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School Choice and the First Amendment

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INTRODUCTION

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." However, The Supreme Court has acknowledged that there is an inherent tension between the Establishment Clause and the Free Exercise Clause of the First Amendment.[1] The Establishment Clause was written with the intent to create a wall separating church and state. This has created a point of contention between those who desire to send their children to religious schools and those who support public school education. This point of contention is the focal point of the infamous "school choice" debate.

On one end of the debate are parents and advocates who are pro-school choice and believe that public education funding should "follow the student" rather than the school.[2] These advocates believe that students should be entitled to apply public funding to the educational program of their choice – whether it is public, private, religious, charter, or home school. Opponents of school choice, however, believe that people who choose private and religious schools should not be permitted to use public funds to afford it. One of the major arguments against school choice is that using public funding to pay for tuition at religious schools violates the First Amendment. Critics of school choice claim that this use of government funds forces taxpayers to fund religious education, thereby establishing religion and violating the Establishment Clause. Advocates for school choice have argued, however, that refusing to apply public funding to tuition at religious schools *solely* because they are religious schools violates the Free Exercise Clause by discriminating against religion.

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[1] *Comm. For Pub. Ed. and Relig. Liberty v. Nyquist*, 413 U.S. 756, 788 (1973).

[2] EdChoice, https://www.edchoice.org/school-choice/what-is-school-choice/.

HISTORY OF SCHOOL CHOICE

School Choice programs can take on various different forms. There are education savings accounts, school vouchers, tax-credit education savings accounts, tax-credit scholarships, and individual tax credits and deductions. The debate regarding the constitutionality of school choice vouchers in particular has been at the heart of many Supreme Court decisions throughout American history.

Wisconsin was the first state to create the *modern* school voucher system in 1989.[3] However, before there were school vouchers, there was Vermont's "town-tuitioning" program.[4] Vermont began its town-tuitioning program in 1869. The program served to provide education for students who didn't have local public schools.[5] The program paid tuition, using public funds, directly to the schools that Vermont students attended – whether public or private and inside or outside of Vermont.[6] The amount sent to private schools was determined by calculating the average tuition for Vermont public schools or the tuition of the private school.[7] This system was designed, however, specifically for towns that did not have public schools. Therefore, no district was allowed to have both a traditional public school and a voucher system.[8] The Vermont jurisdictions that provided a voucher program were referred to as "tuitioning towns."[9] Tuitioning

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[3] School Choice Wisconsin, https://schoolchoicewi.org/about/history/.
[4] EdChoice, https://www.edchoice.org/school-choice/programs/vermont-town-tuitioning-program/.
[5] EdChoice, https://www.edchoice.org/school-choice/programs/vermont-town-tuitioning-program/.
[6] EdChoice, https://www.edchoice.org/school-choice/programs/vermont-town-tuitioning-program/.
[7] EdChoice, https://www.edchoice.org/school-choice/programs/vermont-town-tuitioning-program/#legal_history.
[8] Susanne E. Cannon, *School Vouchers and Home Prices: Premiums in School Districts Lacking Public Schools*, 24 J. Hous. Rsch., no. 1, (2015), at 1.
[9] Susanne E. Cannon, *School Vouchers and Home Prices: Premiums in School Districts Lacking Public Schools*, 24 J. Hous. Rsch., no. 1, (2015), at 4.

town residents had an option to not only send their children to public schools in Vermont but also out-of-state public schools and private schools as well.[10]

The second state to establish a Town Tuitioning Program was Maine.[11] In 1873, Maine implemented the program which, similarly to Vermont's program, permitted students from towns without public schools to attend schools in other towns while using public funds to pay tuition.[12] Like in Vermont, only students who lived in towns without public schools, also known as "sending towns", could take advantage of the Town Tuitioning program.[13] In 1980, Richard Cohen, the Attorney General of Maine issued an advisory opinion in which he expressed that allowing students to use town tuition to attend religious schools could possibly violate the First Amendment's Establishment Clause.[14] As a result, in 1981, the Maine legislature amended the relevant statute, Me. Rev. Stat. Ann. tit. 20-A, § 2951(2), to state that a private school could only receive public funds if it is nonsectarian.[15] Forty years later, the Supreme Court reviewed this sectarian exclusion in *Carson as next friend of O.C. v. Makin* and held that the nonsectarian requirement was a violation of the First Amendment's Free Exercise Clause, and, thus, was unconstitutional.

