

Cambridge University Press

978-0-521-53217-4 - Under God?: Religious Faith and Liberal Democracy

Michael J. Perry

Excerpt

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Part I

Mainly for the Agnostics
and the Exclusionists

What Does the Establishment Clause Forbid?

Reflections on the Constitutionality of School Vouchers

INTRODUCTION

[This chapter was completed before the Supreme Court, on June 27, 2002, decided the Cleveland school voucher case: *Zelman v. Simmons-Harris*.¹ The Court ruled, by a vote of five to four, that the Cleveland school voucher program does not violate the Establishment Clause of the United States Constitution. As one can infer from my argument in this chapter, I think that the Court’s ruling was correct.²]

Both during his campaign for the presidency of the United States and after moving into the White House, George Bush made two proposals that fanned the flames of the ongoing controversy over the proper role of religion in the nation’s public life. Expressing alarm at the persistently sorry state of many of the nation’s public elementary and secondary schools, Bush proposed a program of school vouchers in which even religiously affiliated schools would be eligible to participate.³ More famously, he proposed making it easier for “faith-based” social service providers⁴ to gain access to federal financial support.⁵ In response to Bush’s (and similar) proposals, many have insisted, and many others have denied, that government aid to religiously affiliated entities, such as elementary and secondary schools and social service providers, would violate the constitutionally mandated separation of church and state. In this chapter, I inquire whether the constitutional imperative that government not “establish” religion leaves any room for government to spend money in support of religiously affiliated schools. I begin by elaborating a general understanding of what the Establishment Clause – or, as I prefer to call it, the “nonestablishment norm” – does and does not forbid government to do.

I focus in this chapter on just one sort of government aid to religiously affiliated schools: school vouchers. However, the logic of my

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argument in this chapter extends beyond school vouchers to other forms of government aid to religiously affiliated schools; indeed, it extends even to government aid to faith-based social service providers. There is, in my judgment, no constitutionally relevant distinction – no distinction relevant to the nonestablishment norm – between school vouchers and other forms of government aid to religiously affiliated schools; nor is there any constitutionally relevant distinction between government aid to religiously affiliated schools and government aid to faith-based social service providers. If, as I argue here, including religiously affiliated schools in a program of school vouchers does not necessarily violate the nonestablishment norm, then, by a parity of reasoning, including them in other programs of government aid to nonpublic elementary and secondary schools does not necessarily violate the nonestablishment norm; and if including religiously affiliated schools in programs of government aid to nonpublic schools does not necessarily violate the nonestablishment norm, then including faith-based social service providers in programs of government aid to nongovernmental social service providers does not necessarily violate the nonestablishment norm. Of course, the reader must decide for herself whether the logic of my argument about the constitutionality of school vouchers extends as far as I claim; she must also decide whether, even if the logic of my argument does extend as far as I claim, the argument is persuasive.

A word of caution may be useful. I address, in this chapter, the question of the constitutionality of school vouchers – and, by implication, the constitutionality both of other forms of government aid to religiously affiliated schools and of government aid to faith-based social service providers. I do *not* address the different question of whether, as a matter of sound public policy, government should adopt a program of school vouchers; nor do I address, even by implication, the question of whether government should adopt any other program of aid to religiously affiliated schools or any program of aid to faith-based social service providers. Because proposals to adopt such programs have been so controversial, it bears emphasis, here at the outset, that the fact that a government program may be, all things considered, bad public policy does not entail that the program is unconstitutional, any more than the fact that the program is a good idea entails that the program is constitutional. Nor does the fact that a government program is constitutional entail that the program is, all things considered,

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good public policy, any more than the fact that the program is unconstitutional entails that the program is otherwise bad public policy. If, for example, the state program of school vouchers that I describe in this chapter does not violate the nonestablishment norm, this does not not entail that, as a matter of sound public policy, any state should adopt the program. There is no inconsistency in concluding *both* that government is constitutionally free to adopt a voucher program like the one I describe here *and* that, as a matter of sound public policy, no government should do so.⁶ We deserve careful analysis of difficult issues by conflating, or confusing, the question of the constitutionality of a government program with the different question of whether, apart from the question of its constitutionality, the program is sound public policy.⁷ My concern here is constitutionality, not sound public policy.⁸

