
Kirk A. Kennedy
University of Nebraska College of Law

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol73/iss2/6
Note


TABLE OF CONTENTS

I. Introduction ........................................... 408
II. Factual Background ................................... 409
III. Modern Establishment Theory ........................ 412
   A. The Incorporation of Secularism .................... 412
   B. The Birth of the Lemon Test ......................... 414
   C. Zobrest: The Opportunity to Reconsider Lemon .... 417
IV. Analysis of Zobrest .................................... 419
   A. The Establishment Clause Does Not Prohibit
      Religious Organizations from Receiving Government
      Benefits ............................................ 419
   B. Government Benefits Provided in Accordance with
      IDEA Are Available to All Parents of Handicapped
      Children Irrespective of Religious Affiliation ...... 421
   C. Private Choices Made by the Recipients of
      Government Benefits Are Consistent with the
      Establishment Clause .................................. 423
   D. The Indirect Government Assistance to Salpointe
      Would Not Result in a Direct Benefit to Religion. .. 424
V. Conclusions of Zobrest ................................. 427
VI. Zobrest, Vouchers and the Establishment Clause ...... 427

I. INTRODUCTION

In Zobrest v. Catalina Foothills School District,1 the United States Supreme Court provided an additional ray of hope to the proponents of wholesale educational reform when it held that a state-paid sign lan-
guage interpreter furnished to a student in a pervasively sectarian school is not prohibited by the Establishment Clause. While the decision of the Court does little to clear the murky waters of contemporary Establishment Clause jurisprudence, Zobrest has definitive implications for the constitutionality of education vouchers and school choice. Symbolically, Zobrest is a paradigmatic expression of the struggle between the autocracy of public education and parents seeking to expand their children's educational opportunities.

This Note first examines the factual background and procedural history of Zobrest and includes a brief summary of Establishment Clause theory. Next, the Note analyzes the legal underpinnings of Zobrest in terms of prior case law developing the parameters of the Establishment Clause as applied to religious and sectarian education. From a First Amendment perspective, this Note determines the Court's decision is exceptionally narrow in scope and leaves intact nearly five decades of secularist Religion Clause doctrine. Nonetheless, the Note concludes that irrespective of Zobrest's de minimis impact on the contours of the Establishment Clause, the ramifications of Zobrest in the domain of educational choice, tuition tax-credits, and education vouchers are substantial.

II. FACTUAL BACKGROUND

In 1988, Larry and Sandra Zobrest contemplated enrolling their son James at Salpointe Catholic High School in Tucson, Arizona. Salpointe is unabashedly a school where Catholic orthodoxy is the order of the day and secular instruction is not divorced from the inculcation of religious values. The faculty at Salpointe is encouraged to manifest to the students the “presence of God ... in nature, human history, ... and other secular areas of the curriculum.” Students are also required to attend classes in Religion, and although not mandatory, attendance at daily Mass is viewed with approbation by school administrators. To Larry and Sandra Zobrest, this was the education they deemed best for their son. Although James Zobrest was deaf, they did not foresee his handicap as an impediment to attending Salpointe. From their perspective, James would be entitled to a sign language interpreter in accordance with the Individuals with Disabilities Education Act (IDEA) irrespective of their choice of school. IDEA was enacted by Congress for the express purpose of assisting “[s]tates and localities to provide for the education of all children with disabilities ...” Furthermore, the State of Arizona, as a recipient of federal

2. Id.
3. Id. at 2464.
4. Id. at 2472.
6. Id. § 1400(c)(emphasis added).
funds under IDEA, enacted its own statutory scheme\textsuperscript{7} whereby handicapped children in private and public schools receive educational services designed to facilitate their education.

Several months prior to James' enrollment at Salpointe, the Zobrests petitioned the Catalina Foothills School District for a sign language interpreter to assist James in his classes. Acting on the legal advice of the Pima County Attorney, the school district refused the Zobrests' request.\textsuperscript{8} The district claimed the provision of a sign language interpreter at Salpointe would be tantamount to the establishment of religion and a breach of both the Arizona and United States Constitutions.\textsuperscript{9} In accordance with the relevant provisions of IDEA, the Zobrests filed suit in federal district court seeking a preliminary injunction requiring the district to provide the interpreter.\textsuperscript{10} The court denied the Zobrests' request for injunctive relief and granted summary judgment to the school district stating "[t]he interpreter would act as a conduit for the religious inculcation of James... at government expense. . . . That kind of entanglement of church and state . . . is not allowed."\textsuperscript{11}

On appeal, the Ninth Circuit applied the prevailing Establishment Clause test promulgated in \textit{Lemon v. Kurtzman}.
\textsuperscript{12} According to the three pronged \textit{Lemon} test, a statute will withstand scrutiny under an Establishment Clause challenge if (1) it has a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement between government and religion.\textsuperscript{13} Affirming summary judgment in a divided 2-1 vote, the Ninth Circuit agreed IDEA has a secular legislative purpose,\textsuperscript{14} but determined that "IDEA, if applied as [the Zobrests] proposed, would have the primary effect of advancing religion and thus would run afoul of the Establishment Clause."\textsuperscript{15} But perhaps the most quixotic aspect of the opinion was the court's admission that although "denial of aid to the Zobrests does impose a burden on their free exercise rights... [t]he government has a compelling interest in ensuring the Establishment Clause is not violated."\textsuperscript{16} Thus, as a matter of constitutional

\begin{footnotesize}
\textsuperscript{8} \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 113 S. Ct. 2462, 2464 (1993).
\textsuperscript{10} \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 113 S. Ct. 2462, 2464 (1993).
\textsuperscript{11} \textit{Id.}
\textsuperscript{12} 403 U.S. 602 (1971).
\textsuperscript{13} \textit{Id.} at 612-13.
\textsuperscript{14} \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 113 S. Ct. 2462, 2464-65 (1992).
\textsuperscript{15} \textit{Id.} at 2465.
\textsuperscript{16} \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 963 F.2d 1190, 1196-97 (9th Cir. 1992), \textit{rev'd} 113 S. Ct. 2462 (1993).
\end{footnotesize}
law, the Ninth Circuit Court of Appeals held the Free Exercise Clause is subordinate to the Establishment Clause.

