

FAITH AND EDUCATION IN THE COURTS

James A. Sonne and Lloyd Macauley Richardson

American education is in crisis, and there is a strong case to be made for expanding the role of religious schools and other faith-based organizations as part of the solution to our problems. Those who would press for a larger role for faith-based schools and other organizations in our society must be alert to the limitations imposed on them by modern judicial doctrine. The Supreme Court has set up a number of roadblocks to expanding the role of faith-based institutions in education, so it is critical to understand the history and current status of these constitutional roadblocks to appreciate how difficult it will be to apply the appropriate remedies to the crisis in education.

During the past thirty years, our nation has witnessed a systematic assault on the principle that judges are to interpret, not create, the law. The events occurring in Florida during our most recent Presidential election offer but the latest (albeit an egregious) example of this “legislating from the bench.” As evidenced by the litigation spawned by the election, the inevitable result of judicial activism is the replacement of the popular will, as expressed through elected legislatures, with the judge’s individual notion of a “just result.” Although partisans may applaud particular outcomes, chaos has ensued, for not only does judicial activism polarize issues best resolved through political channels, it also breeds uncertainty, because visions of a “just result” naturally vary by judge, by court, and by issue. Nowhere have the harmful effects of this activism been more evident than in two traditional pillars of American life - religion and education -and their interaction in modern society.

It is no secret that our educational system is a failure. Critics from across the political spectrum decry the state of our public schools and the moral and academic impoverishment of their students. Yet the courts have played a significant role in this failure, a fact which is virtually ignored. Through their activism, today’s judges have marginalized faith-based alternatives to the public system and diminished the role of such institutions as the traditional bedrock of American education. In particular, activist courts, in the name of the “separation of church and state,” have denied faith-based institutions equal access to government programs and benefits that are otherwise available to

public and even secular private schools. Religious schools have suffered, but the public system has suffered too, lacking the serious competition that faith-based schools have traditionally offered.

There are both practical and philosophical reasons to take a hard look at faith-based schools and the contribution that they can make to our society. As a practical matter, we should understand how religious schools spend less per student than the public schools and, in general, achieve better academic results.¹ Like private schools in general, religious schools offer a compelling alternative to public education and increase the range of choices available to parents in the marketplace. Competition and experiment - a microcosm of federalization if you will. How can this be bad for education?

In addition, religious schools offer much to admire from a philosophical perspective. Typically, they make no bones about inculcating moral values. In a nation of eroding moral sensibilities and increasing teen violence, the values of hard work, discipline, and respect, as taught by these schools, should hardly be discouraged. As our public system demonstrates, it is difficult to provide a solid moral or intellectual foundation through values-free education. As William Bennett writes in his *Book of Virtues*,

If we want our children to possess the traits of character we most admire, we need to teach them what those traits are. They must achieve at least a minimal level of moral literacy...to make sense of what they see in life.

And Paul Johnson noted in the September 26, 1987 *Spectator* magazine, in speaking of the British educational system,

For half a century [education] has been in the hands of the educational experts.... They have not yet completely killed the habit among children of reading worthwhile books, but they have certainly had a go.

But those who would press for a larger role for faith-based schools and other organizations in our society must be alert to the limitations imposed on them by modern judicial doctrine. Our 43rd President has stressed the need to expand the role of these institutions. In a speech delivered July 22, 1999, to the Front Porch Alliance in Indianapolis, Indiana, President George W. Bush declared:

[I]n every instance where my administration sees a responsibility to help people, we will look first to faith-based organizations, charities and community groups that have shown their ability to save and change lives.

This theme was echoed in his inaugural address:

Church and charity, synagogue and mosque lend our communities their humanity, and they will have an honored place in our plans and in our laws.

Indeed, through his opening of the new White House Office of Faith-Based and Community Initiatives, President Bush has signaled his commitment to such institutions.