THE NONESTABLISHMENT NORM

The First Amendment to the Constitution of the United States famously insists that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Yet, according to the authoritative case law – law that is constitutional bedrock in the United States⁹ – it is not just Congress but all three branches of the national government that may not prohibit the free exercise of religion, abridge the freedom of speech, and so forth. Moreover, it is not just the (whole) national government but the government of every state that may not do what the First Amendment forbids. I have suggested elsewhere that there is a path from the text of the First Amendment, which speaks just of Congress, to the authoritative case law.¹⁰ But even if there were no such path, it would nonetheless be constitutional bedrock in the United States that neither the national government nor state government may either prohibit the free exercise of religion or establish religion (or abridge “the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).¹¹ For Americans at the beginning of the twenty-first century, the serious practical question is no longer whether the free exercise norm and the nonestablishment norm apply to the whole of

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American government, including state government. They *do* so apply. And there is no going back. The sovereignty of the free exercise and nonestablishment norms over every branch and level of American government – in particular, their sovereignty over state government as well as the national government – is now, as I said, constitutional bedrock in the United States. For Americans today, the serious practical inquiry is about what it means to say that government (state as well as national) may neither prohibit the free exercise of religion nor establish religion. I have addressed elsewhere what it means to say that government may not prohibit the free exercise of religion.¹² However, it is not the free exercise norm that bears on the principal question I address in this chapter – the constitutionality of school vouchers – but the other constituent of the American constitutional law of religious freedom: the nonestablishment norm. In the United States, what does it mean to say that government may not establish religion? What does the nonestablishment norm forbid government to do?

From 1947, when the U.S. Supreme Court first applied the non-establishment norm to the states,¹³ to the present, the justices of the Court have been sharply divided about what it means to say that government may not establish religion.¹⁴ They have been divided both about what the nonestablishment norm means as a general matter and, especially, about what the norm means, about what its implications are, for government aid to religiously affiliated schools. The division among the present justices is as great as it has ever been: The four most relevant recent cases decided by the Court (in 1995, 1997, 2000, and 2002) were decided by votes of five to four or six to three.¹⁵ In any event, I mean to give, in the paragraph that follows, not the Supreme Court's answer to the question of what, as a general matter, the nonestablishment norm forbids government to do, but the most sensible answer.

The idea of an “established” church is a familiar one.¹⁶ For Americans, the best-known and most relevant example is the Church of England, which, from before the time of the American founding to the present, has been the established church in England¹⁷ (though, of course, the Church of England was much more established in the past than it is today).¹⁸ In the United States, however, unlike the situation in England, there may be no established church: The nonestablishment norm forbids government to enact any law or pursue any policy

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that treats a church (or more than one church) as the official church of the political community; government may not bestow legal favor or privilege on a church – that is, on a church *as such* – in relation to another church or in relation to no church at all. More precisely: *Government may not take any action that favors a church in relation to another church, or in relation to no church at all, on the basis of the view that the favored church is, as a church – as a community of faith – better along one or another dimension of value (truer, for example, or more efficacious spiritually, or more authentically American).* The nonestablishment norm deprives government of jurisdiction to make judgments about which church (or churches), if any, is, as such, better than another church or than no church. The norm requires government to be agnostic about which church – which community of faith – is better; government must act without regard to whether any church is in fact better.¹⁹ (As Justice Brennan once put it: “It may be true that individuals cannot be ‘neutral’ on the question of religion. But the judgment of the Establishment Clause is that neutrality by the organs of *government* on questions of religion is both possible and imperative.”)²⁰ In particular, government may not privilege, in law or policy, membership in a church – in the Fifth Avenue Baptist Church, for example, or in the Roman Catholic Church, or in the Christian Church generally;²¹ nor may it privilege a worship practice – a prayer, liturgical rite, or religious observance – of a church.²²

THE CONSTITUTIONALITY OF SCHOOL VOUCHERS

Just as I gave, in the preceding paragraph, not the Supreme Court’s answer to the question of what, as a general matter, the nonestablishment norm forbids government to do, but (what I believe to be) the most sensible answer, I now want to give the most sensible answer to the question of what the nonestablishment norm means, what its implications are, for government aid to religiously affiliated schools – in particular, for government aid in the form of school vouchers.