In 1875, U.S. Congress Senator James Blaine proposed a federal amendment similar to the nonsectarian requirement in Maine.[16] This amendment would have prohibited the public

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[10] Susanne E. Cannon, *School Vouchers and Home Prices: Premiums in School Districts Lacking Public Schools*, 24 J. Hous. Rsch., no. 1, (2015), at 4.
[11] EdChoice, https://www.edchoice.org/school-choice/programs/maine-town-tuitioning-program/.
[12] EdChoice, https://www.edchoice.org/school-choice/programs/maine-town-tuitioning-program/.
[13] EdChoice, https://www.edchoice.org/school-choice/programs/maine-town-tuitioning-program/.
[14] Nick Murray, *School Choice Map of* Maine, Maine Policy Institute, https://mainepolicy.org/project/school-choice-map/.
[15] Nick Murray, *School Choice Map of* Maine, Maine Policy Institute, https://mainepolicy.org/project/school-choice-map/.
[16] Institute for Justice, https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/.

funding of sectarian schools.[17] The amendment passed in the House but did not have the support of the Senate.[18] As a result, states began individually amending their state constitutions to prohibit the allocation of public funding to religious schools. [19] These amendments came to be known as "Blaine Amendments."[20] Today, approximately 37 state constitutions feature Blaine Amendments.[21]

In 1989, the Milwaukee Parental Choice Program was conceived,[22] and it was officially enacted and launched in 1990. [23] When the program was first launched, it required that schools receiving public funds be nonsectarian and required that families receiving vouchers have a family income of less than 175% of the federal poverty level.[24] In 1995, the Wisconsin Legislature enacted Act 27 which allowed vouchers to be used for tuition at religious schools. [25] In 1998, the Supreme Court of Wisconsin ruled on the issue of whether the Milwaukee Parental Choice Program violated the Establishment Clause of the First Amendment. In *Jackson v. Benson*, the Court held that it did not violate the Establishment Clause because it did not have the primary effect of advancing religion.[26] In its analysis, the *Jackson* Court also emphasized that the Free Exercise Clause and the Establishment Clause are meant to serve the purpose of both

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[17] Institute for Justice, https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/.
[18] Institute for Justice, https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/.
[19] Institute for Justice, https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/.
[20] Institute for Justice, https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/.
[21] Institute for Justice, https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/.
[22] School Choice Wisconsin, https://schoolchoicewi.org/about/history/.
[23] EdChoice, https://www.edchoice.org/school-choice/programs/wisconsin-milwaukee-parental-choice-program/.
[24] School Choice Wisconsin, https://schoolchoicewi.org/programs/milwaukee-parental-choice-program/.
[25] 1995 Wis. Act 27.
[26] *Jackson v. Benson*, 578 N.W.2d 602, 611 (Wis. 1998).

prohibiting the establishment of religion and simultaneously protecting the free exercise of religion.[27]

In the 1990s, Cleveland, Ohio established its own voucher program – the Pilot Project Scholarship Program.[28] In *Zelman v. Simmons-Harris,* the Supreme Court addressed, yet again, the issue of whether such school vouchers violated the Establishment Clause. Because the voucher program was "neutral with respect to religion,"[29] the Court held that it did not violate the Establishment Clause.

The Establishment Clause of the First Amendment is meant to protect citizens against state-enacted laws that have the "purpose or effect of advancing or inhibiting religion."[30] In *Zelman v. Simmons-Harris*, state taxpayers challenged the Ohio Pilot Scholarship Program on the grounds that it violated the Establishment Clause. During this time, the Ohio state auditor had found that Cleveland's public schools were experiencing a crisis.[31] The district was failing to meet state standards, and students were failing basic proficiency exams.[32] At the time, more than two-thirds of high school students had either dropped out or failed, and of the students who *did* reach senior year, 25 percent of them failed to graduate.[33] Even among the students who graduated, the literacy rate was low compared to their peers in other cities.[34]

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[27] *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998).
[28] Ohio Department of Education & Workforce, Scholarship Historical Information, https://education.ohio.gov/Topics/Other-Resources/Scholarships/Additional-Scholarship-Resources/Historical-Information.
[29] *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).
[30] *Id. at* 648–49.
[31] *Id. at* 644.
[32] *Id.*
[33] *Id.*
[34] *Id.*

As a solution to the "crisis,"[35] Ohio enacted the Pilot Project Scholarship Program to provide tuition aid for students impacted by it. Through the program, they could either receive tuition to attend a participating public or private school or could receive tutorial aid while still enrolled in public school.[36] The participating schools included both religious and nonreligious private schools[37] – so long as the participating schools agreed not to discriminate on the basis of race, religion, or ethnic background as well as not to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."[38] The program provided tuition to families based on financial need, and prioritized families that had incomes below 200% of the poverty line.[39] The Court acknowledged in *Zelman* that the primary purpose of this program was to "provide educational assistance to poor children in a . . . failing public school system"[40] and that it was "confer[red] directly to a broad class of individuals defined without reference to religion and permit[ted] participation of all district schools"[41] whether they were religious schools or not.