These are honorable sentiments and beginnings, but can they be more than that? Thanks to our judicial system, faith-based institutions will continue to confront special problems - especially in education. As the new President begins to implement his education policies, he will hit the roadblocks built brick by brick by the judiciary and its liberal allies over the past thirty years. While recent court decisions give some reason for hope, the direction judicial policy will take is open to question - and is likely to depend to a large extent on the future composition of the U.S. Supreme Court. Under these circumstances, the policies pursued by the current administration in Washington may be less important than the appointments it makes to the federal judiciary -in particular the Supreme Court. In any event, those who care about the state of education in this country - both public and private - would do well at the very least to pay close attention to judicial appointments in the near term. They may even see the next four years as an opportunity to press for judicial reform. Otherwise, just as the judiciary built these roadblocks, only the judiciary will be able to pull them down. In the meantime, it is critical for anyone concerned with the crisis in education to understand the history and current status of these constitutional roadblocks to appreciate how intractable this problem will be to solution.

The Lemon Test

Modern courts have professed to “find” law in many parts of the United States *Constitution*—sometimes in a “penumbra,” sometimes in plain text. As an example of this judicial creativity, the analysis of the United States Supreme Court in its 1971 decision in *Lemon v. Kurtzman* is breathtaking. Rarely has a court so completely succeeded in standing the *Constitution* on its head to reach a desired outcome. As a result, *Lemon* and the related line of cases - both state and federal - have worked a particular hardship on faith-based education.

In *Lemon*, the Court struck down statutes in Rhode Island and Pennsylvania: Rhode Island’s law would have permitted appropriated funds to be used to supplement salaries of teachers teaching secular subjects in private (including religious) schools; Pennsylvania’s statute would have allowed the state to contract with private (including religious) schools to teach secular subjects to students in the public school system. *Lemon* was decided under the First Amendment to the *Constitution*,² which provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The two clauses of this straightforward sentence have given rise to two separate Constitutional doctrines -one regarding “establishment” and the other, “free exercise.” Proceeding under the establishment clause, the Court in *Lemon* held that a statute will be constitutional if it is demonstrated that: (1) the statute has a “secular purpose,” (2) the “primary effect” of the statute does not “advance or inhibit religion,” and (3) the statute does not result in an “excessive entanglement” between the religion and government.

At first glance, the *Lemon* test appears reasonable enough, even if fabricated of whole cloth and with no reference to the constitutional text. Not content, however, merely to read new language into that text, the Court, in a further intellectual tour de force, determined that what “primary effect...of advancing or inhibiting religion” really means is that a recipient institution cannot be “pervasively sectarian.” The logic appears to be this: If your school exists largely to advance your religious tenets, then the effect of any activity in which you engage -regardless of your intent or motivation in undertaking that activity -must be to advance religion.³ If you receive any government funds or participate in a government benefit program, then government has likewise advanced religion -which is prohibited by the establishment clause.

How do you know a “pervasively sectarian” institution when you see one? Well, under the *Lemon* doctrine, that’s easy. You undertake an exhaustive examination of the ways in which the faith-based institution implements its religious views in daily practice. With respect to schools, that examination may focus on the following broad areas: (1) the relationship between students and school administration or church officials; (2) the relationship between the faculty and the administration or church officials; or (3) the relationship between the institution itself and its affiliated church (particularly as it affects governance and budget demands). Each of these areas in turn are analyzed by looking at numerous factors -by our count, more than 50 in all. As a result, the *Lemon* test would appear to promote the very “entanglement” that it seeks to avoid. It is certainly hard to imagine a more intrusive way for government to involve itself in religion than through the scrutiny of dozens of different aspects of an institution’s daily practices.

