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Constitutional Law: Does the Establishment Clause Prohibit Sending Public Employees into Religious Schools?

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CASE COMMENTS

CONSTITUTIONAL LAW: DOES THE ESTABLISHMENT CLAUSE PROHIBIT SENDING PUBLIC EMPLOYEES INTO RELIGIOUS SCHOOLS?

Petitioners, a deaf child and his parents, asked Respondent school district to provide a sign language interpreter to assist the child in classes at a Roman Catholic high school[1] pursuant to the Individuals with Disabilities Education Act (IDEA).[2] Respondent concluded that providing an interpreter on the parochial school's premises violated the Establishment Clause.[3] Petitioners instituted this action in the United States District Court for the District of Arizona, asserting that the IDEA and the Establishment Clause required Respondent to provide an interpreter.[4] The district court held that providing an interpreter at the government's expense violated the Establishment Clause because the interpreter acted as a conduit for the school's religious indoctrination of the child.[5] The United States Court of Appeals for the Ninth Circuit affirmed, holding that providing a publicly employed interpreter in a parochial school advanced religion at government expense and thus violated the Establishment Clause.[6] After granting certiorari, the United States Supreme

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1. Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993). Petitioner attended grades one through five in a school for the deaf and grades six through eight in a public school. *Id.* at 2464. While the petitioner attended public school, the respondent provided a sign language interpreter. *Id.* For religious reasons, petitioner's parents enrolled him in a Roman Catholic high school. *Id.* While enrolled in the Catholic High School the respondent refused to provide an interpreter. *Id.* Petitioner's parents had to provide their son with an interpreter. *Id.*

2. Individuals with Disabilities Education Act, 20 U.S.C. § 1400-1452 (1993) [hereinafter IDEA] (IDEA provides federal funds to state governments to educate handicapped children. The IDEA also required that each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children).

3. *Zobrest*, 113 S. Ct. at 2464. The question was next referred to the Arizona Attorney General who concurred in the County Attorney's opinion. *Id.*

4. *Id.*

5. Zobrest v. Catalina Foothills Sch. Dist., No. CIV-88-516 (D. Ariz. Oct. 19, 1989) (order granting summary judgment), *aff'd*, 963 F.2d 1190 (9th Cir. 1992), *rev'd*, 113 S. Ct. 2462 (1993). *See Zobrest*, 113 S. Ct. at 2464.

6. Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992) (stating that "by placing its employee in the sectarian school, the government would create the appearance that it was a joint sponsor of the school's activities"). In his dissenting opinion, Judge Tang stated that all handicapped children, whether enrolled in public or private schools and not religious institutions, are IDEA's primary beneficiaries. Judge Tang further stated that the only persons directly benefitting from the IDEA are the parents and the child and that the sectarian school only incidentally benefits. Judge Tang also found that the interpreter's presence in the parochial school is attributed to the parents' independent decision, rather than state action. Furthermore, Judge Tang reasoned that unlike teachers, the sign language interpreter merely facilitates communication, and therefore is not a potential source of religious indoctrination. *Id.* at 1197-1202 (Tang, J., dissenting).

Court reversed and HELD, that the Establishment Clause does not prevent Respondent from providing a disabled child enrolled in a sectarian school a sign language interpreter in order to assist his education.[7]

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion."[8] The Establishment Clause protects religious activities from the government's active involvement, sponsorship, or financial support.[9] However, absolute separation is not required and some interaction between government and religion is inevitable.[10] Earlier cases held that the Establishment Clause does not bar religious sects from participating in publicly sponsored social welfare programs.[11]

In the landmark case *Lemon v. Kurtzman*,[12] the Supreme Court applied a three-prong test to determine whether government action violated the Establishment Clause.[13] The issue in *Lemon* was whether providing state financial aid to sectarian schools to advance secular education violated the Establishment Clause.[14] In order to be constitutional, a statute must first have a secular purpose.[15] Second, the statute's principal purpose must neither advance nor inhibit religion.[16] Third, the statute must not foster excessive government entanglement with religion.[17] The *Lemon* Court found that the state program involved excessive entanglement between government and religion, and declared it to be unconstitutional.[18]

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7. *Zobrest*, 113 S. Ct. at 2469.