In its analysis, the *Zelman* Court pointed out that government funds from the Pilot Project Scholarship Program were only able to go to religious schools by way of the parents' "true [independent] private choice."[42] Therefore, Ohio was not establishing or advancing any religion by implementing the program.[43] Courts have been careful to distinguish between programs that provide funds to religious schools directly and programs that only provide government aid

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[35] *Id.*
[36] *Id.* at 645.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 640.
[41] *Zelman v. Simmons-Harris*, 536 U.S. 639, 640 (2002).
[42] *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).
[43] *Id.*

towards religious schools indirectly when the parents and children entitled to the funds choose to apply them to religious schools.[44]

The *Zelman* Court primarily considered three cases in their Establishment Clause analysis. First they considered *Mueller v. Allen*, where the plaintiffs challenged a Minnesota program that included private school tuition at religious schools as a tax deductible educational expense. The Court began its analysis by determining who the group of beneficiaries was. They found that the beneficiaries were "all parents" – both with children in sectarian private schools *and* with children in nonsectarian private schools.[45] Because the group of beneficiaries consisted of such a broad spectrum of people, the Court concluded that there was a secular effect.[46] Since there was a secular effect, the Court found that the program was not subject to challenge under the Establishment Clause.[47] Next, the *Mueller* court analyzed the program entirely. It then found that because the public funds were reaching religious schools "only as a result of numerous, private choices of individual parents," the state was not endorsing religion and, therefore, had not violated the Establishment Clause.[48]

After looking to Mueller, the Zelman Court looked at *Witters v. Washington Department of Services for the Blind*. In *Witters*, the Washington Department of Services for the Blind had a vocational rehabilitation assistance program and refused to extend it to a student who was pursuing a bible studies degree at a private Christian college. The student, Witters, had aspirations of becoming a pastor, missionary, or youth director,[49] but when he applied for the

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[44] *Id*. at 649.
[45] *Mueller v. Allen*, 463 U.S. 388, 397 (1983).
[46] *Id.*
[47] *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002).
[48] *Mueller v. Allen*, 463 U.S. 388, 397 (1983).
[49] *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986).

program, the Commission denied him, relying on a policy statement that "the Washington State Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas."[50] In response, Witters filed suit. When the case reached the Washington Supreme Court, the court declined the state constitution challenge and based its ruling on the Establishment Clause – holding that aiding Witters would have violated the Establishment Clause. To come to this conclusion, the Washington Supreme Court analyzed the case using the *Lemon* test from *Lemon v. Kurtzman* (which the Supreme Court has "abandoned"[51]) and held that the provision of financial assistance by the State to enable someone to become a pastor, missionary, or church youth director clearly had the primary effect of advancing religion.

Witters then appealed the Washington Supreme Court decision, and the U.S. Supreme Court reversed. Like in *Mueller*, the Court came to its conclusion by analyzing *how* the funds were reaching the religious school. Since the funds were paid directly to the student before the student transferred it to the school of their choice, the *Witters* Court held that any government funding that flowed to religious schools only did so "as a result of the genuinely independent and private choices of aid recipients."[52] The court acknowledged that the assistance program wasn't skewed toward religion and didn't create a financial incentive for students to pursue sectarian education.[53] Therefore, the Court held that providing Witters with assistance to pursue his bible studies degree would not have advanced religion in a way that would violate the Establishment

[50] *Id*. at 483.
[51] *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2022).
[52] *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986).
[53] *Id.*

Clause. Witters also claimed that the Free Exercise Clause required Washington to extend aid to him, but the *Witters* Court refused to express an opinion on that issue.

Last, the *Zelman* Court considered *Zobrest v. Catalina Foothills School Dist.* in its analysis. In *Zobrest*, the parents of a deaf student filed suit to require the school district to provide an interpreter for the student – although the student attended a Catholic school – after the school district's attorney told them that doing so would violate the United States Constitution. In the suit, the Zobrests asserted that the Individuals with Disabilities Education Act (IDEA) and the Free Exercise Clause required the school district to provide an interpreter. They also asserted that providing one would not violate the Establishment Clause. The Court of Appeals, applying a three-part test from *Lemon v. Kurtzman*, determined that the aid would not be of a secular nature and would, therefore, violate the Establishment Clause. They reasoned that placing a government employee in the religious school would create an appearance that the government was a "joint sponsor" of the school's activities.[54]

In the Supreme Court case, the Court reversed the Court of Appeals decision and held that providing such aid would not violate the Establishment Clause. The Court stated that they have never held that the First Amendment barred religious institutions from participating in government funded social welfare programs.[55] The *Zobrest* Court, citing both *Mueller* and *Witters* as precedent, held that because the IDEA does not create a financial incentive for parents to choose a sectarian school, and therefore did not violate the Establishment Clause.

The *Zobrest* Court also differentiated, in its analysis, between the state providing funds as a direct subsidy to the religious school and the state providing funds to the parent or the student

[54] *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1194–95 (9th Cir. 1992), rev'd, 509 U.S. 1 (1993).
[55] *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

for their attendance at the religious school. In *Zobrest,* the state's arguments relied on *Meek v. Pittenger*[56] and *School Dist. Of Grand Rapids v. Ball*[57] as a way to support their contention that applying government aid for this purpose would violate the Establishment Clause. However, the Court distinguished *Meek* and *Ball* from *Zobrest* because *Meek* and *Ball* focused on private programs that received grants *directly* from the government whereas in *Zobrest*, the government provided aid directly to the parents and the students, and the parents and students would then pay the schools themselves. *Zobrest* reminds us that while "The State may not grant aid to a religious school . . . where the effect of the aid is 'that of a direct subsidy to the religious school' from the State,"[58] the state *can* grant aid to individuals who may then use that aid to fund private religious education. Both the *Lemon* court[59] and the *Ball* court[60] have stated that the analysis depends on whether it is the school or an individual that is receiving funding from the government.