The *Lemon* test was problematic for faith-based education from the outset. First, it put the burden on the religious institution to show that the statute creating the program in which the institution was attempting to participate met all the elements of the test. From a procedural perspective, this approach is truly antithetical to the proper purpose of the establishment clause, for it puts the burden on the citizen to show that the government has not exceeded its constitutional powers. As part of the Bill of Rights, the establishment clause was above all else intended as a limit on the actions of government, not citizens. Substantively as well, *Lemon* has effectively limited

the participation of faith-based institutions in our public life, especially as the scope of government and government funding has expanded in recent history. Moreover, interpreted as a limitation on religion, this establishment clause jurisprudence rests squarely in the way of any sensible reading of the Constitution's "free exercise" clause -as the Supreme Court has only just begun to admit in a few cases.

Lemon is most troubling in its conclusion that an institution may participate in a public program only to the extent that it is not "too religious." As a result, the test creates a perverse incentive for religious schools to abandon fundamental practices, so as to appear more "secular," while at the same time attempting to maintain their standing among their constituents by providing traditional, faith-based education. This is an untenable position. In effect, the more "religious" an institution is, the greater the forfeiture of rights.⁴ As Justice Thomas recently opined in *Helms v. Mitchell*, the "pervasively sectarian" criterion reserves special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to their children.

This is not just a theoretical problem. Consider the case of Liberty University, located in Lynchburg, Virginia, and founded by the Reverend Jerry Falwell, a well-known religious activist. In a 1991 case, *Habel v. IDA of Lynchburg*, the Supreme Court of Virginia, based on Liberty's religious nature, rejected its request for conduit bond financing under a Virginia program that involved no expenditure of public funds. Following the decision, Liberty was not only denied access to the conduit bond program, but was forced to eliminate or modify its religious practices so that its students could continue to receive state tuition grants under another state program which threatened to cut off grants as a result of *Habel*. (Notice this aid went directly to the student, not to the school.) To retain funding, Liberty eliminated required chapel attendance, dropped the requirement that students adhere to Liberty's statement of faith, and, perhaps most significantly, cut the school's formal ties to its affiliated church. Even making these changes, Liberty was never able to resume its participation in the state's bond program.

Although almost ten years later the Supreme Court of Virginia reconsidered *Habel* in a similar case involving Regent University, and reversed the earlier holding, this reversal was little consolation to Liberty and is binding precedent only in Virginia. Other states and federal courts, even those in Virginia, have used and may continue to use *Habel*-like reasoning. Among other things, Liberty's experience clearly demonstrates what is at stake for schools: the billions of dollars that government collects as taxes and then redistributes to its favorite charities. These dollars offer a powerful incentive for any institution to fit within the parameters imposed by the judiciary and, as we

can see, those who are “too faithful” need not apply.

Finally, because it is so fact-intensive, the *Lemon* test does not foster predictability. In a recent dissent protesting the Court’s refusal to take a case that might have effectively jettisoned *Lemon*, Justice Thomas noted the uncertainty of outcomes resulting from the test:

[By abolishing the *Lemon* test,] we also would provide the lower courts - which are struggling to reconcile our conflicting First Amendment pronouncements -with much needed guidance . . . [T]he growing confusion among the lower courts illustrates that we cannot long avoid addressing the important issues that [this case] presents.⁵

When a legal test is not only invasive but unpredictable as to outcome, it will inevitably have a “chilling” effect on the activities of affected citizens. Nonprofits - including religious schools - are especially vulnerable to these effects, because they typically lack the financial resources to take on a high stakes legal battle. Nor do they seek the notoriety that may result.

In short, *Lemon* represents the worst type of lawmaking - fostering neither certainty nor good sense, qualities that our founders considered important to constitutional democracy. One thing is clear, however: Whether or not by design, through *Lemon* the Supreme Court has successfully limited the access of religious schools to public aid - both direct and indirect - otherwise available to public or secular private schools and, in so doing, has effectively marginalized the impact of faith-based schools.