8. U.S. CONST. amend. I.

9. Walz v. Tax Comm'n, 397 U.S. 664 (1970) (holding that the practice of granting churches property tax exemptions is constitutional because the property tax exemption neither advanced nor inhibited religion because the exemption applied to all nonprofit institutions).

10. Widmar v. Vincent, 454 U.S. 263, 274-75 (1981) (stating that "if the Establishment Clause barred the extension of general benefits to religious groups a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair").

11. Bowen v. Kendrick, 487 U.S. 589, 609 (1988) (holding that the Adolescent Family Life Act, which mainly gives grants to public or non-profit organizations so that the organizations can give adolescents counseling about sex, does not violate the Establishment Clause even though for an organization to qualify it must describe how it will involve religion in its activities).

12. 403 U.S. 602 (1971). The Court declared that previous religious cases had developed three tests which must be considered when analyzing a state program under the Establishment Clause. *Id.* at 612. The *Lemon* test has become the cornerstone in deciding Establishment Clause questions. Since the *Lemon* decision, the Court has decided more than thirty Establishment Clause cases and has failed to apply the *Lemon* test only three times. The three exceptions are Marsh v. Chambers, 463 U.S. 783, 795 (1983) (applying a "tradition" analysis to hold that opening benedictions for legislative sessions did not violate the Establishment Clause); Lee v. Weisman, 112 S. Ct. 2649, 2657-60 (1992) (applying a "coercion" analysis to hold that the Establishment Clause forbids religious exercises to be conducted at a public school graduation ceremony), and the instant case.

13. *Lemon*, 403 U.S. at 625.

14. *Id.* at 606-07.

15. *Id.* at 612.

16. *Id.*

17. *Id.*

18. *Id.*

The Court extended the *Lemon* test in *Grand Rapids School District v. Ball*[19] by holding that a state program which placed public school teachers in parochial schools violated the *Lemon* test's "primary secular effects" prong.[20] The Court barred publicly employed teachers from religious schools for three reasons.[21] First, a state program that provided publicly employed teachers on the religious school's premises conveyed a message of state support for religion.[22] Second, publicly employed teachers, who teach at religious schools may subtly or overtly indoctrinate students in religious beliefs because of the religious surroundings.[23] Third, a state program that relieved the religious school of teaching secular subjects subsidized the school's religious functions.[24] Therefore, the Court held that the state program had the primary effect of advancing religion and thus violated the Establishment Clause.[25]

In *Mueller v. Allen*,[26] the Court carved out an important exception to the *Lemon* test's "primary secular effect" prong. State programs which are neutral and do not refer to religion when offering educational assistance do not violate the *Lemon* test.[27] The *Mueller* Court held that the Establishment Clause did not prohibit a Minnesota tax statute which allowed state taxpayers to deduct expenses they incurred in providing "tuition, textbooks, and transportation" for their children attending an elementary or secondary school.[28]

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19. 473 U.S. 373 (1985).

20. *Id.* at 393. The Court examined *Grand Rapids'* "Shared Time" program where publicly employed teachers offered a variety of remedial and enrichment courses intended to supplement religious schools' core curricula during the regular school day. *Id.* at 375.

21. *Id.* at 384. Forty of the 41 private schools involved in *Grand Rapids'* "Shared Time" program were sectarian. *Id.* at 384-85.

22. *Id.* at 389. The Court stated that

> government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any religious denominations when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

Id.

23. *Id.* at 388.

24. *Id.* at 395-96. The Court found that the "Shared Time" program, which provided teachers and instructional equipment and materials, had the forbidden effect of advancing religion. *Id.* at 397. The Court reasoned that this type of direct aid to the school's educational function was "indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause." *Id.* at 395.

25. *Id.* at 397.

26. 463 U.S. 388 (1983).

27. *Id.* at 398-99.

28. *Id.* at 391. The Court has consistently rejected the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. *Id.* at 393; *see* Everson v. Board of Educ., 330 U.S. 1, 17 (1947) (holding that a state may reimburse parents for expenses incurred in transporting their children to school); *see also* Board of Educ. v. Allen, 392 U.S. 236 (1968) (holding that a state may loan secular textbooks to all children within the state).