Assume that a state legislature, with the support of the governor, has responded to a growing, insistent demand for greater “school choice” in two main ways. First, the legislature has made state funds available to local school districts for the purpose of establishing charter schools.²³ Second, the legislature has funded a statewide voucher program designed to enable poor families to send their children either (a) to

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a public school (a public elementary or secondary school) to which such a family would not otherwise be entitled to send its children – that is, a public school outside the school district in which the family lives – or (b) to a nonpublic school.²⁴ Assume further that the state's new voucher program includes, *inter alia*, the following three features:

1. Only poor families – families that meet a strict standard of financial need – may participate in the voucher program.²⁵
2. Any nonpublic school may participate in the program, even one that is religiously affiliated, if it (a) meets certain strict requirements concerning curriculum, teacher certification, student performance, and the like and (b) does not engage in discrimination or other conduct that violates the public policy of the state or endorse or otherwise promote such behavior.²⁶
3. If a voucher is to be used for a nonpublic school, the amount of the voucher may not exceed, in any school year, the average per-pupil expenditure in the preceding school year by the school district in which the family lives.²⁷

It is the second feature of the state's voucher program that concerns me here: Does the nonestablishment norm forbid the state to permit religiously affiliated schools to participate in the voucher program; that is, does the nonestablishment norm require the state to exclude from the program schools that are religiously affiliated? Or, instead, does the nonestablishment norm permit the state to include schools in the program without regard to whether or not they are religiously affiliated?

The state does not violate the nonestablishment norm by permitting religiously affiliated schools to participate in its voucher program; that is, the state does not *necessarily* violate the nonestablishment norm by doing so. The reason is simple. By including schools in its voucher program without regard to whether or not they are religiously affiliated, the state is not necessarily taking any action that favors one or more churches in relation to one or more other churches, or in relation to no church at all, on the basis of the view that the favored church(or churches) is, as a church, truer, or more efficacious spiritually, or more authentically American, or otherwise better; nor, in particular, has the state privileged either membership in, or a worship practice of, one or more churches. So long as (but only so long

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as) each of two criteria are satisfied, the state may include religiously affiliated schools in its voucher program (or other aid program). The first criterion speaks to the design of the voucher program, the second to the basis of the political choice to adopt the program.

First. The eligibility requirements for school participation in the program are religiously neutral; school participation in the program does not depend on whether or not the school is religiously affiliated.

If this criterion is *not* satisfied, it is fair for the courts to presume that the political choice to adopt the program is based on the belief that the favored church(or churches) is, as a church, truer, or more efficacious spiritually, or more authentically American, or otherwise better than one or more other churches or than no church at all. But even if this criterion *is* satisfied (as in the real world it surely will be), it still may be the case that the political choice to adopt the program is based on – that the program would not have been adopted but for – that belief.²⁸ In that sense, the program may be a subterfuge: a covert establishment of religion.²⁹ Hence, the need for this second criterion, which comes into play only if the voucher program satisfies the first criterion:

Second. The state's adoption of the voucher program, though it may operate in some jurisdictions to favor one or more churches (namely, those that in those jurisdictions sponsor many eligible primary or secondary schools) in relation to one or more other churches (those that do not sponsor many or even any such schools), is not based on the belief that the favored church (or churches) is, as a church, better (truer, etc.) than one or more other churches or than no church at all.³⁰

It bears mention that four justices of the present Supreme Court have recently espoused a position substantially like the one articulated in the preceding paragraph: Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas.³¹ The other five justices require that additional criteria be satisfied if a government aid program is to survive review under the nonestablishment norm.³² According to one of the principal additional criteria, if government money is to end up in the pocket of a religiously affiliated school, it must do so not because government gave the money directly to the school, upon certification that an eligible child has enrolled there, but only because