Impact on Financing of Religious Schools

The outcome in the *Habel* case is typical of how faith-based schools have fared nationwide in participating in government-sponsored tax-exempt bond financing programs (sometimes referred to as “conduit bonds”). Conduit bonds use no public monies, subsidies or guarantees. As a form of financing, they represent a cheap alternative to other sources of capital available to a school. Increasing capital costs limit an institution’s role in the marketplace by increasing its cost of doing business. In 1973, the Supreme Court extended *Lemon* to conduit bond programs through its decision in *Hunt v. McNair* - even though these bonds represent only the most indirect form of government aid. Based on the facts in that case, the Court upheld the constitutionality of South Carolina’s conduit bond program, even though certain faith-based schools were allowed to participate in the program. Unfortunately for the interests of clarity and predictability, the school at issue in that case was determined by the Court not to be “pervasively sectarian.” Nor did the Court indicate what it would have done if the school had been “pervasively sectarian,” but lower courts, and even the Supreme Court in later cases, have interpreted *Hunt* as banning all types of aid to these schools, even aid of the most indirect type.

It is difficult to quantify the impact of *Lemon* on faith-based schools. Virtually every religious school in the country - whether primary, secondary, college or university - has considered a bond financing at one time or another in the past 30 years. It is estimated that in 1998 there were approximately 21,000 faith-based schools in the United States (including Catholic schools). A few have successfully issued bonds in that period. But how many more have simply given up and accepted the higher cost of alternative financing? How many new schools would otherwise have been founded? How many existing schools would otherwise have larger or better facilities, and be able to attract more students as a consequence? No one knows for sure, but attorneys involved in financing nonprofit schools have ample anecdotal evidence.

This whole area of the law has been further complicated for faith-based schools by a distinction drawn by the courts between “direct” and “indirect” aid. While this distinction frequently affects outcomes, courts have not clearly defined these terms. Some courts have taken the view that direct aid goes to the school; while indirect aid goes to the student, who then makes an independent decision on where to use the aid. Other cases seem to suggest that what matters is the form the aid takes, with appropriated public monies being the most limited.

Under either set of definitions, exclusion of religious schools from conduit bond programs seems particularly unnecessary given that any aid provided by these programs is about as “indirect” as government aid can be. Conduit bond programs use no public funds (other than to defray the internal costs of program administration, which are often offset by user fees paid by the schools); nor do they provide aid directly to the user schools. Congress makes tax-exempt bonds generally available to nonprofit organizations on the theory that by not taxing the interest paid on such debt, the nonprofit issuers can more effectively deliver services to society at large, because a greater proportion of their revenues will go to substantive programs rather than to debt service. It is important to understand how tax-exempt bonds do this. Investors buy bonds because they want a stable return on invested funds. Interest rates on bonds are set by the financial markets; the individual investor determines his return on the bonds by taking into account his tax bracket. The higher his tax bracket, the higher the interest rate he will demand on a taxable corporate debt obligation. If he does not have to pay tax on the interest he receives (as is the case with tax-exempt bonds), he can accept a lower interest rate and remain in the same financial position on an after-tax basis. This lower interest rate benefits the nonprofit issuer of the tax-exempt instrument by lowering its debt service requirements. The dollars saved on debt service translate into more funding for its substantive programs. Thus the benefit is not a transfer payment made by the government to the nonprofit; rather, the benefit flows to the nonprofit only indirectly, by the government’s *not* taxing the investor who buys the nonprofit’s debt instruments.

The amount of benefit bestowed on the investor through tax-exempt bonds is a function of the investor's own tax situation, which has nothing to do with the nonprofit. This benefit is no different conceptually from the "subsidy" to nonprofits that results from the government's policy of not imposing taxes on nonprofits generally. Avoiding direct taxation of nonprofits arguably represent a direct subsidy of their activities; yet no one would assert that this government-dictated exemption from taxation allowed to nonprofits represents an impermissible "establishment of religion." Indeed, in *Walz v. Tax Commissioner of the City of New York*, 397 U.S. 664 (1970), the U.S. Supreme Court specifically upheld general property tax exemptions on religious entities [and exemptions from income taxes have been similarly upheld]. In *Walz* Justice Brennan acknowledged in his concurring opinion that tax exemptions for churches, of which the overwhelming majority were Christian, existed "from the beginning of the Nation's life."

