SUPREME COURT OF THE UNITED STATES

Nos. 00–1751, 00–1777 and 00–1779

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL., PETITIONERS

00–1751 *v.*

DORIS SIMMONS-HARRIS ET AL.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

00–1777 *v.*

DORIS SIMMONS-HARRIS ET AL.

SENEL TAYLOR, ET AL., PETITIONERS

00–1779 *v.*

DORIS SIMMONS-HARRIS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 27, 2002]

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

I join JUSTICE SOUTER's opinion, and I agree substantially with JUSTICE STEVENS. I write separately, however, to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. I do so because I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program. And by explaining the nature of the concern, I hope to demonstrate why, in my view, "parental choice" cannot

significantly alleviate the constitutional problem. See Part IV, *infra.*

I

The First Amendment begins with a prohibition, that "Congress shall make no law respecting an establishment of religion," and a guarantee, that the government shall not prohibit "the free exercise thereof." These Clauses embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to "worship God in their own way," and allows all families to "teach their children and to form their characters" as they wish. C. Radcliffe, The Law & Its Compass 71 (1960). The Clauses reflect the Framers' vision of an American Nation free of the religious strife that had long plagued the nations of Europe. See, *e.g.*, Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969) (religious strife was "one of the principal evils that the first amendment sought to forestall"); B. Kosmin & S. Lachman, One Nation Under God: Religion in Contemporary American Society 24 (1993) (First Amendment designed in "part to prevent the religious wars of Europe from entering the United States"). Whatever the Framers might have thought about particular 18th century school funding practices, they undeniably intended an interpretation of the Religion Clauses that would implement this basic First Amendment objective.

In part for this reason, the Court's 20th century Establishment Clause cases—both those limiting the practice of religion in public schools and those limiting the public funding of private religious education—focused directly upon social conflict, potentially created when government becomes involved in religious education. In *Engel* v. *Vitale,* 370 U. S. 421 (1962), the Court held that the Establish-

ment Clause forbids prayer in public elementary and secondary schools. It did so in part because it recognized the "anguish, hardship and bitter strife that could come when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval . . . ." *Id.,* at 429. And it added:

> "The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Id.,* at 431.

See also *Lee* v. *Weisman,* 505 U. S. 577, 588 (1992) (striking down school-sanctioned prayer at high school graduation ceremony because "potential for divisiveness" has "particular relevance" in school environment); *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203, 307 (1963) (Goldberg, J., concurring) (Bible-reading program violated Establishment Clause in part because it gave rise "to those very divisive influences and inhibitions of freedom" that come with government efforts to impose religious influence on "young impressionable [school] children").

In *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971), the Court held that the Establishment Clause forbids state funding, through salary supplements, of religious school teachers. It did so in part because of the "threat" that this funding would create religious "divisiveness" that would harm "the normal political process." *Id.,* at 622. The Court explained:

> "[P]olitical debate and division . . . are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which [the First Amendment's religious clauses were] . . . intended to

protect." *Ibid.*

And in *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756, 794 (1973), the Court struck down a state statute that, much like voucher programs, provided aid for parents whose children attended religious schools, explaining that the "assistance of the sort here involved carries grave potential for . . . continuing political strife over aid to religion."

When it decided these 20th century Establishment Clause cases, the Court did not deny that an earlier American society might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. See, *e.g.*, D. Tyack, Onward Christian Soldiers: Religion in the American Common School, in History and Education 217–226 (P. Nash ed. 1970). Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict. See Kosmin & Lachman, *supra*, at 45 (Catholics constituted less than 2% of American church-affiliated population at time of founding).

The 20th century Court was fully aware, however, that immigration and growth had changed American society dramatically since its early years. By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million. Jeffries & Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 299–300 (Nov. 2001). There were similar percentage increases in the Jewish population. Kosmin & Lachman, *supra*, at 45–46. Not surprisingly, with this increase in numbers,

members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid-19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, *supra*, at 300. "Dreading Catholic domination," native Protestants "terrorized Catholics." P. Hamburger, Separation of Church and State 219 (2002). In some States "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading." Jeffries & Ryan, 100 Mich. L. Rev., at 300.

The 20th century Court was also aware that political efforts to right the wrong of discrimination against religious minorities in primary education had failed; in fact they had exacerbated religious conflict. Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)." *Id.,* at 301. And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (*i.e.*, Catholic) schooling for children. *Id.,* at 301–305. See also Hamburger, *supra*, at 287.