Reversing the court of appeals, the Supreme Court, by a 5-4 margin, held that providing James Zobrest a sign language interpreter would not violate the Establishment Clause. The Court substantially mirrored the dissenting opinion of Circuit Judge Tang, and concluded that a sign language interpreter provided under IDEA is a general welfare benefit available to all handicapped children and is not analogous to a form of direct government assistance to religion. Unlike the Ninth Circuit, the Court did not engage in an overt application of the Lemon test. However, in the two principal cases cited by Justice Rehnquist, Mueller v. Allen and Witters v. Washington Department of Services for the Blind, the Lemon test was directly applied. Thus, in a tangential manner, Lemon affected the outcome of the decision.

Writing for the dissent, Justice Blackmun first chided the majority for their lack of judicial restraint in exercising jurisdiction over a case that according to Blackmun, should have been remanded “for consideration of the statutory and regulatory issues.” It did not matter to the dissenters that these issues were not raised at the trial court level or to the court of appeals. For in its Supreme Court brief, the Catalina Foothills School District, for the first time, asserted that IDEA “does not require it to furnish [James Zobrest] with an interpreter . . . so long as [one is] made available at a public school.” Additionally, the district maintained that under IDEA, the government is expressly prohibited from paying for services that facilitate “[r]eligious worship, instruction, or proselytization.” Quoting a plethora of cases standing for the proposition that the Supreme Court should avoid constitutional questions unless absolutely necessary, all four dissenters were resolute in contending the Court should vacate and remand. On Establishment Clause grounds, only Justices Souter and Blackmun argued that a state-paid sign language interpreter at Salpointe would be unconstitutional, relying primarily upon the case of Grand Rapids School District v. Ball. Interestingly the dissent, like the

18. Id. at 2468-69.
22. Id. at 2465.
23. Id. at 2465 n.7 (quoting 34 C.F.R. § 76.532(a)(1)(1992)).
24. Id. at 2470.
25. Although O'Connor and Stevens did not concur with Part II of Blackmun's dissent, they agreed the case should have been remanded "for consideration of the various threshold problems . . . ." Id. at 2475 (O'Connor, J., dissenting).
majority, did not ground its analysis of Zobrest expressly in terms of the three part Lemon test. In fact, Blackmun made reference to Lemon only once.27

III. MODERN ESTABLISHMENT THEORY

To glean a better understanding of Zobrest and its narrow impact on the freedom of religion, it is necessary to briefly examine the historical development of modern Establishment Clause doctrine. During the last forty years the Supreme Court has structured its Religion Clause analysis around the separationist jurisprudence championed by Justices Black, Brennan, and as seen in Zobrest, Blackmun.28 While the secularist view has certainly been predominate, more recently, under the leadership of Chief Justice Rehnquist, conservatives on the Court are looking to fashion a less hostile relationship between government and religion.29 First and foremost among their objectives is to jettison the Lemon test, the bedrock of strict separationism.30 Yet as Zobrest so aptly demonstrates, efforts to formulate a more amicable relationship between government and religion have been elusive at best.

A. The Incorporation of Secularism

The genesis of contemporary Establishment Clause jurisprudence is the seminal case of Everson v. Board of Education.31 Everson made the Establishment Clause applicable to the states by incorporating it into the Fourteenth Amendment's guarantee of due process.32 In Everson, the Court fashioned an avant-garde interpretation of the Establishment Clause which inter alia, "requires the state to be neutral in its relations with groups of religious believers and non-believers."33

29. During oral argument in Zobrest, the Chief Justice, in a friendly exchange with Justice White, urged, "[T]'s time we tried to straighten [this] out," referring to the Establishment Clause chaos produced by the Lemon test; to which the latter responded, "Be careful." Jeffrey Rosen, Lemon Law: Court Watch, NEW REPUBLIC, Mar. 29, 1993, at 17.
30. As to why the Court in Zobrest did not explicitly overrule Lemon, at least one Court observer speculated that because Justice White had "one foot out the door," he was reluctant to alter Lemon, and such a task would be better left to his replacement, Ruth Ginsburg. Max Boot, Supreme Court Extends Scope of Religious Rights, CHRISTIAN SCI. MONITOR, June 21, 1993, at 6.
32. Id. at 15.
33. Id. at 18.
More succinctly put, *Everson* went beyond the traditional notion that government is prohibited from favoring one religion over another by holding the Establishment Clause mandates government neutrality between religion and irreligion as well.\(^{34}\) Before *Everson*, the states were free to formulate more provincial rules regarding church-state relations, uninhibited by the constraints of the First Amendment. For non-preferentialists,\(^{35}\) the insidious aspect of incorporation was not incorporation in a procedural sense, but rather the secularist perspective on the Establishment Clause ensconced within the doctrine. And while no reasonable First Amendment academic would seriously argue for the repeal of incorporation, it is the substantive component of incorporation that has profoundly affected Establishment Clause theory.

Essentially, the Establishment Clause jurisprudence made applicable to the states in *Everson* is grounded exclusively on the Court's de facto constitutionalization of Jefferson's savorless metaphor the "wall of separation between church and state."\(^{36}\) Nowhere is this more self-evident than in the last paragraph of Justice Black's majority opinion: "The First Amendment has erected a wall of separation between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."\(^{37}\) Viewed in the context of this singular paragraph, it is much easier to see how the Court in *Everson* could promulgate an interpretation of the Establishment Clause which proscribes the passage of laws "which aid one religion, aid all religions, or prefer one religion over another."\(^{38}\)

The weak link in this intellectual chain is the faulty historical premise that Jefferson's letter to the Danbury Baptist Association, in which the metaphorical "wall of separation" was first erected, provides the authoritative constitutional exegesis of the Establishment Clause.\(^{39}\) The intrinsic problem with the "wall" theory is two-fold: (1) it erroneously assumes Jefferson's expansive role in the formulation and adoption of the Religion Clauses in the Bill of Rights, and (2) it

---

34. *Id.*

35. Non-preferentialists argue the Establishment Clause merely prevents the federal government from establishing a national religion and that non-discriminatory aid to religion is consistent with the framers' intent. The primary spokesman for non-preferentialism, Chief Justice Rehnquist, would be more willing to defer to the legislative will in the area of church-state relations.


