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INTRODUCTION

State financial aid to religious schools, including vouchers and scholarships, has primarily raised issues under the Establishment Clause of the First Amendment, although there are a few cases addressing Free Exercise Clause issues. Under current law, state financial assistance to religious schools does not violate the Establishment Clause as long as 1) the public financial aid was afforded neutrally to a broad class of recipients regardless of their religious or social standing and 2) the financial aid flowed to the religious school through the recipient's independent and private choice.

The law governing the Free Exercise issues raised by some financial aid programs is less clear because the lower courts are split on the proper interpretation of the sole Supreme Court decision addressing such a claim. Generally, the Free Exercise Clause does not mandate the inclusion of religious institutions within every government aid program where their inclusion would be permissible under the Establishment Clause. Thus, the United States Supreme Court has held that states have the discretion to deny scholarships to otherwise eligible college students because they pursue ministerial degrees. Whether states may exclude certain kinds of religious schools from participation in generally available financial aid programs is less clear. One federal appellate court struck down a program which excluded "pervasively sectarian" colleges from a scholarship program. By contrast, a Florida state court held that a school voucher program that barred religious schools from participating was constitutional under the Free Exercise Clause. It may be some time before the Supreme Court clears up the confusion.

I. ESTABLISHMENT CLAUSE

The constitutionality of school vouchers and other state-sponsored aid to religious academic institutions under the Establishment Clause has been before the United States Supreme Court in several cases. The Court first addressed the constitutionality of financial assistance to religious schools in *Everson v. Board of Education*.¹ There a New Jersey town sought to provide publicly funded transportation to students of both public and parochial schools.² The Supreme Court held that the Establishment Clause is not violated where financial aid is directed to individuals selected without reference to their religious belief, as opposed to aid directed to religious activities or institutions.³ The Court reasoned that the aid provided benefits to individuals, regardless of their religion, in getting children “safely and expeditiously to and from accredited schools.”

In *Mueller v. Allen*,⁴ the Court upheld Minnesota tax laws which allowed parents to deduct tuition, textbook, and transportation expenses incurred by their children attending parochial schools. Key to the Court’s decision was the fact that the financial benefits were directed to parents and not to the schools.⁵ By contrast in *Lemon v. Kurtzman*,⁶ the Court struck down a Rhode Island statute that created a program to reimburse non-public schools, the majority of which were church-affiliated, for teacher salaries, textbooks, and instructional materials.⁷

¹ 330 U.S. 1 (1947).

² *Id.* at 3–4.

³ *Id.* at 16.

⁴ 463 U.S. 388 (1983).

⁵ *Id.* at 399.

⁶ 403 U.S. 602 (1971).

⁷ *Id.* at 609.

The recipient's identity continues to be the central focus in later cases dealing with financial aid. In *Mitchell v. Helms*,⁸ the plurality opinion held that if the aid offered by the state is neutral, that the aid is available to "a broad range of groups or persons without regard to their religion," the aid program is constitutional. *Mitchell* further held that when any governmental aid goes to a religious institution "only as a result of the genuinely independent and private choices of individuals," it does not offend the neutrality of the aid itself.⁹

Similarly, in *Witters v. Washington Department of Services for the Blind*,¹⁰ the Court unanimously held that the authorization of payment of funds to a visually handicapped student who sought to use the funds to pay the tuition at a Christian college to be a "pastor, missionary, or youth director" did not have the primary effect of advancing religion and thus did not violate the Establishment Clause. The source of the funds was the Washington Commission for the Blind, a state program which provided vocational rehabilitation assistance to the visually impaired pursuant to a Washington statute.¹¹ Justice Marshall stated that the aid program provided "no financial incentive for students to undertake sectarian education" and did not "tend to provide greater or broader benefits for recipients who apply their aid to religious education."¹² When "any aid to religion results from the private choices of individual beneficiaries," that should not be deemed a violation of the Establishment Clause.¹³

Again in *Zobrest v. Catalina Foothills School District*,¹⁴ the Court upheld the same principle, ruling that when the state provided a publicly funded sign-language interpreter for a

⁸ 530 U.S. 793, 809 (2000).