The *Zelman* Court distinguished these cases from *Committee for Public Ed. & Religious Liberty v. Nyquist*, which featured a program in New York that provided aid only to private schools and the students at them. In *Nyquist*, the Court held that the program had a primary effect that advanced religion[61] since it directly subsidized religious activities[62] and "offered . . . an incentive to parents to send their children to sectarian schools."[63] Using *Mueller*, *Witters*, and *Zobrest* to come to a conclusion, the *Zelman* Court stated that like in those cases, the Pilot Project Scholarship Program was neutral with respect to religion and that any application of it

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[56] *Meek v. Pittenger*, 421 U.S. 349 (1975).
[57] *School Dist. Of Grand Rapids v. Ball*, 473 U.S. 373 (1985).
[58] *See Witters*, 474 U.S. 481, 487 (1986) (quoting *Ball, supra*, 473 U.S. 373, 394 (1985)).
[59] *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971).
[60] *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).
[61] *Comm. For Pub. Ed. and Relig. Liberty v. Nyquist*, 413 U.S. 756, 774 (1973).
[62] *Id.*
[63] *Comm. For Pub. Ed. and Relig. Liberty v. Nyquist*, 413 U.S. 756, 786 (1973).

towards religious education was the result of "true private choice"[64] and the deliberate choices of the individual recipients.[65] The court also added that the role of the government ended with the disbursement of the benefits to the recipient.[66] Overall, when a program is neutral with respect to religion, provides benefits to a wide spectrum of people,[67] and is made available without regard to public or nonpublic nature of the institution,[68] the program is a program of true private choice and does not offend the Establishment Clause.[69]

The (now overruled) *Lemon v. Kurtzman* case was regarding two Rhode Island systems: one was a statutory program that provided financial support to nonpublic schools through reimbursement and the other was a statute under which the state paid a salary supplement directly to teachers in nonpublic elementary schools.[70] In both programs, aid had been provided for church-related educational institutions, and the Supreme Court held in *Lemon* that both programs were unconstitutional[71] violations of the Establishment Clause.[72]

In coming to this conclusion, the Court formulated what later came to be known as the "*Lemon* test." The *Lemon* test was a three-pronged test and stated that for a statute to not be a violation of the Establishment Clause, 1) it must have a secular legislative purpose; 2) its principal or primary effect must be one that neither advances nor inhibits religion; and 3) it must not foster an excessive government entanglement with religion.[73] By using this test, the *Lemon* Court asserts, they are able to draw lines to avoid the three main evils against which the

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[64] *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).
[65] *Id*. at 640.
[66] *Id*.
[67] *Id.* at 662.
[68] *Id*. at 651.
[69] *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).
[70] *Lemon v. Kurtzman*, 403 U.S. 602, 606–07 (1971).
[71] *Id*.
[72] *Id*. at 609.
[73] *Id*. at 612–13.

Establishment Clause was designed to protect: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[74]

In *Lemon v. Kurtzman*, the defendant, the parent of a child enrolled in a public school, filed suit against the Pennsylvania Superintendent of Public Instruction due to its approval of the allocation of funds under the Pennsylvania Education Act ("The Pennsylvania Act").[75] He also filed suit against the State Treasurer of the Commonwealth of Pennsylvania as she was tasked with allocating the approved funds.[76] The central focus of the case was that, under The Pennsylvania Act, the superintendent was permitted to contract for the purchase of secular educational services from nonpublic schools.[77] The Pennsylvania Act defined "secular educational services" as "any course which is presented in the curricular of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect."[78]

The United States District Court for the Eastern District of Pennsylvania noted in *Lemon v. Kurtzman*, 310 F. Supp. 35 (E.D. Pa. 1969) that the Pennsylvania Legislature determined that Pennsylvania's elementary and secondary education system had been undergoing a crisis[79] as a result of cost increases, [80] population increases, and high demands for more teachers and facilities. They also asserted that elementary and secondary education are "public welfare

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[74] *Id.*
[75] *Lemon v. Kurtzman*, 310 F. Supp. 35, 39 (E.D. Pa. 1969), rev'd, 403 U.S. 602 (1971).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*

purpose[s],"[81] so when nonpublic institutions provide education on secular subjects, they contribute greatly to the achievement of that purpose.[82]

