forum).
26. *Id.* at 831.
27. *See* OHIO REV. CODE ANN. § 3313.976(A)(6)(Anderson 2002) (forbidding participating schools to teach unlawful behavior or "hatred of any person or group" based on race, ethnicity, national origin, or religion).
or endorsed by the state. If the state was endorsing the viewpoint of participating schools, then religious schools would have been barred from participation under settled Establishment Clause principles prohibiting the government from endorsing religion.

Second, religion as a category is not a separate subject matter that can be excluded by fiat from the scope of a program involving education. Rather, religion is as much a viewpoint or perspective on how to educate. Therefore, to exclude religious schools as a category bears no relation to the educational goals of the program in question. These points are especially clear in *Good News Club*, which held that Christian worship, singing, and Bible memorization could not be excluded from a forum allowing access to schoolrooms for any group “that ‘promote[s] the moral and character development of children.’” Just as the state could not simply define religious teaching as outside the bounds of “moral and character development,” it cannot set up a program of aid in which private schools participate primarily based on their educational performance, and then simply define religious schools as ineligible even though they meet the performance standards. In *Good News Club*, that a student group held a religious perspective on morals and character was irrelevant to whether it fit within the category of moral and character development. Similarly, the fact that a school’s perspective on education is religious is irrelevant to whether it fits within the category of institutions providing educational options for parents.

These principles remain relevant even though a school choice program involves monetary subsidies, and even though it may not involve a full-fledged public forum designed solely to facilitate expression. The prohibition on viewpoint discrimination against private speakers has force even when the government is providing subsidies, as the Court held in *Legal Services Corp. v.*

---

28. *See Zelman*, 536 U.S. at 652 (“The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.”).


30. *Id.* at 111.
Velazquez\(^{31}\) — and remember, the expression by religious schools in a voucher program is unquestionably private rather than governmental.\(^ {32}\) Furthermore, viewpoint discrimination is invalid even in a so-called nonpublic forum, if the speech in question otherwise fits within the parameters of the forum, such as subject matter or speaker identity.\(^ {33}\) If a school choice program is open to a significant range of educational choices but disqualifies religious-school choices, this is unquestionably viewpoint discrimination and is presumptively invalid.

B. The Ultimate Issue: Religious Choice, Not Formal Equality

The constitutional case against excluding religious schools from voucher programs appeals to Supreme Court precedents, like *Lukumi* and *Rosenberger*, which emphasize nondiscriminatory treatment of religion. However, the nondiscrimination theme may

31. 531 U.S. 533, 544 (2001) (holding that forum and viewpoint discrimination principles still "provide some instruction" in subsidy cases, and that withdrawal of legal-services funding for arguments challenging federal welfare legislation was unconstitutional viewpoint discrimination).

32. See *infra* notes 40–49 and accompanying text. *United States v. American Library Association*, 123 S. Ct. 2297 (2003), which upheld the conditioning of federal funds on a library installing Internet filters to block pornography from children, does not undercut the claim that excluding religious schools from a voucher program is unconstitutional. Although public libraries do not endorse every publication in their collections, they do make content-based choices about what material to collect, "material of requisite and appropriate quality for educational and informational purposes." *Id.* at 2308 (plurality opinion). Accordingly, public libraries in that case were to some extent choosing their own messages. In addition, and importantly, government need not be neutral toward pornography as it must be toward religion. "[L]ibraries have traditionally excluded pornographic material from their collections," *id.*, and unquestionably public schools can teach children that pornography should be avoided. But schools plainly cannot teach students that religion should be avoided. Again, religion is a neutrality right, and government should not influence private choice on religious matters in the way it can attempt to influence other private choices.

give a misleading impression. It might suggest that the reason to include religious schools in a choice program is simply to treat religion the same as other activities or perspectives concerning education. Many opponents of school choice argue, correctly, that it would be a great mistake to do away generally with distinctive constitutional rules for religious activity and organizations. They point out, correctly, that the First Amendment, in both the Establishment and the Free Exercise clauses, treats religion differently from other human activities.