Tax-exempt bonds raise an establishment clause issue because, under the federal tax code, nonprofits can avail themselves of tax-exempt bonds only if a state or local government body issues the bonds on their behalf. On its face, the role thus played by the government appears to confer a direct benefit on the nonprofit. The state or local government, however, serves as a mere conduit in these transactions, and its credit is in no way implicated in the financing. The nonprofit pays all of the principal and interest due on the bonds, while the local government simply issues the bonds as an accommodation. Beyond its initial, nominal participation as issuer of the bonds, the state or local government has virtually no continuing involvement in the financing. The "subsidy," then, does not arise by transferring government revenues from one person to another but, rather, as the result of social policy that discourages government taxation of interest income received by investors to the extent that the interest is being paid by a nonprofit. The amount of the subsidy is ultimately determined by the market and the individual investor, free of government interference.

It is often asserted, however, that when nonprofits are not taxed, other taxpayers are likely to pay more taxes to cover the shortfall and, accordingly, this is a true subsidy which should be impermissible under the establishment clause. This argument overlooks several points: First, the tax revenues that government loses by avoiding taxation of nonprofits can be viewed as an expenditure for social needs that reduces the government's role in servicing those needs, thereby reducing demands on the public fisc commensurately. Second, characterizing these monies as "lost revenues" to the government presupposes that government would otherwise tax these organizations. But government avoids taxation of nonprofits (which it plainly has the power to do) partly because nonprofits and the role they play in society predate the state in general and the welfare state in particular. Charitable organizations trace their origins to the Middle Ages,

when (as today) they were often affiliated with the Church. The Church in those days represented a parallel government whose representatives (and often parishioners) were largely unfettered by secular laws. It is not surprising that these habits of mind found their way to the United States; all of the several states at one time or another in their early history adopted the English Common Law, and respect for the independence of charitable institutions was by then deeply ingrained in that tradition. Finally, government avoids taxation of religious nonprofits because such taxation, in itself, has the potential to create its own establishment clause problems by entangling the government in the financial and other internal affairs of churches.

Implicit in the discussion of the taxation of churches is also an inevitable moral dimension. The rise of the welfare state in the latter half of the Twentieth Century has clearly demonstrated that programs funded and operated directly by the government tend to weaken or corrupt the virtues of its citizens. While a detailed explanation of this phenomenon is beyond the scope of this discussion, it is clear that the virtue of “charity,” when compelled by government, is no virtue at all.

By contrast with faith-based charities, nonprofit organizations promoting secular humanism seem to have unbounded access to public coffers. Moreover, such organizations are likely to be *directly* subsidized by the government, thereby leveraging their ability to compete effectively for funds and to get their message heard in the public square.⁶ Small wonder that the religious viewpoint on important social issues is increasingly stifled or marginalized in the national dialogue.

History of the Establishment Clause: A Tradition of Neutrality

The *Lemon* legacy stands in direct contrast to the earlier history of the Establishment Clause. When our founding fathers debated the inclusion of a “bill of rights” in the *Constitution* as a means of limiting government power, they brought many different religious and political perspectives to the table. From the Congregationalists of Massachusetts and the Quakers of Pennsylvania, to the Anglicans of Virginia and the Catholics of Maryland, these statesmen, although predominantly Christian, shared no particular principles when it came to determining the relationship between religion and government. Influenced by their shared experiences in Europe and as colonists, however, they achieved a delicate balance in constructing the religion clauses of the First Amendment. Of course, as with all provisions in the Bill of Rights, these prohibitions applied only to the federal government, and specifically Congressional action. But early on, the several states all included similar provisions in their own constitutions.

