By the Book

First Amendment Compels Equal Funding for Religious and Public Schools

By Mitchell Kelter

In January, Arizona followed Wisconsin in upholding a school-choice program. *Kotterman v. Killian*, 1999 WL 27517; *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). Although *Jackson* merely permitted equal funding for religious and public schools, recent U.S. Supreme Court decisions imply that the First Amendment compels funding equality. Equal funding reflects the Framers' intentions and maximizes individual liberty.

Parents who participate in the approved Wisconsin program receive state funds they may send to any school, public or private, religious or secular. The Wisconsin Supreme Court recalled that the U.S. Supreme Court had approved educational choice programs that were both "indirect" and "neutral." See, e.g. *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). A program is properly indirect when the religious institution receives funds due to the private choices of individuals, not state direction. For example, a state employee may constitutionally donate his paycheck to his church.

Programs are properly neutral when they provide all students with equal assistance, regardless of the school the student selects. Larry Witters, a blind student, could therefore use a state grant to study at a religious seminary, since he would have received the same aid if he had chosen nonreligious instruction. Similarly, Larry Zobrest could "assign" his deaf son's federally funded sign-language interpreter to translate lectures at any school, religious or secular. As neither a disability nor the name "Larry" is a constitutional prerequisite for such educational autonomy, the Wisconsin court correctly followed these precedents.

Whereas *Witters* and *Zobrest* permitted equal funding, *Rosenberger v. Rector & Visitors of the University of Va.*, 515 U.S. 819 (1995) demanded it. The *Rosenberger* court compelled the University of Virginia to fund a campus religious newspaper equally with secular publications. Having established a public forum, the school violated students' free speech rights by discriminatorily funding only nonreligious speech.

Private school choice programs thus may not exclude religious schools. Religious schools are not entitled to funding parity with public schools under the Free Speech Clause, because the state may favor its own speech. But the *Rosenberger* Court explained that the Establishment Clause itself requires neutrality towards religious speech. This neutrality compels school-funding parity.

The primary effect of state action can neither advance nor inhibit religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The court formerly held that the state advanced religion by partially reimbursing parents for religious school tuition payments. *Sloan v. Lemon*, 413 U.S. 825, 832, (1973). Such assistance provided an incentive to pursue religious education, even though state funding substantially disfavored religious education compared to public schools. *Sloan* reflected the "no-aid" rule, which held the Establishment Clause was designed as an absolute bar to state support for religious activity.

Witters and *Zobrest* replaced the no-aid doctrine with the neutrality doctrine, which holds that the Establishment Clause was designed to prevent *relative* assistance that discriminates for or against any religious denomination or religion generally. Accordingly, an improper incentive that advances religion now exists only if the state allocates *more* support for religious schools than nonreligious schools.

If providing religious students with more resources creates an impermissible incentive for religious study, providing fewer resources creates a disincentive, which impermissibly inhibits religion. History and policy support the equality imperative.

Thomas Jefferson asserted that banning state funding of religion was necessary to protect private, voluntary funding, as coerced support undermined voluntary support. "[T]o compel a man to furnish contributions ... for ... opinions which he disbelieves, is sinful and tyrannical ... [E]ven forcing him to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of [supporting his preferred pastor]." *Everson v. Board of Educ.*, 330 U.S. 1, 13 (1947). The Establishment Clause's negative liberty and the Free Exercise Clause's positive liberty thus both furthered a model of religious "voluntarism," in which the individual pursued religious direction free from state influence.

When the Constitution was ratified, nearly all instruction was provided under religious, not governmental, auspices. To which institution does the task belong?

In the limited-government 1700s, the primary threat to religious voluntarism was direct state funding, which could "establish" one sect over other alternatives. As the state now funds alternatives to religious institutions, a no-aid rule discriminates against religion; the state withdraws nearly $20,000 of education aid from parents who send their three children to religious schools. If the state conditions its support on an institution's conforming to a "secular orthodoxy," *Rosenberger* observed, such "pervasive bias or hostility to religion [could] undermine the very neutrality the Establishment Clause requires."

In *Everson*, the Supreme Court recalled the events that led to the enactment of the Establishment Clause. James Madison and Jefferson successfully campaigned against a proposed Virginia tax that demanded citizens donate to the Christian denomination of their choice.

The tax discriminated against minority religions, forcing "Turks, Jews and infidels," to support Christianity first, burdening support for their own institutions. Madison warned that the same authority that could disfavor non-Christians could also disfavor certain Christian denominations.

This favoritism later occurred. States used compulsory tax funds to support a Protestant-oriented public education and banned any support for competing Catholic institutions. Nativists sought to use schools to purge new immigrants of their "backward" customs and transform them into "real Americans." Prejudice aside, public education structurally disfavors denominations with comprehensive teachings that cannot be transmitted through once-a-week schooling.

In recent generations, an increasingly secular public school system has prompted many Protestants to join Catholics and Jews in sponsoring private schools. Despite their "nondenominational" ambition, public schools create an unwelcome climate for minority religious practices.

For example, Sabbath-observing students may effectively be excluded from extracurricular activities unless they abandon their principles. The private-school tuition required to play sports in a league without Sabbath games amounts to an impermissible fine on Sabbath observance.

Madison's objections to favoritism notwithstanding, the recurring pattern has been one where a dominant majority demands contributions from a dissenting minority, which must fend for itself with its leftover funds.

The disfavored minority has shifted from non-Christian to non-Protestant to anyone with strong sectarian beliefs, but the result remains: Government offers financial inducements to exert a "hydraulic insistence on conformity to majoritarian standards." *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972).

In "On Liberty," J.S. Mill described public education as a "mere contrivance for molding people ... [as] pleases the predominant power in the government." To preserve "individuality of character, and diversity in opinions," Mill opposed the government's education monopoly, yet his purported ideological heirs are its most passionate defenders. Although they cite correct principles, their objections are better directed at the status quo:

■ "Denominations should not compete for political support." Mill described how public education leads to quarreling about educational philosophy (i.e. bilingual instruction), with the winners of these battles spending the losers' money. Religious-based conflicts occur as the state's unlimited taxing power redistributes wealth from religious school parents to public school parents. Sending parents a fixed payment, which they could direct to the school they favor, insures any competition exists solely in the consciences of parents, not in legislatures or school boards. A fixed payment would also equalize spending between rich and poor districts.

■ "Religious values should be inculcated privately." The Supreme Court has barred privately sponsored religious instruction on public school grounds, as student conformity could lead students to embrace religious teachings that differed from their parents'. But the state now acts in loco parentis, placing the school's authority behind opinions on controversial issues such as the morality of contraception, abortion or sex outside of marriage, which may conflict with parental teachings. School choice insures that parents, not the government, shape their children's values.

■ "The functions of religion and government must remain separate." The separation imperative begs the question: To which institution does the task of education belong? When the Constitution was ratified, nearly all instruction was provided under religious, not governmental, auspices. Many parents still trust their church more than the state to teach their children.

Ultimately, it is "the fundamental interest of parents, as contrasted with the State, to guide the religious future and education of their children." *Yoder*, 406 U.S. at 232. Parents who are unable or unwilling to homeschool must be free to delegate that critical role to the education provider of their choice, without discrimination for or against religion.

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