In particular, critics have argued that treating religious schools equally in programs of vouchers and other government aid is inconsistent with—and will undermine—any distinctive protection for religious exercise in the face of coercive laws and regulations. Treating religion the same as other activities under the Establishment Clause, the critics say, entails treating it the same as other activities under the Free Exercise Clause. The result, they say, has been decisions such as Employment Division v. Smith, which held that (for the most part) the government may constitutionally impose severe burdens on religious practice as long as the law applies equally to nonreligious activity. Equal treatment, in short, means the loss of any distinctive constitutional protection for religious exercise. Indeed, it might mean that distinctive protection for religion is forbidden.

A number of scholars, including myself, believe that the equal participation of religious choices in benefits programs is consistent with maintaining a distinctive concern for religious freedom in the face of legal burdens. Our position has been
criticized as inconsistent. Professors Lupu and Tuttle have described our camp as "driving on [a] one-way street," treating religious institutions as "distinctive when that characterization relieves them of regulatory obligations, but not when it seals them off from government benefits." Likewise, Professor Brownstein has objected to "the proposition that religious practices and institutions should be treated as the exact equivalents of their secular counterparts when government spending decisions are reviewed, while religion receives a uniquely favored status when it is burdened by regulatory legislation."

But these arguments are misplaced for several reasons. To begin with, the equal participation of religious entities in benefits programs does not rest ultimately on the maxim of equal treatment, that religious entities must be treated formally the same as others. Rather, equal treatment with respect to benefits ultimately serves a deeper constitutional value: preserving the choice of private individuals and groups in religious matters.

Take K–12 school vouchers as an example. If religious schools are ineligible for cash vouchers, then parents have a greater financial incentive to choose state-supported, secular schools, public or private (which the parents are forced to pay taxes to support). This is particularly true for low-income families who cannot easily pay the tuition charged by a school unsubsidized by the state. Excluding religious schools from voucher programs greatly distorts families' choices. Including religious schools on the same terms as others prima facie eliminates that distortion. This is "substantive" neutrality, in Douglas Laycock's words: the government seeks to minimize the incentives that its actions give to


38. Ira C. Lupu & Robert W. Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37, 49 (2002) (adding that one needs to look elsewhere "[f]or consistent answers to our question").

private persons either to practice or not practice religion.\textsuperscript{40}

The Supreme Court approved vouchers under the Establishment Clause based on a theory of parental choice or substantive neutrality, not a theory of formal equality or mere sameness of treatment. \textit{Zelman} held that the Cleveland scholarships were "programs of true private choice," under which tax-generated money reaches religious schools "only as a result of the genuine and independent choices of private individuals."\textsuperscript{41} Of the three factors that led to this conclusion, only one of them was the program's formal equality of terms—that it was "neutral in all respects toward religion"\textsuperscript{42}—and that factor mattered only because there were "no 'financial incentive[s]' that 'skew[ed]' the program toward religious schools."\textsuperscript{43}

The other two factors directly point to the value of individual choice. One was that the aid went not "directly to religious schools," but directly to parents and families "who, in turn, direct the aid to religious schools . . . of their own choosing."\textsuperscript{44} The Court signaled that it would continue to place special limits on government directly appropriating money for religious schools\textsuperscript{45}—a distinction defensible in terms of individual choice because with many direct appropriations the allocation is made by government officials rather than by the various families' choices of what school to attend.\textsuperscript{46}

\textsuperscript{42} \textit{Id.} at 653.
\textsuperscript{43} \textit{Id.} (quoting \textit{Witters v. Wash. Dept. of Servs. for the Blind}, 474 U.S. 481, 488 (1986)).
\textsuperscript{44} \textit{Id.} at 649.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} It can be argued persuasively that direct aid programs that allocate money on a per capita basis—that is, as a function of the number of students that enroll in a school—are consistent with the choice value because the choices of numerous families still dictate the amount of aid. \textit{See} Mitchell \textit{v. Helms}, 530 U.S. 793, 810–11, 829–30 (2000) (plurality opinion). But Justice O'Connor, who holds the controlling vote on this issue, still requires additional limits on all direct aid programs because with such programs a family who chooses a particular school has no choice over whether state
Finally and most importantly, Zelman required that there be "genuine opportunities for Cleveland parents to select secular educational options" as alternatives to religious schools. The premise appears to be that if there were no real secular options, then parents' choice of religious schools was not "genuine and independent." This factor therefore represents an important step toward grounding the jurisprudence of aid to religious institutions firmly in the notion of individual choice concerning religious matters. In a discussion that, significantly, took up the longest part of the opinion, the majority held that Cleveland did offer genuine secular options. These included secular private schools and a variety of public options including charter ("community") schools, magnet schools, and supplemental tutoring in the regular public schools.