38. *Id.* at 15.

ignores the Madisonian perspective on the purpose and meaning of the Establishment Clause.\(^{40}\)

It seems indisputable from... Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the (First) Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in Everson—while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these (Jefferson's) views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.\(^{41}\)

As Justice Rehnquist correctly points out, when the Court in Everson merged the constitutional contributions of Madison and Jefferson into an amalgam of church-state separationism, it betrayed an accurate historical interpretation of the Establishment Clause.\(^{42}\)

B. The Birth of the Lemon Test

In School District v. Schempp,\(^{43}\) the Supreme Court added to the foundation of Everson when it struck down a Pennsylvania statute which permitted students to read from The Holy Bible as part of their daily classroom activities.\(^{44}\) As a harbinger to the Lemon test, Schempp employed a "purpose" and "primary effect" analysis identical to the "purpose" and "primary effect" prongs that would be articulated in Lemon v. Kurtzman\(^{45}\) eight years later: "The test may be stated as follows: what are the purpose and the primary effect of the enactment? . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."\(^{46}\)

Not surprisingly, the Court's decision to invalidate the Pennsylvania statute relied upon the thematic underpinnings of Everson—namely, that Jefferson and Madison shared indistinguishable positions on the meaning of the Establishment Clause and therefore, government is compelled by the Constitution to maintain a posture of

---

40. Two noted First Amendment scholars contend that Justice Black's sense of American History was certainly jaded toward a Jeffersonian perspective on the Establishment Clause. While correctly characterizing the positions espoused by Jefferson, Black missed the historical mark with respect to giving an accurate portrayal of Madison's views. See John H. Garvey and Fredrick Schauer, The First Amendment: A Reader 367 (1992).
42. Id. at 106.
44. Id. at 205.
45. 403 U.S. 602 (1971).
“wholesome neutrality” between religion and secularism.\textsuperscript{47} Yet, as Justice Stewart cogently points out in his dissenting opinion, when the power of the state is juxtaposed between religion on the one hand and secularism on the other, “religion is placed at an artificial and state-created disadvantage.”\textsuperscript{48}

In terms of the purpose and primary effect prongs enunciated in \textit{Schempp}, their mechanistic application is designed to yield results consistent with \textit{Everson}'s historically suspect premise that government is proscribed from aiding religion. Ironically, in its effort to enforce a constitutional neutrality between state action and religion, the Court has achieved results inapposite to that goal. Instead the outcome is the “establishment of a religion of secularism, or at the least, government support of the beliefs of those who think that religious exercises should be conducted only in private.”\textsuperscript{49}

The \textit{Lemon} test as originally articulated in \textit{Lemon v. Kurtzman},\textsuperscript{50} was merely the culmination of previous Establishment Clause case law having a theoretical basis in an extreme form of church-state separatism. Like its predecessors in \textit{Everson} and \textit{Schempp}, the Court in \textit{Lemon} began its inquiry with an acknowledgement, in almost apologetic terms, that the Religion Clauses of the First Amendment possess nearly metaphysical qualities, thereby reducing the expectations for a decision grounded in sound jurisprudence.\textsuperscript{51} Unfortunately, such prefatory language only weakens the legal import of the Court’s decision and provides credibility to claims questioning the constitutional workability of the \textit{Lemon} test.

In applying the purpose prong from \textit{Schempp} to a pair of Rhode Island and Pennsylvania statutes, the Court in \textit{Lemon} discovered a secular legislative purpose whereby state tax dollars were expended to augment the salaries of teachers in non-public schools. The statutes’ explicitly stated goals were to “enhance the quality of the secular education in all schools covered by the compulsory attendance laws.”\textsuperscript{52} Simply because the legislatures of Rhode Island and Pennsylvania outwardly articulated a secular purpose behind these laws and seemed sincere, the purpose prong was satisfied. As for the second prong, the Court in \textit{Lemon} withheld judgment as to whether the primary effect of the two statutes advanced religion in a manner violative of the Establishment Clause, opting instead to void the statutes on entanglement grounds.\textsuperscript{53}

\textsuperscript{47} \textit{Id.} at 213-14.  
\textsuperscript{48} \textit{Id.} at 313 (Stewart, J., dissenting).  
\textsuperscript{49} \textit{Id.}  
\textsuperscript{50} \textit{403 U.S.} 602 (1971).  
\textsuperscript{51} \textit{See id.} at 612.  
\textsuperscript{52} \textit{Id.} at 613.  
\textsuperscript{53} \textit{Id.} at 613-14.
The entanglement prong of the Lemon test, borrowed from Walz v. Tax Commission,\(^5\) provided the legal impetus for invalidating the Rhode Island and Pennsylvania statutes.\(^5\) According to the Court, the logic of Walz, which was used to uphold the constitutionality of property tax exemptions for religious organizations, was equally applicable to the facts in Lemon.\(^5\) The essence of the entanglement prong as applied in Walz and later in Lemon insures that the net effect of legislation is not an excessive government entanglement with religion and vice versa.

The Court's opinion in Lemon defined "entanglement" in terms of the necessity of preventing "the danger that a teacher under religious control and discipline poses" to the desired goal of church-state separation.\(^5\) To make the entanglement prong seem less hostile to religion, the Court envisioned a scenario where the entanglement prong would protect religion. For example, in order to avoid the "danger" of a teacher in a sectarian school, who, for instance, teaches a secular subject such as mathematics or typing, from inculcating the students with faith or morality, it would be necessary for the government to impose a system of state surveillance in the classroom "to insure that . . . restrictions are obeyed and the First Amendment otherwise [is] respected."\(^5\) Such government intrusion would itself involve an excessive entanglement between church and state and thus run afoul of the Establishment Clause.

Lemon's entanglement prong is not without its critics.\(^5\) For instance, it is nearly impossible to expunge religion from all aspects of public life. Therefore, tests that call for an examination of the interrelationship between government and religion exclusively in secular

---

\(^7\) Id. at 617. The question of who really poses a "danger" was addressed by Justice Scalia during oral argument in Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993), where the state of New York tried to prevent a church from having access to school facilities during after-school hours. In his intellectual dissection of a brief filed by the New York State Attorney General, Scalia took issue with the assertion that religion "yields a benefit only to those who already believe" by asking State Attorney John Hoefling the following question: "It used to be believed that a God-fearing person was less likely to mug me and rape my sister. I guess that's not the view anymore. Has this new regime worked very well?" Timothy M. Phelps, Where to Separate the Church, State? High Court Weighs Right of LI Congregation to Use School, NEWSDAY, Feb. 25, 1993, at 4.