Although the meaning of the free exercise and establishment clauses has engendered intense debate in past decades, they received scant attention in

our early history. Constitutional scholars debate the reasons for this inattention, but three reasons are compelling. First, as mentioned above, the balance struck by the founding fathers literally affected only the federal government (specifically, Congress), and not the states, each of which had its own religious tradition. Indeed some states actually had established “state” churches at the time. It was only with the adoption of the 14th Amendment after the Civil War (and for almost 80 years thereafter), that the religion clauses were interpreted to reach state action. Before the 14th Amendment was enacted, the relatively small size and role of the federal government minimized the potential scope of potential conflict.

The second reason for the relative calm in religious matters in the early years, was that our nation was relatively homogenous, at least in terms of general Christian beliefs. Indeed, Christianity dominated both private culture and public life. As a result, when conflicts did arise (e.g., the federal funding of Christian schools to educate Native Americans in the early nineteenth century), they did not receive the attention they would today.⁷ As Justice Black argued in the 1963 case of *Abington School District v. Shempp*, “Practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and nonbelievers alike.”

The third reason for a lack of early conflict, also noted by Justice Black in *Abington School District* and cited by Stone, Seidman, Sunstein and Tushnet in their treatise, is the fact that the educational arena, where the vast majority of modern cases have arisen, was largely dominated at the time by private, not public, schools. As Black posits, “Education, as the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision.” The near-passage of the Blaine Amendment in the 1870s, which would have amended the *Constitution* to prohibit aid to any “sectarian” (a code-word for “Catholic,” according to Justice Thomas in the recent case of *Helms v. Mitchell*) institutions, did raise the specter of conflict centering on education, but the issue remained otherwise dormant until the mid-20th century.

The Modern Battle

The groundwork was laid for the modern establishment clause debate by the Court’s 1947 decision in *Everson v. Board of Education*. In *Everson*, the Court determined that the 14th Amendment compelled the establishment clause to apply to state action. The Court’s decision was reached not on legal, but on policy grounds - as an appeal to religious freedom. Unlike some other federal constitutional provisions that had been found to limit state power - e.g., search and seizure, or cruel and unusual punishment -the establishment clause by its terms applies only to Congressional laws respecting religion and does not

on its face create individual rights. Moreover, it was unnecessary to read the establishment clause into this area because most state constitutions already contained similar limitations on the actions of their state legislatures. Nevertheless, *Everson* had an impact, perhaps because of the increasing dominance and prestige of federal courts in that period and the historical tendency of state courts to follow federal constitutional analysis.

Although radical in its implications, the *Everson* decision itself was restrained and carefully crafted, balancing the potentially conflicting principles of free exercise and establishment. In approving a program providing bus transportation for all elementary and secondary school children, including those attending parochial schools, the Court held that establishment of religion concerns must not “prohibit [the state government] from extending its general state law benefits to all citizens without regard to their religious belief.”

This “neutral” approach of the Court continued through cases like *Walz* (1970), where it upheld the constitutionality of a real property tax exemption extending to churches; and *Board of Education v. Allen* (1968), where it approved the provision of textbooks to pupils attending parochial schools. The Court in *Walz* recognized that certain tax exemptions necessarily afford an “indirect economic benefit,” but that “benevolent neutrality” toward churches is a part of our national fabric generally, “so long as none is favored over others and none suffers interference.” Similarly, in *Allen*, the Court upheld the aid primarily because the “law merely makes available to all children the benefits of a general program to lend school books free of charge.” Neutrality remained a factor in Supreme Court decisions throughout the 1970s and 1980s, particularly for aid programs that were viewed as “indirect” (e.g., tax deductions (see *Mueller v. Allen* (1983)), or nonfundable aid granted to students rather than directly to schools (see *Witters v. Washington Department of Services for the Blind* (1985)), but it was no longer the dominant mode of analysis after the 1971 *Lemon* decision.