The plaintiffs in *Lemon* claimed that the purpose and primary effect of the Education Act was to aid religion.[83] In analyzing the validity of this claim, the district court considered both whether the Education Act violated the Establishment Clause by advancing religion *and* whether the act violated the Free Exercise Clause. In its analysis, it considered *Everson v. Board of Education* – a case in which the Supreme Court held that a statute authorizing reimbursement for bus fare to parents of children in both public *and* parochial schools didn't violate the Establishment Clause as well as noted that a State may not exclude religions from receiving public welfare benefits.[84] Using *Everson* as precedent, the district court in *Lemon v. Kurtzman* ultimately concluded that the Education Act did not violate the Establishment Clause since the purpose and primary effect of the Education Act was secular in nature.[85] The plaintiffs also contended that the Education Act violated the Free Exercise Clause,[86] but the district court, citing *School Dist.of Abington Tp., Pa. v. Schempp*, rejected this claim because "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion,"[87] and the plaintiffs had not asserted that the law coerced them.[88]

On appeal, the Supreme Court revisited *Lemon v. Kurtzman* to determine if the Education Act violated the Establishment Clause and reversed the district court's decision. The court

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[81] *Id*.
[82] *Id*.
[83] *Id.* at 43.
[84] *Id.* at 43-44.
[85] *Id.* at 48.
[86] *Id*.
[87] *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963).
[88] *Lemon v. Kurtzman*, 310 F. Supp. 35, 49 (E.D. Pa. 1969), rev'd, 403 U.S. 602 (1971).

implemented the *Lemon* test: In order for a statute to not be a violation of the Establishment Clause, 1) the statute must have a secular legislative purpose; 2) the statute's principal or primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster "an excessive government entanglement with religion."[89] The Court derived elements two and three from *Board of Education v.* Allen[90] and *Walz v. Tax Commission of City of New York*[91] respectively. The *Lemon* Court held that, since church-related elementary and secondary schools have a significant religious mission and that a substantial part of their activities is centered on religion,[92] the overall impact involved an "excessive entanglement between government and religion."[93]

Lemon was later overruled by *Kennedy v. Bremerton School District*, a case in which a football coach at a public high school was fired for praying at the end of football games. Initially, he began the practice by praying alone,[94] but over time players on his team began to join him.[95] Eventually, the practice reached a point where most of the team would pray with him.[96] He then began giving speeches with religious references after the games and participated in locker room prayers with the players.[97] The school district expressed displeasure with the coach's public prayers and requested that he discontinue them, but this did not stop him.[98] Eventually, the school district responded by placing him on paid administrative leave.[99] The district then

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[89] *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).
[90] *Id*. At 612.
[91] *Id*. At 613.
[92] *Id*.
[93] *Id*. at 614.
[94] *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020), aff'd, 991 F.3d 1004 (9th Cir. 2021), rev'd, 597 U.S. 507 (2022), and vacated and remanded, 43 F.4th 1020 (9th Cir. 2022).
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*. at 1231.
[99] *Id*.

released a statement regarding his suspension and asserted that "this action was necessitated by Kennedy's refusal to comply with the District's lawful and constitutionally required directives that he refrain from engaging in overt, public religious displays on the football field while on duty as a coach."[100]

Consequently, Kennedy filed suit on multiple grounds, one of which was that the district violated his First Amendment right to Free Exercise by suspending him for freely exercising his religion.[101] In its answer to Kennedy's complaint, Bremerton School District cited the Establishment Clause as the source of its affirmative defense.[102] The school district also had written a letter to Kennedy prior to the suit explaining that religious activities of students must be "student-initiated" and not "encouraged . . . or supervised by any District staff." They also told him that his religious activity must be "physically separate from any student activity, and [that] students may not be allowed to join such activity . . . [i]n order to avoid the perception of endorsement."[103]

In its analysis of the *Kennedy* case, the United States District Court for the Western District of Washington used the endorsement test, which required them to consider whether an "objective observer" would perceive the act as a state endorsement of religion.[104] The district court concluded that the District's decision to suspend Kennedy was valid[105] because Kennedy's public displays of religion failed the endorsement and coercion tests and, therefore, violated the

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[100] https://abcnews.go.com/US/hs-football-coach-administrative-leave-praying-field/story?id=34824515.
[101] Complaint & Demand for Jury Trial at 14, Joseph A. Kennedy v. Bremerton School District, 597 U.S. 507 (2022) (No. 3:16-cv-05694).
[102] Answer at 10, Joseph A. Kennedy v. Bremerton School District, 597 U.S. 507 (2022) (No. 3:16 -cv-05694).

[103] *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1229 (W.D. Wash. 2020), aff'd, 991 F.3d 1004 (9th Cir. 2021), rev'd, 597 U.S. 507 (2022), and vacated and remanded, 43 F.4th 1020 (9th Cir. 2022).
[104] *Id*. at 1237.
[105] *Id.* at 1240.