These historical circumstances suggest that the Court, applying the Establishment Clause through the Fourteenth Amendment to 20th century American society, faced an interpretive dilemma that was in part practical.

The Court appreciated the religious diversity of contemporary American society. See *Schempp,* 374 U. S., at 240 (Brennan, J., concurring). It realized that the status quo favored some religions at the expense of others. And it understood the Establishment Clause to prohibit (among other things) any such favoritism. Yet *how* did the Clause achieve that objective? Did it simply require the government to give each religion an equal chance to introduce religion into the primary schools—a kind of "equal opportunity" approach to the interpretation of the Establishment Clause? Or, did that Clause avoid government favoritism of some religions by insisting upon "separation"—that the government achieve equal treatment by removing itself from the business of providing religious education for children? This interpretive choice arose in respect both to religious activities in public schools and government aid to private education.

In both areas the Court concluded that the Establishment Clause required "separation," in part because an "equal opportunity" approach was not workable. With respect to religious activities in the public schools, how could the Clause require public primary and secondary school teachers, when reading prayers or the Bible, *only* to treat all religions alike? In many places there were too many religions, too diverse a set of religious practices, too many whose spiritual beliefs denied the virtue of formal religious training. This diversity made it difficult, if not impossible, to devise meaningful forms of "equal treatment" by providing an "equal opportunity" for all to introduce their own religious practices into the public schools.

With respect to government aid to private education, did not history show that efforts to obtain equivalent funding for the private education of children whose parents did not hold popular religious beliefs only exacerbated religious strife? As Justice Rutledge recognized:

> "Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one [religious sect] by numbers [of adherents] alone will benefit most, there another. This is precisely the history of societies which have had an established religion and dissident groups." *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 53–54 (1947) (dissenting opinion).

The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, *not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue.

II

The principle underlying these cases—avoiding religiously based social conflict—remains of great concern. As religiously diverse as America had become when the Court decided its major 20th century Establishment Clause cases, we are exponentially more diverse today. America boasts more than 55 different religious groups and subgroups with a significant number of members. Graduate Center of the City of New York, B. Kosmin, E. Mayer, & A. Keysar, American Religious Identification Survey 12–13 (2001). Major religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. *Ibid.* And several of these major religions contain different subsidiary sects with different religious beliefs. See Lester, Oh, Gods!, The Atlantic Monthly 37 (Feb. 2002). Newer Christian immigrant groups are "expressing their Christianity in languages, customs, and independent churches that are barely recognizable, and often contro-

versial, for European-ancestry Catholics and Protestants." H. Ebaugh & J. Chafetz, Religion and the New Immigrants: Continuities and Adaptations in Immigrant Congregations 4 (Abridged Student ed. 2002).

Under these modern-day circumstances, how is the "equal opportunity" principle to work—without risking the "struggle of sect against sect" against which Justice Rutledge warned? School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?

Consider the voucher program here at issue. That program insists that the religious school accept students of all religions. Does that criterion treat fairly groups whose religion forbids them to do so? The program also insists that no participating school "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Ohio Rev. Code Ann. §3313.976(A)(6) (West Supp. 2002). And it requires the State to "revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation" of the program's rules. §3313.976(B). As one *amicus* argues, "it is difficult to imagine a more divisive activity" than the appointment of state officials as referees to determine whether a particu-

lar religious doctrine "teaches hatred or advocates lawlessness." Brief for National Committee For Public Education And Religious Liberty as *Amicus Curiae* 23.

How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in a religious ceremony, or resort to force to call attention to what it views as an immoral social practice? What kind of public hearing will there be in response to claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? How will the public react to government funding for schools that take controversial religious positions on topics that are of current popular interest—say, the conflict in the Middle East or the war on terrorism? Yet any major funding program for primary religious education will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive. Efforts to respond to these problems not only will seriously entangle church and state, see *Lemon*, 403 U. S., at 622, but also will promote division among religious groups, as one group or another fears (often legitimately) that it will receive unfair treatment at the hands of the government.

I recognize that other nations, for example Great Britain and France, have in the past reconciled religious school funding and religious freedom without creating serious strife. Yet British and French societies are religiously more homogeneous—and it bears noting that recent waves of immigration have begun to create problems of social division there as well. See, *e.g.*, The Muslims of France, 75 Foreign Affairs 78 (1996) (describing increased religious strife in France, as exemplified by expulsion of teenage girls from school for wearing traditional Muslim scarves); Ahmed, Extreme Prejudice; Muslims in Britain, The Times of London, May 2, 1992, p. 10 (describing re-

ligious strife in connection with increased Muslim immigration in Great Britain).