\(^8\) Id. at 666. See also Aguilar v. Felton, 473 U.S. 402, 430 (1985)(O'Connor, J., dissenting)("To a great extent, the anomalous results in our Establishment Clause cases are 'attributable to [the] entanglement prong.' ")(citation omitted).
terms will invariably prejudice sectarian interests. For if the Constitution presumes that government and religion cannot intersect within the same domain, then the absence of religion, or secularism, is the only permissible result. Chief Justice Rehnquist considers the entanglement component limited to the facts of Walz v. Tax Commission, and "that when divorced from the logic of Walz, it creates an 'insoluble paradox.'" Furthermore, the special property tax exemption for religious institutions is well grounded in the 200 years of American history. Admittedly, entanglement analysis worked well within the historical structure of Walz, but to formulate a rule of law outside of its historical context reminds one of Oliver Wendell Holmes' revelation, "a page of history is worth a volume of logic."

C. Zobrest: The Opportunity to Reconsider Lemon

Because the Lemon test is part and parcel of an Establishment Clause doctrine which rests exclusively on the historically misplaced metaphor, "wall of separation between church and state," its application will more often than not yield inconsistent results. Still, the Supreme Court has delayed fashioning an interpretation of the First Amendment more accommodating to religion. This is due in part to stare decisis and the difficulty of reaching a consensus among justices who are critical of the secularist doctrine inherent in Lemon. For example, in Lee v. Weisman, a school prayer case decided in 1992, the anti-Lemon forces could only produce a stinging dissent from Justice Scalia and were at least one vote short of explicitly overturning Lemon. Nonetheless, when the Court granted certiorari in

60. See McConnell, supra note 28, at 129-30. While generally critical of the Lemon test, McConnell represents the "religious accommodationist" wing in the current debate on church-state relations. Although the accommodationists eschew the secularist Establishment Clause jurisprudence of the last fifty years, neither are they willing to adopt the religious majoritarianism advocated by Chief Justice Rehnquist.
64. Id. at 675-76 (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)). See also Bowen v. Kendrick, 487 U.S. 589, 615 (1988)(describing the entanglement prong as a "Catch-22").
66. Zobrest is an excellent example of how the justices' general dissatisfaction with the Lemon test does not necessarily translate into a unified approach to interpreting the Establishment Clause.
68. Justice Kennedy's coercion test, first articulated in County of Allegheny v. ACLU 492 U.S. 573 (1989), could only muster a bare plurality in Lee v. Weisman, 112 S.
some commentators seemed to think the case would provide another opportunity to bring certainty to an area of law wrought with judicial vacillation.\textsuperscript{70}

Despite the Court's narrow holding, \textit{Zobrest} is a useful paradigm of the tension between the secularist underpinnings of \textit{Lemon} and the desire of non-preferentialists to reshape the course of Establishment Clause jurisprudence. The legal process in \textit{Zobrest} illustrates this philosophical conflict and the problematic application of \textit{Lemon} as well. To support its legal conclusion in \textit{Zobrest}, the majority utilizes four cases in which the Court rendered a favorable result to religious interests.\textsuperscript{71} Likewise, the dissent in \textit{Zobrest} employs four Establishment Clause cases where government aid to religion was held unconstitutional.\textsuperscript{72} Besides the fact that all eight cases were decided within a relatively close time frame,\textsuperscript{73} the common denominator in the eight cases is the application of the \textit{Lemon} test. Herein lies the gravamen of the dilemma. All eight cases concerned the intersection between religion, government, and education, yet the finest of lines must be drawn to distinguish the outcome of each case. The end result becomes the paramount objective.\textsuperscript{74} Thus, \textit{Zobrest} and future Establishment Clause cases may be reduced to which faction of the Court commands

\small
\textsuperscript{69} Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir.), cert. granted, 113 S. Ct. 52 (1992).

\textsuperscript{70} The \textit{Boston Globe} speculated that "the present Supreme Court may be inclined [in \textit{Zobrest}] to modify—or even overturn—the \textit{[Lemon]} test." Arguing Church-State Relations, \textit{Boston Globe}, Feb. 25, 1993, at 16. Christianity Today observed \textit{Zobrest} "could afford the high court an opportunity to provide new definitions for proper church and state boundaries." Establishment Clause Issues Examined, \textit{Christianity Today}, April 5, 1993, at 71. \textit{See also} Rosen, \textit{supra} note 29, at 17 (stating \textit{Zobrest} gives the Court "the opportunity to cut the Gordian knot by replacing \textit{Lemon} . . . .").


\textsuperscript{72} See Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975). Although the Court in \textit{Wolman} upheld aid to religious schools in the form of textbooks and diagnostic services, in the same opinion, the Court also struck down certain instructional materials and bus transportation for field trips as unconstitutional.

\textsuperscript{73} The Court decided \textit{Meek} in 1975 and \textit{Bowen} in 1988, a 13-year span.

\textsuperscript{74} Constitutional adjudication that is result driven has a de-stabilizing effect on the composition of the law. As Judge Bork observed, "[i]f you do not care about stability, if today's result is all-important, there is no occasion to respect either the constitutional text or the decisions of your predecessors." \textit{Robert H. Bork, The Tempting of America} 159 (1990).
a majority and can most deftly fit the facts of a particular case into the uncertain contours of prevailing Establishment Clause principles.

IV. ANALYSIS OF ZOBREST

A. The Establishment Clause Does Not Prohibit Religious Organizations from Receiving Government Benefits

The underlying proposition advanced by the Court in Zobrest dispelled the notion that institutions having a religious character are a fortiori prohibited from receiving government assistance. Although it is undisputed that the sign language interpreter provided to James Zobrest inhered an indirect government benefit to Salpointe Catholic High School, the Supreme Court reasoned that the Establishment Clause cannot be construed to impose an absolute bar on the flow of government benefits to religious organizations. If such were the case, then "a church could not be protected by the police and fire departments, or have its public sidewalks kept in repair." However, the question remains: At what point does government assistance to a pervasively religious organization work a violation of the Establishment Clause? At first blush, the answer to this question may seem unclear, primarily because Zobrest was decided with only a thinly veiled analysis in terms of the Lemon test. Nevertheless, the precedential value of Zobrest transcends Lemon. The principles derived from Zobrest are consistent with the Establishment Clause irrespective of the continued viability of the Lemon test or any other test the Court generates.