Establishment Clause.[106] On review, five judges in the Ninth Circuit Court of Appeals stated that the district court made the wrong decision and that their "objective observer" test stemmed from the *Lemon* test, which they said was no longer a valid test for determining if an action or statute constituted an Establishment Clause violation.[107]

In *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), the resulting Supreme Court case, the Court agreed with the Ninth Circuit that it had abandoned the *Lemon* test and the endorsement test[108] in *American Legion v. American Humanist Association*, 588 U.S. 29 (2019).[109] In lieu of the *Lemon* test, the Court advised that the Establishment Clause should be interpreted using "reference to historical practices and understandings" in accordance "with history" and in a way that reflects "the understanding of the Founding Fathers."[110] The Court ultimately held that Kennedy's actions were protected by the Free Exercise (and Free Speech) Clause[111] and that Kennedy's actions would not have violated the Establishment Clause.

The *Kennedy* Court also addressed the District's discrimination against religious exercise. It cited to *Employment Div., Dept. Of Human Resources of Oregon v. Smith* in stating that a government policy will not be considered neutral if it is "specifically directed at religious practice."[112] The Court adds that a government policy may fail the neutrality test if it facially discriminates or if a religious exercise is its "object."[113] Within the context of this rule, the *Kennedy* Court held that the District's actions weren't neutral or generally applicable because

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[106] *Id*. at 1238.
[107] *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. 2021).
[108] *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022).
[109] *Am. Legion v. Am. Humanist Assn.*, 588 U.S. 29, 34 (2019).
[110] *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535–36 (2022).
[111] *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022).
[112] *Smith*, 494 U.S. 872, 878 (1990).
[113] *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022).

they restricted Kennedy's actions simply because of their religious character.[114] They weren't neutral because their object was to prohibit religious practice, and they weren't generally applicable because they claimed to punish Kennedy for an act (not supervising athletes after games) that they did not punish other coaches for. Therefore, they sought to treat Kennedy differently from other coaches.[115] This holding from Kennedy shows why refusing to extend school vouchers to religious schools solely because they are religious schools would be an act of discrimination that would fail both the neutrality test *and* the general applicability test.

On January 7, 1980, Richard S. Cohen, the Attorney General of Maine, released an advisory opinion regarding the issue whether Maine's school voucher statute violated the First Amendment by allowing individuals to attend private religious schools at public expense.[116] This opinion was in response to a question submitted by Maine Senator Howard M. Trotzky. The statute provided that "a district may meet the requirement of providing a secondary school facility by contracting . . . with a private academy for all or part of its pupils for a term of from 2 years to 10 years."[117] The statute allowed districts that didn't have an elementary school and didn't contract for elementary school education to pay tuition for any student living in the district that attended an approved elementary school. It also allowed those units to enter contracts with approved private schools for secular educational services.[118]

Similar to the Establishment Clause in the United States Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

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[114] *Id.*
[115] *Id.* at 526-27.
[116] Me. Op. Atty. Gen. No. 80-2 (Jan. 7, 1980).
[117] 20 M.R.S.A. § 912.
[118] ME. REV. STAT. tit. 20, § 1289.

exercise thereof," Article I Section 3 of the Maine Constitution included a similar statement. The Maine Constitution provided that:

"All men have a natural and unalienable right to worship Almighty God according to the dictates of their consciences, and no one shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship; —and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."

In the advisory opinion, Cohen began his Establishment Clause analysis by citing *Everson v. Board of Education* as precedent. The *Everson* Court acknowledged that the Establishment Clause was created with the intent to erect a wall of separation between Church and State.[119] Cohen then went on to discuss *Abington*, *Schempp*, *Board of Education v. Allen*, and *Lemon.* He addressed that after *Lemon*, the Court added a third and fourth element to the "purpose and effect" test that originated from *Schempp* and *Allen.*[120] However, citing *Committee For Public Education v. Nyquist*, he acknowledged that a law that grants an indirect, remote, or incidental benefit to religious institutions is not necessarily constitutionally invalid.[121]

Cohen then provided an explanation of each of the tests proposed by *Lemon:* The Purpose Test, The Primary or Principal Effect Test, The Entanglement Test, and The Political Divisiveness Test. Finally, he analyzes the Maine voucher statute within the context of each of those tests. Under The Purpose Test, he says that the statute does not violate the First Amendment since it had a secular purpose of providing the general education of all elementary

[119] Me. Op. Atty. Gen. No. 80-2 (Jan. 7, 1980).
[120] Me. Op. Atty. Gen. No. 80-2 (Jan. 7, 1980).
[121] *Comm. For Pub. Ed. and Relig. Liberty v. Nyquist*, 413 U.S. 756, 771 (1973).

and high school students. Under the Primary Effect Test, he says that since the voucher statute would allow the government to pay tuition for students at sectarian institutions, it would have the primary effect of advancing religion, and would, therefore, violate the Establishment Clause. In his analysis under the Entanglement Test, he concluded that using public funds to pay for education at sectarian schools would not be conducive to the maintenance of the wall of separation between Church and State. Therefore, he said this practice created an "excessive entanglement between the state and . . . sectarian schools" and that it was a violation of the Establishment Clause. Finally, he concluded that under the Political Divisiveness Test, the practice could lead to the kind of political divisiveness that the First Amendment was meant to prevent.