So Zelman emphasizes religious choice; excluding religious schools from voucher programs distorts families' choices; and including religious schools on equal terms is the course most consistent with choice. In Professor Laycock's terms, the equal inclusion of religious schools is the most substantively neutral course: it minimizes the incentives that the government creates either for or against religious practice.

By contrast, where religious exercise conflicts with regulatory laws, private religious choice is maximized, at least sometimes, by distinctive treatment for religion—that is, by granting exemptions to religious practice. When a generally applicable law prohibits conduct that a religious person must engage in as part of his faith, it creates a powerful incentive to abandon the practice or the faith. After Smith, for example, Native American Church members in a state that criminalizes peyote must give up the central act of their worship services if they want to avoid jail or fines. Exemption has the prima facie effect of money may follow the child to that school. See id. at 841-44 (O'Connor, J., concurring in the judgment) (cited and followed in Zelman, 536 U.S. at 649). Whichever of these views is correct, both are animated by the principle of private choice.  

47. 536 U.S. at 655.  
48. Id. at 649.  
49. Id. at 656-60.
promoting religious choice by removing government regulations that, in absolute terms, restrict religion.

But the choice-based analysis has not only an absolute component, but also a comparative one. That is the lesson from the analysis above concerning vouchers: allowing parents to use benefits at secular schools but not religious schools creates a disincentive, in comparative terms, to the religious-school choice. Similarly, if the exemption of religiously motivated conduct creates an incentive to choose that conduct over the secular alternatives, then exemption would be improper under a choice analysis. That incentive will exist in cases where the exemption coincides substantially with self-interest—as may well be the case, for example, with most claims to tax exemptions. As Professor Laycock puts it: "If religious objectors to paying taxes do not have to pay, there is an incentive to adopt the faith that gives rise to the objection."50

But this does not undercut most religious exemptions. To quote Professor Laycock again, in most cases:

[E]xemptions minimize the incentive effects. Most religious behavior is meaningless or burdensome to nonbelievers. I do not want to have a driver's license without a picture; I would have a harder time cashing checks or proving my identity in other contexts. I do not want to refrain from work on the Sabbath; I am too far behind as it is. I do not want to eat peyote; I would almost certainly throw up. Most exemptions do very little to draw adherents to a faith.51

Those who believe that exemptions from regulation, combined with equal access to benefits, loads the dice in favor of religion should remember that these are not the only major

50. Laycock, supra note 37, at 350. For other arguments distinguishing self-interest from other exemptions, see Berg, supra note 37, at 705, and Michael W. McConnell, Accommodation of Religion An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685, 700–01 (1992).

51. Laycock, supra note 37, at 350.
category of cases under the Religion Clause. The third major area of Religion Clause case law involves expression by government in public institutions such as public schools, government buildings, and so forth. In that context, religion is singled out for "disfavored" treatment under the Establishment Clause. Government may not speak religiously, teach that religion or any particular faith is true, or sponsor religious expression; but it may do all those things with respect to secular ideas and perspectives. That is the lesson of the decisions forbidding official school prayers, Bible readings, moral instruction in the Ten Commandments, and promotion of creationism.\textsuperscript{52} To repeat an argument I have made previously:

A public school teacher may teach the truth of democracy or free markets, but not of Christianity, Islam, or other religions; he or she may participate enthusiastically in the chess or scuba diving club, but not the Bible study club. The school may schedule its commencement ceremony to begin with the Pledge of Allegiance or a Walt Whitman poem, but not with the Lord's Prayer.\textsuperscript{53}

These constitutional restrictions on government sponsored religion are extremely controversial. Many people believe that the