In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits. See, *e.g.*, Webster, On the Education of Youth in America (1790), in Essays on Education in the Early Republic 43, 53, 59 (F. Rudolph ed. 1965) ("[E]ducation of youth" is "of more consequence than making laws and preaching the gospel, because it lays the foundation on which both law and gospel rest for success"); Pope Paul VI, Declaration on Christian Education (1965) ("[T]he Catholic school can be such an aid to the fulfillment of the mission of the People of God and to the fostering of dialogue between the Church and mankind, to the benefit of both, it retains even in our present circumstances the utmost importance").

III

I concede that the Establishment Clause currently permits States to channel various forms of assistance to religious schools, for example, transportation costs for students, computers, and secular texts. See *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947); *Mitchell* v. *Helms,* 530 U. S. 793 (2000). States now certify the nonsectarian educational content of religious school education. See, *e.g.*, *New Life Baptist Church Academy* v. *East Longmeadow*, 885 F. 2d 940 (CA1 1989). Yet the consequence has not been great turmoil. But see, *e.g.*, May, Charter School's Religious Tone; Operation of South Bay Academy Raises Church-State Questions, San Francisco Chronicle, Dec. 17, 2001, p. A1 (describing increased government supervision of charter schools after complaints that students were "studying Islam in class and praying with their

teachers," and Muslim educators complaining of "'post-Sept. 11 anti-Muslim sentiment'").

School voucher programs differ, however, in both *kind* and *degree* from aid programs upheld in the past. They differ in kind because they direct financing to a core function of the church: the teaching of religious truths to young children. For that reason the constitutional demand for "separation" is of particular constitutional concern. See, *e.g.*, *Weisman*, 505 U. S., at 592 ("heightened concerns" in context of primary education); *Edwards* v. *Aguillard,* 482 U. S. 578, 583–584 (1987) ("Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools").

Private schools that participate in Ohio's program, for example, recognize the importance of primary religious education, for they pronounce that their goals are to "communicate the gospel," "provide opportunities to . . . experience a faith community," "provide . . . for growth in prayer," and "provide instruction in religious truths and values." App. 408a, 487a. History suggests, not that such private school teaching of religion is undesirable, but that *government funding* of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university. See *supra*, at 4–6. Contrary to JUSTICE O'CONNOR's opinion, *ante*, at 4–5 (concurring opinion), history also shows that government involvement in religious primary education is far more divisive than state property tax exemptions for religious institutions or tax deductions for charitable contributions, both of which come far closer to exemplifying the neutrality that distinguishes, for example, fire protection on the one hand from direct monetary assistance on the other. Federal aid to religiously based hospitals, *ante*, at 5 (O'Connor, J., con-

curring), is even further removed from education, which lies at the heartland of religious belief.

Vouchers also differ in *degree*. The aid programs recently upheld by the Court involved limited amounts of aid to religion. But the majority's analysis here appears to permit a considerable shift of taxpayer dollars from public secular schools to private religious schools. That fact, combined with the use to which these dollars will be put, exacerbates the conflict problem. State aid that takes the form of peripheral secular items, with prohibitions against diversion of funds to religious teaching, holds significantly less potential for social division. In this respect as well, the secular aid upheld in *Mitchell* differs dramatically from the present case. Although it was conceivable that minor amounts of money could have, contrary to the statute, found their way to the religious activities of the recipients, see 530 U. S., at 864 (O'CONNOR, J., concurring in judgment), that case is at worst the camel's nose, while the litigation before us is the camel itself.

IV

I do not believe that the "parental choice" aspect of the voucher program sufficiently offsets the concerns I have mentioned. Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. And it

does little to ameliorate the entanglement problems or the related problems of social division that Part II, *supra,* describes. Consequently, the fact that the parent may choose which school can cash the government's voucher check does not alleviate the Establishment Clause concerns associated with voucher programs.

V

The Court, in effect, turns the clock back. It adopts, under the name of "neutrality," an interpretation of the Establishment Clause that this Court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity to secure government funding overcomes the Establishment Clause concern for social concord. An earlier Court found that "equal opportunity" principle insufficient; it read the Clause as insisting upon greater separation of church and state, at least in respect to primary education. See *Nyquist*, 413 U. S., at 783. In a society composed of many different religious creeds, I fear that this present departure from the Court's earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric. Because I believe the Establishment Clause was written in part to avoid this kind of conflict, and for reasons set forth by JUSTICE SOUTER and JUSTICE STEVENS, I respectfully dissent.