The Court relied on three factors in determining that the statute had a primary secular effect.[29] First, the deduction was one of many deductions which attempted to distribute the tax burden to all taxpayers.[30] Second, the deductions permitted all taxpayers, regardless of whether their children attended public or private schools, to deduct their children's educational expenses.[31] Finally, the statute gave financial assistance to the parents and not directly to the parochial school, thus preventing state approval from being conferred on any particular religion.[32] Thus, the *Mueller* Court reasoned that a state program does not violate the *Lemon* test as long as the assistance to parochial schools is incidental to a program which applies neutrally to all school children.[33]

The Court created another exception to the *Lemon* test's "primary secular effects" prong in *Witters v. Washington Department of Services for the Blind*.[34] In *Witters*, the Court concluded that a general scholarship program does not violate the Establishment Clause when students use the funds to attend religious schools.[35] The *Witters* Court held that a vocational rehabilitation assistance program,[36] which granted funds to a blind student who in turn used the fund to attend a Christian college, did not violate the Establishment Clause.[37] The program did not violate the "primarily secular effects" prong of *Lemon* because the funds were paid directly to the student; consequently, any aid that flowed to the school resulted from the student's genuinely independent and private choices.[38] Further, the program created "no financial incentive for students to undertake sectarian education."[39] In addition, the program made funds generally available irrespective of whether the

29. *Mueller*, 463 U.S. at 396-402.

30. *Id.* at 396. The Court stated that an essential feature of Minnesota's tax law was the fact that the tuition deduction was one of many such deductions, including deductions for medical expenses and charities, that were available to all taxpayers. *Id.*

31. *Id.* at 398.

32. *Id.* at 399. The Court stressed that "the fact that aid is disbursed to parents rather than to [the] schools is a material consideration in Establishment Clause analysis." *Id.* (citing Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 765, 781 (1973)).

33. *Mueller*, 463 U.S. at 401, 403.

34. 474 U.S. 481 (1986).

35. *Id.*

36. WASH. REV. CODE § 74.16.181 (1981) (provided "for special education and/or training in the professions, business or trades," to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care . . . ."). This provision was repealed in 1983.

37. *Witters*, 473 U.S. at 489.

38. *Id.* at 487. The Court found it important that nothing in the record indicated that any significant portion of the aid expended under the program would end up supporting religious education. *Id.* at 488. Also, the Court stated that the program's function was "hardly to provide financial support for non-public, sectarian institutions." *Id.*

39. *Id.*

institution benefitted was sectarian or nonsectarian.[40]

In the instant case, a closely divided United States Supreme Court followed the reasoning of both *Mueller* and *Witters*.[41] The instant Court stated that the sign language interpreter was part of a general government program to distribute benefits neutrally to any child who qualified as handicapped under the IDEA, without regard to the school's "sectarian-nonsectarian" nature.[42] The Court found that the IDEA created no financial incentive for the parents to choose a sectarian school; thus, the interpreter's presence in the school could not be the result of the government's decisionmaking.[43] Instead, the Court stated that the IDEA ensured that a government paid interpreter would be present in a sectarian school only as the result of individual parents' private decisions.[44]

Further, the instant Court stated that the aid extended to the petitioner did not amount to an impermissible direct subsidy to the sectarian school.[45] The IDEA's purpose was to help handicapped children and not to benefit sectarian schools.[46] Any benefit sectarian schools received was merely incidental.[47] In addition, an interpreter, unlike a teacher, neither adds nor subtracts from the sectarian school's environment, but merely interprets whatever material is presented to the class.[48] Therefore, the Court held that the IDEA created a neutral government program that gave aid to individual handicapped children and not to the parochial school.[49]

In dissent, Justice Blackmun stated that until now the Court has never authorized a public employee to participate directly in religious indoctrination.[50] The dissent argued that where the secular and the sectarian are as entangled as in the instant case, governmental assistance to the school's educational function entails the government's participation in the school's religious

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40. *Id.*

41. *Zobrest*, 113 S. Ct. at 2466-67.

42. *Id.* at 2467. "When the government offers a neutral service on the premises of a sectarian school as part of a general program that is no way skewed towards religion, it follows under our previous decisions that provision of that service does not offend the Establishment Clause." *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 2468-69. "The State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school from the state." *See also Grand Rapids*, 473 U.S. at 394.