\textsuperscript{53} Thomas C. Berg, \textit{The New Attacks on Religious Freedom Legislation, and Why They Are Wrong}, 21 CARDOZO L. REV. 415, 440 (1999). The point is merely strengthened by the recent court of appeals decision striking down the religious reference "under God" in the Pledge requiring that the exercise contain only secular language. See Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003) (en banc), \textit{cert. granted}, Elk Grove Unified Sch. Dist. v. Newdow 124 S. Ct. 384 (2003) (mem). The Establishment Clause ban even extends to government sponsorship of all religions on an equal basis. The public school cannot conduct "nonsectarian" or "nondenominational" religious ceremonies, see Weisman, 505 U.S. at 589-90; Engel, 370 U.S. at 430, and presumably it cannot sponsor the prayers of varying denominations on different days in rotation.
restrictions create the impression that religion is, if not false, then at least unimportant to the moral, civic, and intellectual training of children. Undeniably, the government speech decisions single out religious ideas for limitation. But the rule against government inculcation of religion, especially within public schools, is correct—even though it treats religion differently from other ideas and perspectives—because it leaves religious matters to the choice of individuals and minimizes government's influence over those choices.

If we are keeping crude scorecards, then, the score really is: religion treated more favorably than secular ideas once (free exercise), treated less favorably once (government speech), and treated basically equally once (benefits for education and other temporal social purposes). All three rules are best explained by the principle of minimizing government's effect on private persons' choices whether to practice religion or not.

The Supreme Court expressed the balance struck under the Religion Clauses in a passage in Lee v. Weisman, the decision that invalidated a public school's inclusion of a short, nondenominational prayer by a rabbi at a graduation ceremony. The Court acknowledged that sustaining objections to the prayer meant treating religion very differently from other ideas, "[S]tudents may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return." But, the Court said, this distinctive treatment followed from the Establishment Clause principle that "[in] religious debate or expression," unlike with secular ideas, "the government is not a prime participant." Rather, "[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which is itself promised freedom to pursue that mission." Therefore, while the Establishment Clause restricts government's religious expression,

54. Weisman, 505 U.S. at 591.
55. Id.
56. Id. at 589.
the Free Exercise Clause calls for accommodations to preserve "freedom to pursue [the religious] mission." With respect to government benefits, equal treatment of religious options is the course most consistent with religious freedom, to prevent the distortion of the religious choice that follows from the favoring of secular options.

II. THE JUSTIFICATIONS FOR EXCLUDING RELIGIOUS SCHOOLS ARE INADEQUATE

In the light of this prima facie case, the exclusion of religious-school choices from a voucher program requires a strong, if not a "compelling," justification. The justifications commonly put forward for such exclusion are inadequate. Most of these asserted justifications share a common fault: the dangers that they see in including religious schools in a choice program are present just as much or more so when religious schools are singled out for exclusion.

A. Divisiveness

Consider, for example, the argument that including religious schools in choice programs will foment "divisiveness" by including religious schools "that preach religious hatred, racial bigotry, the oppression of women, and other views." Set aside the fact that some secular private schools may engage in the same objectionable practices or expression, and that most religious schools do not, and

57. Id.

58. Laura S. Underkuffler, The Price of Vouchers for Religious Freedom, 78 U. DEP'T MERCY L. REV. 463, 477 (2001); see also Zelman v. Simmons-Harris, 536 U.S. 639, 684 (2002) (warning of "the impact of religious strife" and citing "the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another"); id. at 715, (Souter, J., dissenting) ("As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord"); id. at 717 (Breyer, J., dissenting) (emphasizing at length "the risk that voucher programs pose in terms of religiously based social conflict"); Laura S. Underkuffler, Vouchers and Beyond The Individual as Causative Agent in Establishment Clause Jurisprudence, 75 IND. L.J. 167, 188–89 (2000).
that therefore the appropriate remedy is to exclude the offending schools, not religious schools as a category.\textsuperscript{59} In addition, excluding religious schools from choice programs may well produce more social strife than including them would.