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the person(s) to whom government gave the money chose to use it to pay expenses incurred in sending the child to that particular school.³³ This direct/indirect distinction seems to me entirely formalistic: I cannot fathom why it should make a constitutional difference that voucher money goes directly to a parent, who then gives it to the school, rather than directly to the school, upon certification that an eligible child has enrolled there. If a voucher program would be constitutional in the former case, then it should be constitutional in the latter case, too – and if unconstitutional in the latter case, then in the former case, too.³⁴ But because five justices, including Justice O'Connor, see the matter differently,³⁵ no state should adopt a voucher program that does not include the requirement that the voucher money go directly to the parents. According to the Ohio Pilot Project at issue in the Cleveland school voucher case, “[e]ach scholarship for children attending a private school is payable to the parents of the student entitled to the scholarship. . . . Scholarship checks are mailed to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition.”³⁶ Therefore, Justice O'Connor was able to join Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas in ruling that the Ohio Pilot Project did not violate the nonestablishment norm.

The story of the evolution of the Supreme Court's nonestablishment jurisprudence – in particular, its evolution in the context of constitutional controversies over government aid to religiously affiliated entities, especially schools – is an important one. But because the story has been well told elsewhere, there is no need to rehearse it here.³⁷ One feature of the story bears brief mention, however: Anti-Catholicism has animated not only Protestant opposition to Catholic schools but also judicial opposition (in the name of the nonestablishment norm) to government aid to such schools, even when the aid program could not plausibly be said to establish religion.³⁸ The anti-Catholicism is now largely spent, but not the position – still defended by some Supreme Court justices³⁹ and some scholars⁴⁰ and others⁴¹ – that government aid to religiously affiliated primary and secondary schools can and often does violate the non-establishment norm, even though (a) participation by such schools in the aid program would be pursuant to eligibility requirements that are religiously neutral and (b) government's decision to include such schools in the aid program is not based on the belief that

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one or more churches are, as such, better than one or more other churches or than no church at all.⁴² That position took root in the soil of anti-Catholicism, as the historian John McGreevy and the legal scholars Thomas Berg and Douglas Laycock have each explained.⁴³ Laycock notes, near the end of his discussion, that

[r]espectable anti-Catholicism faded in the 1950s and all but collapsed in the 1960s in the wake of the Kennedy presidency and Vatican II. But even at the time of *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)], some justices were influenced by residual anti-Catholicism and by a deep suspicion of Catholic schools. This appears most clearly in Justice Douglas's citation of an anti-Catholic hate tract in his concurring opinion in *Lemon* [403 U.S. 602, 635 n. 20 (1971)] and in Justice Black's dissenting opinion in *Board of Education v. Allen* [392 U.S. 236, 251–52 (1968)]. The Court's opinion in *Lemon* is more subtle and arguably open to more charitable interpretations, but it relied on what it considered to be inherent risks in religious schools despite the absence of a record in *Lemon* itself and despite contrary fact-finding by the district court in the companion case.⁴⁴

The position identified in the preceding paragraph is tantamount to the position that the nonestablishment norm sometimes (often) requires the state to discriminate against religiously affiliated schools vis-à-vis nonpublic schools that are not religiously affiliated.⁴⁵ As Akhil Amar has observed, it is the position of the three justices who dissented in *Mitchell v. Helms*⁴⁶ – Justice Souter, who wrote the dissenting opinion, and Justices Stevens and Ginsburg, who joined it – that (in Amar's words)

the government may not, pursuant to a genuinely secular law, give computers on a completely evenhanded basis to all public schools and private schools. To put it yet another way: The Constitution requires that if the government decides to give computers to private schools, it may give them to the Secular School and the Indifferent Institute but must withhold them from various religious schools. If a given private school eligible for certain computers later decides to add prayer to its curriculum, while otherwise continuing to teach all the basics, that school must forfeit the computers. The Constitution requires this discrimination, depriving religious schools, and only religious schools, of a benefit that all other schools receive.⁴⁷

Amar's response to this position is correct: "The Constitution, however, requires no such thing, at least if the test is the best reading of its words, history, and structure, as opposed to the many outlandish (and contradictory) things that have been said about it in the *United States Reports*."⁴⁸

The *Mitchell* dissenters' construal of the nonestablishment norm is indeed troubling – not only as a matter of the Constitution's "words,