46. *Zobrest*, 113 S. Ct. at 2469.

47. *Id.*

48. *Id.* The Court stated that a sign language interpreter's job is different from that of a teacher. *Id.* The Court stated that the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school. *Id.*; *see also* Wolman v. Walter, 433 U.S. 229, 242 (1977) (stating that "the provision of health services to all school children—public and non-public—does not have the primary effect of aiding religion, even when those services are provided within sectarian schools").

49. *Zobrest*, 113 S. Ct. at 2469.

50. *Id.* at 2471 (Blackmun, J., dissenting).

indoctrination.[51] A publicly employed sign language interpreter would be required to translate religious beliefs throughout all facets of the parochial school's education.[52] Justice Blackmun reasoned that in an environment so imbued with religious discussion, the interpreter's every gesture would be infused with religious significance.[53] Therefore, Justice Blackmun believed that if the government provided the sign language interpreter, the interpreter would act as a conduit for the school's religious indoctrination.[54]

The instant case presented the Court with the opportunity to clarify its Establishment Clause jurisprudence, and in doing so, the Court has departed from the *Lemon* test. Although the instant Court did not overrule *Lemon*, the Court refused to apply its three-prong test.[55] However, the Court's holding is consistent with its previous decisions which allowed services to be supplied to a parochial school if the services were neutrally available to all and were not subject to the parochial school's control.[56] As in *Mueller* and *Witters*, the instant Court adopted a "child-benefit theory."[57] The government can provide educational benefits directly to children or their parents, even if the benefits are used in connection with a religious school, but cannot provide the same aid directly to the school.[58]

The Court in the instant case, as in *Witters*, stressed that it is the parents' freedom to select a school of their choice.[59] Likewise, a material consideration in both cases is that aid was distributed to the parent rather than the school.[60] Thus, any aid provided under the IDEA that ultimately flows to religious institutions does so only as the result of "the genuinely independent and private choices of aid recipients," and not through government action.[61]

The instant Court found that the IDEA's "primary effect" is not to ad-

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51. *Id.* at 2472 (Blackmun, J., dissenting).

52. *Id.* "A state employed sign language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Mass." *Id.*

53. *Id.* "This case involves ongoing, daily and intimate government participation in the teaching and propagation of religious doctrine. When government dispenses public funds to individuals who employ them to finance private choices, it is [not] difficult to argue that government is actually endorsing religion." *Id.*

54. *Id.* at 2474 (Blackmun, J., dissenting). "[G]overnment crosses the boundary when it furnishes the medium for communication of a religious message." *Id.*

55. Neither the majority nor the dissent in the instant case applied the *Lemon* test to reach their conclusion.

56. *Zobrest*, 113 S. Ct. at 2467.

57. Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 443-46 (1986) (describing six theories that have been endorsed by one or more Justices in Establishment Clause cases).

58. *Id.*

59. *Zobrest*, 113 S. Ct. at 2467; *cf. Witters*, 474 U.S. at 488.

60. *Zobrest*, 113 S. Ct. at 2467; *Witters*, 474 U.S. at 488.

61. *Zobrest*, 113 S. Ct. at 2467.

vance religion.[62] Under the IDEA the Court found that the primary beneficiaries are all handicapped children.[63] Since the IDEA is available to all handicapped children, the government only sends an interpreter to a religious school if the child chooses to attend such a school.[64] An individual choice to use neutrally available government aid at a sectarian school does not confer any message of government's endorsement of religion, because the government has no authority under the IDEA to determine which schools will receive the benefits.[65]

Furthermore, the IDEA does not create any financial incentive to undertake sectarian education, because the IDEA's benefits are available to all children, regardless of whether they attend a sectarian or nonsectarian school.[66] Unlike the program in *Grand Rapids*, the IDEA in the instant case does not "in effect subsidize the religious functions of parochial schools by taking over a substantial portion of their responsibilities for teaching secular subjects."[67] In the instant case, the Court stated that the IDEA does not act as a direct subsidy to relieve the parochial school of an expense that it would have undertaken in educating its students.[68] The instant Court stated that handicapped children and not sectarian schools are the IDEA's primary beneficiaries, and that sectarian schools only incidentally benefit under the IDEA.[69] Thus, the Court reasoned that the IDEA's function was hardly to provide support to sectarian schools.[70]

Furthermore, a state program that provides a sign language interpreter to a deaf child does not create a symbolic union between church and state.[71] A state program that provides a sign language interpreter to translate religious beliefs does not imply that the government agrees with these religious beliefs.[72] Unlike *Grand Rapids*, where a state program supplied teachers to parochial schools, a state program that supplies an interpreter does not ad-

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62. *Id.* at 2467-68.