Currently, considerable political and social strife stems from denying families important educational benefits because of the ideology of the schooling they choose. As Professor Rick Duncan notes, "The public schools have become one of the primary battlegrounds in the culture war."\textsuperscript{60} If religious families are pushed into public schools by the state's refusal to support the religious alternative, it is only natural that they will fight for the inclusion of religious content in the public schools—measures such as prayers at school events, or creationism in the classrooms, that far more directly impose religion on others than school choice programs do.\textsuperscript{61} But if choice programs are enacted including religious schools, many such parents will likely take their children elsewhere and leave the public schools in peace.\textsuperscript{62} As a reviewer of a recent book on diversity summarizes: "The greater our tendency to monopolize, the more fierce become our battles over multiculturalism; and the more we learn to rely on private solutions such as vouchers, the more likely that the passions will be diffused."\textsuperscript{63}

\textsuperscript{59} Some such schools might be excluded from a choice program based on constitutionally valid conditions on participation—such as a condition that participating schools not discriminate on the basis of race in employment or admissions. \textit{See generally} Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

\textsuperscript{60} Richard F. Duncan, \textit{Public Schools and the Inevitability of Religious Inequality}, 1996 BYU L. Rev. 569, 580.

\textsuperscript{61} For chronicles of such disputes, see \textsc{Stephen Bates}, \textit{Battleground One Mother's Crusade, the Religious Right, and the Struggle for Control of Our Classrooms} (1993).

\textsuperscript{62} Of course, the extent to which choice programs actually facilitate the movement of religious parents out of public schools depends on how broad the programs are—in particular, whether they extend beyond the limited urban-district pilot programs enacted to date.

\textsuperscript{63} Alan Wolfe, \textit{The One and the Many}, \textsc{The New Republic}, June 9, 2003, at 26, 29 (reviewing \textsc{Peter H. Schuck}, \textit{Diversity in America Keeping Government at a Safe Distance} (2003)).
In this light, it is both inaccurate and constitutionally impermissible to treat religious schools as uniquely divisive and on that basis exclude them from choice programs. Recall Justice Brennan's statement in *McDaniel v. Paty* that government may not "treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." For similar reasons, the Supreme Court has discarded its one-time doctrine that aid to religious schools could be invalidated because it caused "political divisiveness." When controversy and division are possible either way, the proper course is to treat religious educational choices the same as other educational choices.

**B. Religious Autonomy**

Or consider the argument that school choice programs, like other forms of government assistance, will bring with them conditions and regulations that will intrude on the autonomy of religious organizations and thereby weaken religion as an independent cultural force. The argument appeals back to, among

64. 435 U.S. 618, 641 (Brennan, J., concurring in the judgment).
65. Compare *Lemon v. Kurtzman*, 403 U.S. 602, 622–23 (1971) (announcing the doctrine, referring to "the divisive political potential" of school aid programs); *with* *Bowen v. Kendrick*, 487 U.S. 589, 617 n.14 (1988) (rejecting the doctrine, for all but cases of "direct financial subsidies" to religious schools); *and* *Mueller v. Allen*, 463 U.S. 388, 403–04 n.11 (1983) (same). The reasons the Court gives for rejecting the doctrine include the fact that on many political issues, opinions divide along religious lines, *Kendrick*, 487 U.S. at 617 n.14, and the concern that the mere divisiveness caused by the filing of a lawsuit might be used to invalidate the practice that the suit challenges. *Lynch v. Donnelly*, 465 U.S. 668, 684–85 (1984). In essence, the Court adopted the same reasoning as in the text that by definition, any course pursued on a controversial subject will cause political division.

other things, James Madison’s warnings that tax assessments for teachers of religion would undermine “purity and efficacy of religion.”\(^67\) While this is a strong argument against heavy regulation of voucher participating schools—extensive regulation will undercut the very goals of diversity and competition that the programs claim to seek—it is weak as a ground for excluding religious schools. An otherwise eligible school can challenge burdensome conditions and regulations by objecting to them. Indeed, standing to raise such intrusions on autonomy should rest with the school, not with a taxpayer plaintiff who sues to forbid the aid or with the state that excludes religious schools from receiving it. In Professor Laycock’s words, “An atheist plaintiff asserting a church’s right to be left alone even at the cost of losing government aid is the best possible illustration of why there are rules on standing.”\(^68\)