The prevailing proposition announced in Zobrest, that the First Amendment does not preclude "religious institutions . . . from participating in publically sponsored social welfare programs," is a fundamental tenet of Establishment Clause jurisprudence. As far back as 1899, the Supreme Court held in Bradfield v. Roberts that a federally financed contract for the construction of a building at a Roman Catholic hospital was not inconsistent with the Establishment Clause. In so holding, the Court in Bradfield reasoned that merely

76. Id. at 2466.
77. Id. (quoting Widmar v. Vincent, 454 U.S. 263, 274-75 (1981)).
78. Zobrest is similar to Lee v. Weisman, 112 S. Ct. 2649 (1992)(Scalia, J., dissenting) and Marsh v. Chambers, 463 U.S. 783 (1983), in that the Lemon test was either completely ignored or not determinative to the decision. In fact, Lemon is mentioned only once in the majority opinion in Zobrest and only in terms of explaining the holding of the Ninth Circuit. See Zobrest v. Catalina Foothills Sch. Dist. 113 S. Ct. 2462, 2464-65 (1993).
80. 175 U.S. 291 (1899).
81. Id. at 295-96.
because the hospital operated under the supervision of the Catholic church, this did not change the predominately secular purpose of the hospital—to provide medical care and treatment.82

Nearly 100 years later, in Bowen v. Kendrick,83 the Court upheld as facially valid, provisions of the Adolescent Family Life Act of 1981 (AFLA).84 In relevant part, AFLA dispensed federal funds to public or private organizations and agencies for “services and research in the area of premarital adolescent sexual relations and pregnancy.”85 Yet, because some religiously-oriented organizations were successful in procuring federal grants in accordance with AFLA, several groups filed suit, claiming AFLA violated the Establishment Clause of the First Amendment.86 Reviewing the legislative history of AFLA, the Court determined Congress did not expressly prohibit religious organizations from obtaining grants under AFLA.87 Furthermore, the Court proclaimed its disapprobation with the view that religion can never be the recipient of government funds:88 “We note . . . this Court has never held that religious institutions are disabled by the First Amendment from participating in publically sponsored social welfare programs.”89

Like AFLA, IDEA is a government sponsored welfare program.90 Therefore, when the Catalina Foothills School District denied a sign language interpreter to James Zobrest, it was legally insufficient for the district to simply contend that Salpointe’s receipt of government assistance via IDEA would be a per se violation of the Establishment Clause. To underscore this point, the Supreme Court in Zobrest correctly observed that “government programs that neutrally provide benefits . . . without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.”91

82. Id. at 298.
86. Id. at 597.
87. Id. at 604 n.9.
B. Government Benefits Provided in Accordance with IDEA Are Available to All Parents of Handicapped Children Irrespective of Religious Affiliation

When the benefits of a government program are available to individuals irrespective of religious affiliation, such a program will withstand the scrutiny of an Establishment Clause challenge.92 In Zobrest, the educational services rendered to the parents of James Zobrest were disseminated using the handicap of the student as the sole criteria for determining benefit eligibility under IDEA.93 Accordingly, the Court reasoned that this factor was "an important index of [IDEA's] secular effect."94 Zobrest is thus consistent with a line of case law articulating "neutral application" as the sine qua non of government benefit programs having the ancillary effect of aiding religion.

In Committee for Public Education and Religious Liberty v. Nyquist,95 the Supreme Court held as unconstitutional a series of New York statutes authorizing the expenditure of public funds for private elementary and secondary schools.96 Because the benefits under the New York statute flowed exclusively to children attending private and primarily sectarian schools, the program was prima facie invalid.97 Nevertheless, the Court suggested in dicta that if the program had been restructured to include all school children, both public and private, the program would have passed constitutional muster.98

Similarly, in Widmar v. Vincent,99 the Court upheld an Eighth Circuit decision involving a student religious group's right to equal access to university facilities.100 When the University of Missouri at Kansas City passed a regulation excluding religious organizations from the use of university buildings "for purposes of religious worship or religious teaching,"101 several students brought suit seeking to enjoin enforcement of the regulation. The Supreme Court, in Widmar, held that a university policy of equal access permitting an almost unlimited range of groups access to university facilities does not violate the Establishment Clause.102 In Widmar, students were seeking equal access to a neutrally provided government benefit, a benefit not con-

92. Id. at 2466.
95. 413 U.S. 756 (1977).
96. Id.
97. Id.
98. See id. at 782 n.38.
100. Id.
101. Id. at 265.
102. Id. at 276-77.
ceptually dissimilar from those provided in *Bowen* and *Zobrest*. Again, the touchstone for the decision was the broad class of government beneficiaries.

The provisions of IDEA cut across all ideological and religious boundaries, in that to qualify for educational benefits, the only consideration is the handicap of the child. Essentially, IDEA can be classified as a "government program that distributes benefits neutrally to any child qualifying as 'handicapped' . . . without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." James Zobrest qualified for a sign language interpreter because he is profoundly deaf and for no other reason. Similarly, a student who is blind and attends a public school would be entitled to read *Pilgrim's Progress* in braille solely because of his blindness. Whether the school is public or private is simply irrelevant.

The Court's reliance on *Mueller v. Allen* adds additional support to the central argument advanced in *Zobrest* that the neutral application of welfare benefits to a broad class of beneficiaries does not transgress the First Amendment. In *Mueller*, a Minnesota law permitting the parents of all school children to deduct educational expenses from gross income was upheld as constitutional. Justice Rehnquist's majority opinion in *Mueller* is a fitting encapsulation of the neutral application principle that was alluded to in *Nyquist* and formally declared in *Widmar*.

Unlike the assistance at issue in *Nyquist*, [Minnesota law] permits all parents—whether their children attend public school or private—to deduct their children's educational expenses. As *Widmar* and our other decisions indicate, a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

When subjected to a *Lemon* analysis, the Court held the neutral application of government benefits in *Widmar* and *Mueller* did not have the primary effect of advancing religion. *Zobrest* relied upon this same logic with regard to the sign language interpreter furnished in accordance with IDEA. Because a sign language interpreter is one of many government services supplied under IDEA to all handicapped students, the primary effect is that handicapped elementary and secondary students receive an appropriate education. Therefore, even in

---

106. Id. at 397.
107. Id. at 404.
108. Id. at 396-99.
terms of the *Lemon* test, *Zobrest* clears the hurdle of the primary effect prong.