⁹ *Id.* (citing *Agostini v. Felton*, 521 U.S. 203, 226 (1997)) (internal quotes omitted).

¹⁰ 474 U.S. 481, 489 (1986).

¹¹ *Id.* at 483.

¹² *Id.* at 488.

¹³ *Id.* at 491 (citing *Mueller v. Allen*, 463 U.S. 388, 398–99 (1983)).

¹⁴ 509 U.S. 1 (1993).

deaf student in a parochial school classroom, it did not violate the Establishment Clause.¹⁵ Justice Rehnquist stated that “government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.”¹⁶

Most recently in *Zelman v. Simmons-Harris*,¹⁷ the Court summarized its approach to the financial aid cases as follows:

[O]ur jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.¹⁸

The *Zelman* Court reaffirmed *Everson*’s holding that neutral government programs that aid a broad class of individuals, rather than a small group of religious schools will survive constitutional scrutiny.¹⁹

[W]here a government aid program is neutral with respect to religion, and provides assistance *directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice*, the program is not readily subject to challenge under the Establishment Clause.²⁰

II. FREE EXERCISE CLAUSE

¹⁵ *Id.* at 14.

¹⁶ *Id.* at 8. Moreover, in *Agostini v. Felton*, 521 U.S. at 234–35, the Supreme Court upheld “a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis” and held that the program was not invalid under the Establishment Clause when such instruction was given on the premises of sectarian schools. As Justice O’Connor pointed out, both *Zobrest* and *Agostini* concerned the neutral provision of public benefits to eligible recipients, and that “aid is provided to students at whatever school they choose to attend.” 521 U.S. at 228.

¹⁷ 536 U.S. 639 (2002).

¹⁸ *Id.* at 649.

¹⁹ *Id.* at 652.

²⁰ *Zelman*, 536 U.S. at 652 (emphasis added); *see also Mitchell v. Helms*, 530 U.S. 793 (2000).

In the 2004 case of *Locke v. Davey*,²¹ the United States Supreme Court addressed whether a refusal to award generally available state financial assistance to a college student violated his Free Exercise rights. Mr. Davey, a Washington state college student, applied for and received a scholarship from a state program designed to assist with undergraduate education expenses of those who met certain criteria, including academic excellence.²² Mr. Davey met all relevant criteria²³ and chose to attend a private Christian college in pursuit of a dual-degree major in business management and pastoral ministries.²⁴ Mr. Davey was subsequently denied the scholarship due to the fact that he chose to pursue what was considered a “devotional theology degree.”²⁵ The state scholarship program, pursuant to the Washington State Constitution and state law, prohibited aid to students pursuing a degree in devotional theology.²⁶ Mr. Davey challenged the revocation of his scholarship as a violation of the Free Exercise Clause.²⁷

The Rehnquist-led majority, finding for the state, held that, although the Establishment and Free Exercise Clauses are “frequently in tension,”²⁸ there exists a “‘play in the joints’ between them.”²⁹ Designating the case as one involving both clauses, the Court held that “some state actions are permitted by the Establishment Clause but not required by the Free Exercise Clause.”³⁰ In its decision, the Court likened Mr. Davey’s studying to become a minister to actually performing the functions of a minister or “church leader.”³¹ The Court held that it was

²¹ 540 U.S. 712 (2004).

²² *Id.* at 715.

²³ *Id.* at 717.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 716.

²⁷ *Id.* at 718.

²⁸ *Id.*

²⁹ *Id.* (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 669 (1970)).

³⁰ *Id.* at 719.

³¹ *Id.* at 721.

permissible for a state to refuse to “us[e] tax funds to support the ministry,”³² and that revocation of Mr. Davey’s scholarship did not violate the Free Exercise Clause.³³ The Court reasoned that the general ban against discriminating against religion did not extend to a refusal to fund the training of the clergy, at least absent antireligious animus and outside the contours of a public forum for speech. Rather, the State had “merely chosen not to fund a distinct category of instruction.”³⁴ Just as a state may decide not to create theology departments in its public universities, a state may similarly choose to refrain from “even indirectly funding religious instruction that will prepare students for the ministry.”³⁵