With these four tests, derived from the *Lemon* case, Cohen concluded that a program whereby the state would pay tuition for students in sectarian schools using public funds would violate the Establishment Clause. However, Cohen's advisory opinion was released in 1980 – forty-two years before the Supreme Court announced in *Kennedy* that the *Lemon* test was an invalid method for analyzing an Establishment Clause issue. As a response to his advisory opinion, the Maine Legislature added the "nonsectarian requirement."[122] This states that only a nonsectarian school may be approved for receiving public funds in Maine. The Supreme Court of the United States addressed this nonsectarian requirement, 20-A Me. Rev. Stat. §2951(2), in *Carson as next friend of O.C. v. Makin* and held that the requirement was an unconstitutional violation of the Free Exercise Clause.[123]

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[122] Nick Murray, *School Choice Map of Maine*, Maine Policy Institute, https://mainepolicy.org/project/school-choice-map/.
[123] *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 789 (2022).

In *Carson v. Makin*, David and Amy Carson (the parents of O.C.), Alan and Judith Gills (the parents of I.G.), and Troy and Angela Nelson (the parents of A.N. and R.N.) sued the Commissioner of the Maine Department of Education, on behalf of their children. In their complaint, they alleged that the "sectarian exclusion" violated the Free Exercise Clause and the Establishment Clause. The plaintiffs lived in school administrative units that did not have public secondary schools and that provided tuition funding to parents who sent their children to approved private schools. O.C. and I.G. attend a private Christian school while A.N. and R.N. attend a private school that is approved to receive funds from school administrative units. [124] The plaintiffs did not request for their units to pay tuition to selected sectarian schools because they claimed the nonsectarian requirement would make any such requests futile.[125]

First, the appellate court considered the plaintiffs' contention that the nonsectarian requirement discriminates against them on the basis of religion. Plaintiffs claimed that the requirement sought to single them out solely because they exercised their freedom of religion. To assess the validity of this claim, the First Circuit Court of Appeals looked to *Espinoza v. Mont. Dep't of Revenue* as precedent. The court noted that *Espinoza* differentiated between "discrimination in handing out school aid based on the recipient's affiliation with or control by a religious institution"[126] and "discrimination in handing out . . . aid based on the religious use to which the recipient would put it."[127] The First Circuit Court of Appeals categorizes these two types of discrimination as "status-based" and "use-based" respectively. Because the court found

[124] *Carson as next friend of O.C. v. Makin*, 979 F.3d 21, 26 (1st Cir. 2020), rev'd and remanded, 596 U.S. 767 (2022).
[125] *Id.* At 27.
[126] *Id.* at 38.
[127] *Id.*

that Maine's sectarian exclusion was use-based[128] rather than status-based, the court concluded that the exclusion did not violate the Free Exercise Clause.[129]

On appeal, the Supreme Court reversed this decision, holding that Maine's sectarian exclusion *did* violate the Free Exercise Clause. The Court primarily relied on *Espinoza's* holding that a provision of the Montana Constitution that barred government aid to any school "controlled in whole or in part by any church, sect, or denomination" was a violation of the Free Exercise Clause because it prohibited families from accessing "otherwise available" funding at the religious schools of their choice.[130] In *Lyng v. Northwest Indian Cemetery Protective Assn*., the Court expressed that the Free Exercise Clause does not only protect against outright prohibitions on the exercise of religion but also against "indirect coercion or penalties" on free exercise as well.[131] According to the Court, excluding religious observers from "otherwise available" public benefits has repeatedly been held to be a violation of the Free Exercise Clause.[132] If citizens can enjoy their freedom of religion only "at the cost of automatic and absolute exclusion from the benefits of a public program for which . . . [it was] otherwise fully qualified"[133] is that truly freedom?

Such prohibitions on the free exercise of religion are analyzed under strict scrutiny. It is rare that such a bar on religious freedom will survive strict scrutiny[134] as they are not narrowly tailored. While they could serve a compelling governmental interest, sectarian exclusions are not

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[128] *Id.*
[129] *Id.* at 46.
[130] *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 768 (2022).
[131] *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).
[132] *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 778 (2022).
[133] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017).
[134] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 546 (1993).

created in a narrow way to accomplish those interests.[135] According to *Employment Div., Dept. Of Human Resources of Oregon v. Smith*, such a law does not need to serve a compelling governmental interest *if* it is neutral and generally applicable.[136] If it is not neutral or generally applicable, however, it must be narrowly tailored to serve a compelling governmental interest.[137] Given that the nonsectarian exclusions are, by their nature, not generally applicable and not neutral to religion, they *must* serve a compelling governmental interest. While upholding the Establishment Clause is a compelling governmental interest, preserving the right to free exercise of religion is equally as important. The government is not required to fund private education, but when it chooses to fund private education, it cannot exclude religious schools simply because they are religious schools.[138] This is effectively a penalty for those who choose to exercise their right to religion.