The principle of neutral application satisfies the primary effect prong of *Lemon* and is wholly consistent with the mandates of the Establishment Clause. Government benefits available on a neutral basis will withstand scrutiny under the *Lemon* test or any other Establishment Clause formula. Therefore, *Zobrest*, as well as future Religion Clause cases involving government aid to a broad class of citizens, will be deemed compatible with the First Amendment even though "sectarian institutions may also receive an attenuated financial benefit"\(^{110}\) from the state.

C. Private Choices Made by the Recipients of Government Benefits Are Consistent with the Establishment Clause

When the parents of James Zobrest elected to send their son to Salpointe Catholic High School, little did they realize that their private choice would foment a five-year legal nightmare.\(^{111}\) Though in the eyes of the Supreme Court, private choices of individuals that result in indirect government assistance to sectarian schools are harmonious with the First Amendment.\(^{112}\) Nowhere is this proposition more manifest than in *Witters v. Washington Department of Services for the Blind*.\(^{113}\)

In *Witters*, the Supreme Court unanimously held the Establishment Clause did not preclude Washington from providing educational assistance to a blind student who attended a Christian college.\(^{114}\) Critical to the Court's inquiry was whether the direct financial aid given to Larry Witters, which he then used to fund his Christian education, was permissible under the First Amendment. The Court reasoned that although government aid was disseminated to a Christian school, the conduit for the aid was the private choice of the beneficiary.\(^{115}\) Equally important to the Court's analysis was the fact that in cases where government assistance does secondarily benefit a religious institution through the private choices of individuals, such assistance cannot be characterized as state action.\(^{116}\) Justice Marshall correctly articulated this point which applies *a priori* to *Zobrest* as well.

---

111. *See id.* at 2464 n.3.
112. *Id.* at 2467.
114. *Id.*
115. *Id.* at 488.
116. *Id.*
Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. . . . Aid recipients' choices are made among a huge variety of possible careers of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.117

Fundamentally, Zobrest involved the private choices of parents, rather than an impermissible state subsidy to a Catholic high school. Like Witters, and the tax credits provided to parents in Mueller, the decision of the Zobrests to seek a government benefit for their son could hardly be characterized as a subterfuge designed to funnel government money to religion. For just as the government cannot prohibit an unemployed worker from using his unemployment check to give a tithe, it would be ludicrous to require the Zobrests to pledge not to send James to Salpointe as a condition precedent to the government providing him a sign language interpreter. If James Zobrest had elected to attend a public school or even a private nonsectarian school, he still would need the services of a sign language interpreter. As the Court correctly recognized, before any financial benefit could possibly reach Salpointe, an intermediate step had to occur.118 It was the private choice of the Zobrests, and not the public mandates of Congress, that sent a government-paid sign language interpreter to assist James Zobrest.

D. The Indirect Government Assistance to Salpointe Would Not Result in a Direct Benefit to Religion

The principle argument proposed in Justice Blackmun's dissent in Zobrest is that the Establishment Clause does not enable a "public employee to participate directly in religious indoctrination."119 Blackmun contends the sign language interpreter provided to James Zobrest is a form of direct aid and a "resource capable of advancing [Salpointe's] religious mission."120 Accordingly, any government action that results in the conveyance of a religious message is ipso facto a violation of the Establishment Clause.121 To support this contention, the dissent relies on Grand Rapids School District v. Ball122 and

118. See Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2467-68 (1993). In this case, the intermediate step was the decision of the Zobrests to send their son to Salpointe.
119. Id. at 2471.
120. Id. at 2473.
121. See id. at 2474.
to a lesser extent *Meek v. Pittenger*, two cases in which the Supreme Court invalidated government programs that provided a direct economic benefit to religious schools.

*Ball* involved two government-funded educational programs adopted by the city of Grand Rapids, Michigan. Specifically, the "Shared Time" program in *Ball* consisted of remedial education courses offered to students on the premises of various private schools, of which the vast majority were sectarian. And although the city of Grand Rapids attempted to categorize the students in the program as "part-time public school students," it was readily apparent the "Shared Time" program was a government-funded enterprise designed to aid religious schools. In determining "Shared Time" and a related program entitled "Community Education" constituted a violation of the Establishment Clause, the Court concluded the programs in question were a form of direct aid not "indistinguishable from the provision of a direct cash subsidy." This "direct aid" analysis in *Ball* had its genesis in *Meek v. Pittenger*, a case in which the Supreme Court held unconstitutional a Pennsylvania program that, like *Ball*, provided a plenitude of government assistance to religious schools. Benefits in the form of textbooks, instructional materials, and diagnostic services were unambiguously characterized as "massive aid" which are "neither indirect nor incidental." Thus, the key factor in *Ball* and *Meek*, upon which the dissent in *Zobrest* relies, is the concept of "direct aid" to a sectarian school of "any resource capable of advancing [the] school's religious mission."

Of course, the majority opinion in *Zobrest* roundly rejects the notion that the presence of a sign language interpreter at Salpointe would be analogous to giving direct aid to a religious school. As Justice Rehnquist's answer to the dissent's "direct aid" musings demonstrates, at the very most Salpointe could only expect an "attenuated financial benefit." Specifically, the problematic nature of Justice Blackmun's argument is his misguided reliance on *Meek* and *Ball*.  