In his dissent, joined by Justice Thomas, Justice Scalia argued that Washington state had withheld a generally available public benefit that was conditioned on certain neutral criteria based only upon Mr. Davey’s choice of study, thus, singling out religious study for unequal treatment.³⁶ Therefore, Washington’s prohibition of otherwise generally available financial aid for vocational ministerial study was facially discriminatory. Additionally, Mr. Davey was denied equal treatment because he was not afforded “the right to direct his scholarship to his chosen course of study, a right every other [scholarship recipient] enjoys.”³⁷ The dissent also disagreed with the “play in the joints” theory of the majority, stating that, even if that was a valid legal principle, “it would apply only when it was a close call whether complying with one of the Religion Clauses would violate the other. But that is not the case here.”³⁸

³² *Id.* at 723.

³³ *Locke*, 540 U.S. at 723.

³⁴ *Id.* at 721.

³⁵ *Id.* at 719.

³⁶ *Id.* at 727.

³⁷ *Id.*

³⁸ *Id.* at 728.

Since *Locke v. Davey*, two courts have construed the Court's holding in *Locke* and arrived at conflicting results. In *Colorado Christian University v. Weaver*,³⁹ the Tenth Circuit distinguished *Locke*. *Weaver* involved a Colorado state scholarship program which excluded colleges and universities that the state deemed "pervasively sectarian."⁴⁰ The law did not define that term but it did provide guidelines as to which universities were "not" pervasively sectarian.⁴¹ Colorado Christian University ("CCU"), a private university, was subsequently denied state funding, after the Colorado Commission on Higher Education found that CCU was a "pervasively sectarian" university that "tend[ed] to indoctrinate or proselytize."⁴² The Tenth Circuit rejected the state's reliance on *Locke*, holding that, although *Locke* may enable a state to exclude scholarship funds to students pursuing theology degrees, Colorado's law was unconstitutional because it discriminated among religions by excluding "pervasively sectarian" schools but not "sectarian" schools.⁴³ Additionally, the state's determinations about which institutions were "pervasively sectarian" entailed "intrusive governmental judgments regarding matters of religious belief and practice."⁴⁴ The court further held that Colorado's subsidization of higher education to students attending "sectarian" schools, but not "pervasively sectarian" schools was express and explicit discrimination among religious institutions.⁴⁵ Thus, the Tenth Circuit found *Locke* non-controlling where, in conjunction with the use of its scholarship funds, the state manifested a preference among religious institutions.

³⁹ 534 F.3d 1245 (10th Cir. 2008).

⁴⁰ *Id.* at 1250.

⁴¹ *Id.* (citing Colo. Rev. Stat. 23-3.5-105 (repealed in 2009)).

⁴² *Id.* at 1253 (quoting Colo. Rev. Stat. 23-3.5-105(1)(d) (repealed in 2009)).

⁴³ *Id.* at 1256.

⁴⁴ *Id.*; see also *Larson v. Valente*, 456 U.S. 228, 246 (1982) (imposing strict scrutiny on government decisions that discriminate among religiously affiliated organizations); *NLRB v. Catholic Bishop*, 440 U.S. 490, 502–03 (1979) (discussing limitations on the power of the government to base decisions on intrusive questions regarding religious beliefs or practices).

⁴⁵ *Weaver*, 534 F.3d at 1258; see also *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("[A]n exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between kinds of religious schools.").

By contrast, in *Bush v. Holmes*,⁴⁶ the First District Court of Appeals of Florida relied on *Locke* in denying a Free Exercise claim against a state school voucher program. The court held that the “no-aid” provision in the Florida State Constitution prohibiting state funding from going to any sectarian institution was constitutional, pursuant to *Locke*, because state constitutions may impose stricter regulations on public funding of religious institutions without violating the Free Exercise Clause.⁴⁷ The court further relied on *Locke* in holding that Florida’s denial of vouchers to religious schools “fits within the ‘play in the joints’ between the Establishment Clause and the Free Exercise Clause and, thus, does not violate the Free Exercise Clause of the United States Constitution.”⁴⁸

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

⁴⁷ *Id.* at 360–61.

⁴⁸ *Id.* at 365.