Moreover, the exclusion of religious schools might cause the same danger the voucher opponents fear. Excluding religious schools poses a threat to their vigor and autonomy. In the words of Vincent Blasi, “Dependency on public resources is a dangerous condition for religion, to be sure, but so is the condition of competing in the educational marketplace with the well-financed institutions—and some would say the religiously subversive orthodoxies—of the modern welfare state.”\(^69\) State subsidies for secular schools attract families, especially those of modest means, who might otherwise choose religious schools. Religious schools


\(^{69}\) Vincent Blasi, School Vouchers and Religious Liberty Seven Questions from Madison’s Memorial and Remonstrance, 87 Cornell L. Rev. 783, 798 (2002).
often have trouble surviving in the face of such an uneven playing field; ever since the 1850s, the push for equal state assistance for religious schools has been fueled by that reality.\footnote{70}

Thus, religious schools and families determining whether to participate in choice programs face a very different question than Madison did when he opposed tax assessments for religious teaching: today the state already affects religious schools, and in some cases jeopardizes their survival, by funding their secular competitors. At best there are hazards to a religious school’s autonomy and mission from either participating or not participating in a choice program. Thus the school (and by extension the families using it) should be left to judge whether participation will help or harm the mission.

\section*{C. Compelled Aid to Religious Teaching}

Finally, there is the argument that including religious schools in a school choice plan will compel taxpayers to provide assistance to religious teaching to which they may be opposed.\footnote{71} But this argument is insufficient as well. It conflicts with Zelman’s conclusion that under a true private choice program, the government aids the individual family: it is the family, not the government, that sends money to a religious school, much like “the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution.”\footnote{72} Only a


\footnote{71. The argument echoes Thomas Jefferson’s dictum that “to compel a man to furnish contributions of money for the propagation of opinions in which he disbelieves and abhors, is sinful and tyrannical.” Thomas Jefferson, \textit{A Bill for Establishing Religious Freedom} (1786), reprinted in McConnell, \textit{supra} note 67, at 69, 70.

\footnote{72. Mitchell v. Helms, 530 U.S. 793, 841 (O’Connor, J., concurring in the}}
very broad, attenuated concept of aid extends to the decision by numerous families to use their educational benefits at a religious school among a number of other choices.

Indeed, if the state excludes religious schools from a voucher program, it then favors the schools that provide education from a secular perspective: public schools and secular private schools. Education from a secular perspective competes with education from a religious perspective. And yet under a religious-school exclusion, religious citizens who are opposed to the separation of religion from education are forced to pay taxes for secular schools while being denied assistance for their own conscientious educational choice. This is an imposition on their conscience as great as any imposition on the taxpayer opposed to religious schools—greater, perhaps, because the imposition comes through explicit discrimination against religious-school choices.  

CONCLUSION

A state rule excluding religious schools from a school choice program for which they would otherwise qualify is prima facie unconstitutional under the First Amendment. Although several of the precedents for this conclusion speak in terms of nondiscrimination and formal neutrality, ultimately the soundest rationale against excluding religious schools lies in preserving individual choice. The exclusion of religious schools distorts families’ choices on how to educate their children and pressures them to choose secular education, while the equal inclusion of religious schools promotes choice. Under this approach, treating

judgment) (following Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 488 (1986)).

73. I agree with Professor Underkuffler that “religion or freedom of conscience is a uniquely powerful force in human life and law” that “religion ha[s] unique power,” and therefore that “compelled taxpayer funding” in this context is a matter of special constitutional concern. Underkuffler, supra note 58, at 477. But where she is concerned only with “funding of religious activities and religious institutions”, id., in my view the concern extends to compelling religious citizens to support an educational funding system that on its face discriminates against religious education.
religion equally in terms of educational benefits is consistent with treating it distinctively in other areas of Religion Clause disputes. The exclusion of religious schools therefore requires a strong justification, and none of the common justifications are sufficient. In particular, the exclusion of religious schools causes the very problems that it claims to avoid: social divisiveness, imposition on taxpayers’ conscience in religious matters, and threats to the vigor of religious schools.