---

124. Forty of the forty-one schools participating in the program were sectarian in nature. Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 384 (1985).
125. Id. at 378.
126. Id. at 395.
128. Id. at 351-55.
129. Id. at 355. Despite the constitutional setback for religious schools in *Meek*, Justice Powell does conjecture that a "class of general welfare services for children . . . may be provided by the State regardless of the incidental benefit that accrues to church-related schools." Id. at 371 n.21 (emphasis added).
131. Id. at 2468-69.
132. Id. at 2469.
133. Id. at 2468.
Because the "direct" government assistance in *Meek* and *Ball*, "relieved [the] sectarian schools of costs they otherwise would have borne in educating their students," the aid given was properly characterized by the Court as the functional equivalent of a "direct cash subsidy." A sign language interpreter is a different story altogether, "[f]or Salpointe is not relieved of an expense that it otherwise would have assumed in educating [James Zobrest]." For instance, if Salpointe had regularly provided sign language interpreters to all deaf students, then a state-provided interpreter would have definitely alleviated a financial burden on the school. However, this was certainly not the case, as the Zobrests ultimately expended $28,000 to pay for James' sign language interpreter. The only conceivable economic benefit Salpointe would realize from a state-paid interpreter is "assuming [Salpointe] makes a profit." Presuming that parents of handicapped children consider the option of a religious education knowing the government will provide related educational services under IDEA, a claim that religious schools will undergo a financial boon is at best problematic. Certainly the direct-indirect aid dichotomy may at times be subject to differing interpretations, but even the dissent in *Zobrest* concedes "[t]hese distinctions perhaps are somewhat fine, but lines must be drawn."

The majority articulates a second and equally important flaw in the dissent's reasoning. The facts of *Zobrest* suggest an inherent dissimilarity between a teacher and a sign language interpreter. In this respect, *Meek* and *Ball* are fundamentally different from *Zobrest*. Where a teacher may be required to present materials in such a way as to reflect a religious world view, a sign language interpreter has limited discretion in the actual translation of information. As the

134. *Id.*
135. *Id.* (quoting Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 395 (1985)).
136. *Id.* at 2469.
139. In a definitional sense, the Catalina Foothills School District is willing to accept indirect aid to Salpointe, but only on its own terms. For instance they "readily admit[ ] . . . there would be no problem under the Establishment Clause if the IDEA funds went directly to James' parents, who, in turn hired the interpreter themselves." *Id.* at 2469 n.11. It would be interesting to inquire as to the district's view on the constitutionality of educational vouchers, since under a voucher program money is given first to the parents and then to a religious school, much like the hypothetical situation the district endorsed in *Zobrest*.
140. *Id.* at 2474 (Blackmun, J., dissenting) (quoting Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 398 (1985)).
141. *Id.* at 2469.
Court stated, "ethical guidelines require interpreters to 'transmit everything that is said in exactly the same way it was intended.'"\textsuperscript{142}

V. CONCLUSIONS OF ZOBERST

In a technical sense, Zobrest does not signal a wholesale retreat from the secularist jurisprudence that has plagued the Religion Clauses for the last fifty years. And with the departure of Justice White and the addition of Justice Ginsburg to the High Court, it would not be surprising if the next Establishment Clause case turns on a full scale application of the \textit{Lemon} test.\textsuperscript{143} Instead, non-preferentialists and religious majoritarians should view Zobrest as a tactical victory rather than a strategic one. For in addition to vindicating one family's right to government welfare benefits, Zobrest underscores two axiomatic principles of Establishment Clause theory as related to the modern welfare state. First, government programs neutrally available to a broad class of citizens are not violative of the Establishment Clause, despite having the ancillary effect of aiding religion. And second, in cases where religion derives an indirect benefit from a government welfare program as a result of the private choices of individuals, such indirect assistance is constitutionally permissible.

VI. ZOBERST, VOUCHERS, AND THE ESTABLISHMENT CLAUSE

As the political battles rage between proponents of education vouchers and the public education establishment, a new front may soon open in the courtrooms of America. Opponents of education reform and tuition vouchers are relying on the Establishment Clause of the First Amendment to insulate them from political gains won by educational reformers.\textsuperscript{144} However, in view of the Supreme Court's re-

\textsuperscript{142} Id. In Justice Blackmun's world, "government crosses the boundary [imposed by the Establishment Clause] when it furnishes the medium for communication of a religious message." \textit{Id.} at 2474. To Sandra Zobrest, James' mother, this argument is no more than tortured logic. "An interpreter is like a hearing aid—conveying information, not initiating it," she says. "If government pays for a hearing aid, does that mean the hearing aid can't be used to listen to a church service?"

\textsuperscript{143} Tony Mauro, \textit{Interpreter Subsidy at Heart of Case}, USA TODAY, Oct. 6, 1992, at 2A.

\textsuperscript{144} Ruth Bader Ginsburg endorsed the \textit{Lemon Test} during her confirmation hearings.

cent decision in Zobrest, anti-voucher groups may find the “wall of separation between church and state” insufficiently high enough to protect them from defeat.

In November of 1993, the voters of California convincingly rejected the Parental Choice in Education Amendment, more commonly known as Proposition 174. As a proposed amendment to the California Constitution, Proposition 174 would have enabled parents “to choose any school, public or private, for the education of their children.” Unlike other voucher programs that are limited to private nonsectarian schools, the California voucher plan was novel in that it did not exclude religious schools from full participation. And although the electorate in California may not be ready to embrace vouchers as a matter of public policy, it would be premature to think the school choice movement is going to quietly disappear from the political landscape. For this reason, the public policy debate over vouchers continues, and legal questions remain whether future voucher proposals, which permit parents to send their children to religious schools, violate the Establishment Clause of the First Amendment. Analyzing the structural composition of California’s Proposition 174 in terms of Zobrest will help provide the answer.

In the domain of government welfare programs, Zobrest confirmed two fundamental legal principles. First, “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...” Second, when “public funds become avail-

146. Id. § 17.
147. The much publicized Milwaukee Plan was a Pyrrhic victory for voucher purists. Only one percent of all students enrolled in the Milwaukee public schools are able to participate in the program, and parents are prohibited from using vouchers at sectarian schools. Interestingly, the exclusion of religious schools has prompted a federal lawsuit from parents that are now claiming the program violates their free exercise rights under the First Amendment. If the suit is successful, prospective voucher programs may be required by the Constitution to include religious schools. Daniel McGroarty, A Prayer for a Better Education, WALL ST. J., Oct. 1, 1993, at A10.
148. See Proposition 174 supra note 145, § 17(d).
149. State constitutions may pose additional problems for voucher advocates. For example, the Massachusetts Supreme Court has interpreted article 46, section 2 of the Massachusetts Constitution to prohibit any public funds or state aid to religious institutions, including religious schools. See Opinion of the Justices to the Senate, 514 N.E.2d 353 (Mass. 1987). Thus, in order to construct a voucher program in states having constitutions that expressly forbid aid to sectarian schools, a state constitutional amendment would be necessary—certainly a more Herculean task than a simple legislative enactment.
able to sectarian schools . . . 'as a result of the numerous private choices of individual parents of school-age children,'”151 such aid is constitutionally permissible. The relevant provisions of the Parental Choice In Education Amendment fit neatly within the constitutional requirements announced in Zobrest. Section 17 of the amendment provides in part:

THEREFORE: All parents are hereby empowered to choose any school, public or private, for the education of their children, as provided in this Section.