Lemon represented a complete reversal by the Court. With this change, religious institutions began to fare badly, and as was the case with the Blaine Amendment controversy almost a hundred years earlier, parochial schools arguably paid the biggest price. As Justice Thomas noted in his plurality opinion in *Helms*,

Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.” (internal citations omitted). . . . Notwithstanding its history, of course, “sectarian” could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in [*Hunt v. McNair* (1973)], it coined the term “pervasively sectarian” - - a term

which, at that time, could be applied almost exclusively to Catholic parochial schools

The “pervasively sectarian” trend may have reached high tide in 1985 when the Court decided *Aguilar v. Felton* and its companion case, *School District of Grand Rapids v. Ball*. These cases involved programs in which the state sent publicly employed teachers or other professionals into private elementary and secondary schools to teach certain core subjects or provide remedial services. Although the programs were entirely neutral in that they were made available to religious and non-religious schools alike, the Court held in these cases that the institutions at issue were “pervasively sectarian” and, therefore, participation by religious schools in these programs was impermissible as an establishment of religion.

An obvious question that the courts since *Lemon* never seem to ask is: What happened to the free exercise clause? “Free exercise” jurisprudence charted its own relatively independent course through the years, although it generally took a back seat to “establishment.” Indeed, the Supreme Court decided early on, in another example of judicial fiat, that infringement of “free exercise” was justified if necessary to address an “establishment” concern. With the application of the “pervasively sectarian” *Lemon* test to neutral programs such as those at issue in *Aguilar*, however, the inherent conflict between the two clauses became more obvious. As Justice Thomas noted in *Helms*, “the application of the ‘pervasively sectarian’ factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.”

In the 1995 case of *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court took a first, tentative step back toward “neutrality,” largely in an effort to reconcile the two religion clauses. In *Rosenberger*, the Court upheld the right of a fundamentalist Christian magazine, *Wide Awake*, to obtain a printing subsidy from the University of Virginia, a public institution. Without reference to the *Lemon* test, the Court observed that “a central lesson of our decisions is that a significant factor in upholding government programs in the face of Establishment Clause attack is their neutrality towards religion.” The Court stated further that to deny *Wide Awake* participation in the University program because of its religious viewpoint violated the rights of free speech as well as free exercise of religion.

In 1997, the Court extended the *Rosenberger* frame of analysis to the establishment clause. In *Agostini*, reversing its own decision 10 years earlier in *Aguilar*, the Court in effect said, “Why not focus in the first instance on the government’s actions, rather than the character of the faith-based organization?” This modern approach to neutrality examines the manner in which the government administers a particular funding program: If the

program takes all comers and allocates funds without consideration of the religious character, if any, of applicants, then the government's actions are "neutral" with respect to religion, rather than having the effect of establishing a state religion. Then, provided the legislature has declared a secular reason for the funding program in the first place (say, meet healthcare needs, improve education, advance the arts), the funding will be deemed not to violate the establishment clause. Neutrality then is not a form of conservative activism. It is rather a return to the framers' intent and over 150 years of establishment clause tradition.

Despite recent progress, however, neutrality is still not controlling judicial doctrine in religion cases, either at the United States Supreme Court or in other courts throughout the land. Notwithstanding the merits of the neutrality doctrine in both substance and ease of administration, the Supreme Court has shown an unwillingness to abandon the *Lemon* test altogether. As Justice Scalia pointed out in *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993), *Lemon* is

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, . . . stalk[ing] our Establishment Clause jurisprudence, [even though individual justices] have . . . driven pencils through the creature's heart.