When the funds from a public welfare program make their way to a religious school by way of the choices of the parents and students, it is not a violation of the Establishment Clause.[139] Therefore, an attempt to create a stricter separation of Church and State than is required by the Constitution, and violating the Free Exercise Clause to do so, is not compelling[140] or acceptable. It is a clear discrimination against religion[141] and against those who exercise their religious right. Using this reasoning, the *Carson* Court held that Maine's sectarian exclusion for the "otherwise . . . available" tuition assistance program was a violation of the Free

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[135] *Id.*
[136] *Id.* at 521.
[137] *Id.*
[138] *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464, 487 (2020).
[139] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
[140] *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 781 (2022).
[141] *Id.*

Exercise Clause because it sought out to exclude schools solely because of their religious exercise.

Carson v. Makin was one of the two biggest cases to challenge Blaine Amendments because of being an unconstitutional violation of the Free Exercise Clause. The other case that challenged them was *Espinoza* – a case that the *Carson* Court relied on heavily to reach its conclusion. In 2015, Montana enacted the Montana Tax Credits for Contributions to Student Scholarship Organizations program.[142] Under this program, individuals and corporations could claim tax credits in exchange for their contributions towards certain scholarship organizations.[143] Those organizations would then provide scholarships to fund private school and tutoring expenses. The schools that were qualified to receive this assistance came to be known Qualified Education Providers or QEPs. However, when the Montana Department of Revenue implemented Rule 1,[144] they added to the definition of QEP an exclusion that precluded religious private schools from being considered QEPs.

The plaintiffs in *Espinoza* were parents of children who attended a religious private school. They filed suit to challenge the constitutionality of the Rule on the ground that it violated the Free Exercise Clause of the U.S. Constitution as well as the Montana Constitution. In its analysis, the Court acknowledged that the exclusion sought to single out religious schools "solely because of . . . [their] religious character."[145] The defendants contended that the case *Trinity Lutheran Church of Columbia, Inc. v. Comer* did not set a precedent because the *Espinoza*

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[142] https://www.edchoice.org/school-choice/programs/montana-tax-credits-for-contributions-to-student-scholarship-organizations/.

[143] EdChoice, https://www.edchoice.org/school-choice/programs/montana -tax-credits-for-contributions-to-student-scholarship-organizations/.

[144] Admin. R. Mont. 42.4.802.

[145] *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464, 476 (2020).

provision, they claimed, was against religious *use* – not religious character.[146] While the *Trinity* Court had struck down nonsectarian exclusions based on religious *status* as unconstitutional violations of the Free Exercise Clause, the Court did not address the constitutionality of exclusions based on religious *use*.

The *Espinoza* Court explored the defendant's claim of religious use and found that the exclusion set by the Department of Revenue had been based on religious status and not on religious use.[147] Citing *Trinity*, the Court stated that placing this kind of condition on public benefits had the effect of deterring citizens from exercising their First Amendment right to Free Exercise of Religion.[148] The Free Exercise Clause serves to protect against these kinds of "indirect coercion[s]" and punishments.[149] The defendants went as far as to claim that exclusions like this were rooted in American history and tradition,[150] but the Court responded that it was a modern-day Blaine Amendment and that Blaine Amendments were "born of bigotry"[151] due to "hostility to the Catholic Church and to Catholics in general."[152] In its opinion, the *Espinoza* Court firmly maintained that the Constitution "condemns discrimination against religious schools and the families whose children attend them."[153]

CONCLUSION

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[146] *Id.*
[147] *Id.* at 477.
[148] *Id.* at 478.
[149] *Id.*
[150] *Id.* at 482.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 488.

In moments of educational crisis, when a local school system is underperforming (or absent), school choice programs serve as an excellent tool for bridging the gap and fulfilling the educational needs of children. With the primary purpose of educating *all* children, school choice programs accomplish just that. They ensure that every child can have their educational needs met and that government funds are used to meet each child's individual needs. Rather than simply funding the institution, regardless of whether it meets the needs of each child within it, school choice funds the *child* in his or her educational journey. School choice programs prioritize the children first, and that is why, as of right now, twenty-nine states and the District of Columbia currently have at least one school choice program.[154]

Due to a longstanding hostility towards religion, there have been efforts to prevent students and parents from applying school choice aid to religious schools and enjoying the full scope of the benefits that school choice seeks to provide. Since as early as 1875, states have been implementing Blaine Amendments to punish those who exercise their religious right and have been using the Establishment Clause as a justification for doing so. Time and time again, the Supreme Court has expressed that the Establishment Clause does not warrant excluding those who choose religious institutions from the otherwise generally available school choice programs. Excluding these schools (and the parents and students who choose them) is a discriminatory violation of the Free Exercise Clause. In the 1925 Supreme Court case *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the Court acknowledged that parents have the liberty to direct the upbringing and education of their children under the Fourteenth Amendment – even if that includes enrolling their children into religion-oriented schools. States should not be

[154] Libby Stanford, *Which States Have Private School Choice?*, Education Week (Jan. 31, 2024), https://www.edweek.org/policy-politics/which-states-have-private-school-choice/2024/01.

permitted to undermine that liberty and the Free Exercise Clause by discriminating against citizens who avail themselves of them.