(a) Empowerment of Parents; Granting of scholarships. The State shall annually provide a scholarship to every resident school-age child. Scholarships may be redeemed by the child's parent at any scholarship-redeeming school.

(d) Definitions.

(2) A "child" is an individual eligible to attend kindergarten or grades one through twelve in the public school system.

(7) A "scholarship-redeeming school" is any school public or private, located within California which meets the requirements of this Section. No school shall be compelled to become a scholarship-redeeming school. No school which meets the requirements of this Section shall be prevented from becoming a scholarship redeeming school.152

If the neutral application of benefits across a broad spectrum of individuals is the prerequisite for surviving an Establishment Clause challenge, then California's Proposition 174 and other similarly constructed voucher proposals will pass the test. As the language of the amendment clearly indicates, all children, all parents, and all schools are eligible to participate.153 Furthermore, the amendment does not define the class of beneficiaries in terms of religious preferences and "is in no way skewed towards religion."154 Because participation in the voucher program is not obligatory, some religious or private non-sectarian schools may even decide not to take part.155

Section 17(a)(4) of Proposition 174 concerns the decisionmaking process whereby aid is disbursed to the school.

(4) Scholarships provided . . . are grants of aid to children through their parents and not to the schools in which the children are enrolled. . . . The parent shall be free to choose any scholarship-redeeming school, and such selection shall not constitute a decision or act of the State . . . .156

This provision is certainly consistent with the private choice requirement articulated in Zobrest, yet it is interesting to note that section 17(a)(4) attempts to characterize the funding as direct aid to the par-

151. Id. at 2467 (quoting Mueller v. Allen, 463 U.S. 388, 399 (1983)).
152. Proposition 174 supra note 145, §§ 17(a)-17(d)(7).
153. Id.
155. See Proposition 174 supra note 145, § 17(d)(7).
156. Id. § 17(a)(4)(emphasis added).
ents and “not to the school.” However, a subsequent provision of the amendment seems to indicate a more linear relationship between government funds and the coffers of private schools:

After the parent designates the enrolling school, the State shall disburse the student's scholarship funds . . . in equal amounts monthly, directly to the school for credit to the parents account.

The subtle conflict between these two provision again raises the specter of the direct-indirect aid dichotomy manifested in Zobrest. Opponents of vouchers will presumably argue that voucher schemes patterned after Proposition 174 are analogous to the programs struck down in Ball, while voucher advocates will assert that such plans are more similar to the scholarship program upheld in Witters. However upon closer examination, California's proposed voucher system was fundamentally different from Ball in several aspects. First, the programs in Ball were narrowly tailored to specifically benefit a limited number of sectarian schools. The California plan on the other hand, was a broad-based proposal where a hypothetical scenario can be envisioned in which no religious schools participate in the program and thereby receive no government funds. Even the Court in Ball recognized, “[this] Court has never accepted the mere possibility of subsidization . . . as sufficient to invalidate an aid program.” Secondly, like the sign language interpreter in Zobrest and the scholarship money in Witters, state aid under voucher plans modeled after Proposition 174 will not flow to a religious school until the parents first decide to send their children to a particular school. In Ball however, the state funds flowed directly to the religious school independent of any prior decisionmaking process initiated by parents or school administrators. Admittedly, this difference is a matter of degree, but as Justice Brennan observed in Ball, “[t]he problem like many problems in constitutional law, is one of degree.”

Another factor articulated in Zobrest militating in favor of the constitutionality of vouchers is the fact that religious schools will not be “relieved of expenses [they] otherwise would have assumed in educating [their] students.” In Zobrest, Salpointe would not have incurred the expense of a sign language interpreter and when one was provided, albeit from the Zobrests, the resulting financial effect on the school was negligible. Likewise, if Proposition 174 had been successful, religious schools would not have received a massive influx of gov-

157. See id.
158. See id. § 17(b)(7)(emphasis added).
159. See supra note 124 and accompanying text.
160. See supra note 155 and accompanying text.
162. Id. (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
ernment funds to supplement their own costs of educating children.164 For in the absence of the tuition vouchers, religious schools would not have incurred the expense of providing a free education to students. In this sense, Proposition 174 and Zobrest are analytically similar, and when the inevitable legal challenges to the constitutionality of vouchers occur, Zobrest will no doubt be dispositive of the legal issues involved.

Beyond the heated rhetoric of the voucher debate, the final resolution of the constitutional issues surrounding voucher proposals similar to California’s Parental Choice in Education Amendment will certainly have profound implications for the success of education reform. And with the Supreme Court’s decision in Zobrest, educational statists must be concerned. Their hackneyed legal claims that the First Amendment absolutely prohibits government aid to religious schools is losing legal credibility. As Harvard law professor Laurence Tribe, not usually known as a friend of conservative causes, recently commented: “Given the existing doctrine about the separation of church and state, I do not see a serious First Amendment problem with a reasonably written voucher program.”165 Nevertheless, voucher proponents would be wise not to discount the inherent risk associated with allowing government a foothold into the arena of private education. Aside from the apparent constitutionality of vouchers, religious schools and private education in general must consider the ominous possibility of increased government regulation that must inevitably accompany the funding of private schools with public money. Given the government’s propensity to contaminate a good idea, it may be prudential for religious schools to live with the devil they do know, instead of the one they don’t.

*Kirk A. Kennedy ’95

164. But see Proposition 174, supra note 145, § 17(a)(5). Proposition 174 had a phase-in period for students currently attending private schools. Parents of these students would not be eligible to receive vouchers until the 1995-1996 school year. While it may initially appear that private schools would eventually be relieved of the tuition costs of students currently enrolled, this view is analytically unsatisfying. Private schools would still receive the same amount of money for tuition, but the source may be slightly altered, as parents will now pay for the tuition with a voucher instead of cash.