Indeed, the continued vitality of *Lemon* is driven home by the Court's most recent establishment clause decision in *Helms*, where although the plurality seemed to declare the "burial" of *Lemon* and the "pervasively sectarian" analysis, the only way a majority decision was reached was through Justice O'Connor's continued insistence on analyzing the religious nature of the school at issue, even though that school would be receiving neutrally available aid. O'Connor's approach was echoed in the recent Virginia Supreme Court case involving Regent University, where the Court approved conduit bonds for Regent but it signaled that the "pervasively sectarian" nature of the school was still a factor, depending upon the nature of the aid involved.

Where Are We Now?

We have made progress, but whether individual religions will be allowed to participate in government programs still comes down to individual judges and their reasoning, which varies court by court and state by state. As long as activist judges continue to have their say, the chaos will continue. As evidenced by the recent 5-4 decision in *Bush v. Gore*, there is clearly a split in the current Supreme Court, at least partly along ideological lines. Despite recent gains, the future direction of the Court in this area of the law is therefore

in doubt, and is likely to depend on the Supreme Court appointments that President Bush will make in his first term.

While it is possible to construct a principled conservative position against government “entanglement” of all types in the activities of our religious organizations - including through the types of funding discussed here - we believe the better position is to support the Court’s rejection of the *Lemon* doctrine and adoption of neutrality. The funds allocated by these spending programs are after all taxpayers’ monies, which should be distributed as widely as possible and without favoritism, if they are to be spent at all.

Finally, the *Lemon* doctrine promotes direct government programs at the expense of community self-help, a concept which should offend conservative thinking if nothing else does. This outcome is particularly nonsensical when the whole point of promoting nonprofit activity - in education and elsewhere — is to encourage nonprofits to provide community services that government might otherwise be inclined to provide directly. The resulting void in available social goods inevitably encourages a larger role for government, thereby replacing individual and community values with collectivized values dictated by the state.

America is an affluent country, and is only likely to become more so. As affluence increases, the demand for education and other social goods will only go up, not down. The model that is determined in the next four years to be acceptable for the funding of education—including vouchers—will be influential in setting precedent for social spending across the board. Even if government’s role in providing these social goods remains the same in relative terms, then government can only grow in absolute terms. For anyone interested in limited government, this is a battle to watch.

Notes

1. The best data on faith-based schools comes from the parochial system. The National Catholic Educational Association reports that public school students’ mean SAT verbal and math scores were 501 and 510 respectively, while private school students scored 529 and 523 respectively. The U. S. Department of Education reports that in 1993-94, the graduation rate in public schools was 92.6% while the rate of private schools was 98.2%; 87.5% of private high school graduates applied to college, while only 57.4% of public students applied.

As for spending, in 1997-1998 the *Education Statistics Quarterly* reported that the average per student in the public schools was \$6,198. In 1995 the National Center for Education Statistics published an estimated per student expenditure in private K-12 schools of \$3,380.

2. State constitutions also contain these provisions. We will often refer to the

establishment clause of the U.S. *Constitution* without distinguishing that this is the federal and not any state's constitution. Under federal preemption doctrine a state's establishment clause could theoretically restrict a religious organization's participation in a state funding program further than the U.S. *Constitution*. The state could not, however, permit greater access than is permitted by the U.S. *Constitution*.

3. See, for example, Lark and Graves, "A Change of Focus at the Supreme Court May Lead to Wider Availability of Tax-Exempt Financing," *Journal of Taxation of Exempt Organizations*, Jan-Feb 2000.

4. Conservatives in particular should be disturbed by these implications. The test inherently targets those nonprofits that are more likely to promote overtly their religiously-oriented agendas, compared with more mainstream organizations, whose religious views have often become so liberalized as to be indistinguishable from secular humanism.

5. *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir.), cert. denied, 119 S.Ct. 2357 (1999) (Thomas, J., dissenting from denial of petition for writ of certiorari).

6. 1998(?) amendment of federal funding act

7. See Stone, Seidman, Sunstein, Tushnet, *The History of the Religion Clauses, Constitutional Law*, Boston, Little, Brown & Co., 1458-1461 (2nd Ed. 1991).