63. *Id.* at 2469.

64. *Id.* at 2467.

65. *Id.*

66. *Id.*

67. *Id.* at 2468. "Substantial aid to the education function of [religious] schools necessarily results in aid to the sectarian school as a whole, and therefore brings about the direct and substantial advancement of religious activities." *Grand Rapids*, 473 U.S. at 366.

68. *Zobrest*, 113 S. Ct. at 2469.

69. *Id.*

70. *Id.* at 2468.

71. Isabel M. Humphrey, *Establishment Clause Prohibits Provision of State-Paid Sign Language Interpreter to Student Attending Pervasively Religious High School:* Zobrest v. Catalina Foothills School District, 25 ARIZ. ST. L.J. 449, 456 (1993) (stating that high school students should be able to understand that a publicly employed sign language interpreter merely translates religious ideas into visual symbols and does not imply that the state agrees with the precepts of the Roman Catholic Church). The only state purpose that this program communicates to the public is a general desire to help all handicapped children, regardless of their religion, to overcome educational obstacles. *Zobrest*, 113 S. Ct. at 2468.

72. Humphrey, *supra* note 71, at 456.

vance religious beliefs.[73] Under the IDEA there is no danger that an interpreter will convey any religious beliefs at the government's expense.[74] The sign language interpreter merely acts as a translator and only conveys the teacher's message.[75] Therefore, the teacher remains the sole source of religious indoctrination.[76]

The Supreme Court in the instant case faced a "ponderous constitutional conundrum made worse by the opacity of First Amendment jurisprudence."[77] However, by ignoring the *Lemon* test and instead applying the child-benefit theory, the Court added to the confusion that characterizes Establishment Clause jurisprudence. As one commentator notes, there is enough conflicting precedent to allow the Court to reach any decision it wants.[78]

The instant Court reached the right decision by holding that the Establishment Clause did not prevent the school district from providing the deaf child with an interpreter to facilitate his education.[79] This ensured that the parents do not have to choose between their handicapped child's need for special remedial learning services and his religious needs (as perceived by the parents).

However, the Court's analysis confuses more than helps. Establishment Clause jurisprudence is an area already marked by cases that are inconsistent.[80] The instant Court added to the confusion by neither overruling the *Lemon* test nor applying it. In its place, the Court used the child-benefit theory to resolve whether a given state action violated the First Amendment. This change increases the possibility that the Court will continue to decide

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73. *Zobrest*, 113 S. Ct. at 2469. The Court stated that the sign language interpreter will do nothing more than accurately interpret whatever material is presented to the class. *Id.* The Court found that the interpreter will neither add nor subtract to the religious environment. *Id.*

74. *Id.* at 2469. The interpreter will not act as a teacher. The interpreter will not determine what or how the petitioner is taught, will not present instructional activities and will not evaluate the petitioner's activities. T. Page Johnson, Zobrest v. Catalina Foothills School District*: Does the Establishment Clause Bar Sending Public Employees into Religious Schools?*, 82 ED. L. REP. 17 (1993).

75. *Zobrest*, 113 S. Ct. at 2469. Ethical guidelines require interpreters to "transmit everything that is said in exactly the same way as it was intended." *Id.*

76. Humphrey, *supra* note 71, at 5.

77. *Zobrest*, 963 F.2d at 1197 (Tang, J., dissenting). "The language of the Religion Clause of the First Amendment is at best opaque . . . ." *Lemon*, 403 U.S. at 611. "Its authors did not simply prohibit the establishment of a state church or a state religion . . . [i]nstead they commanded that there should be 'no law respecting an establishment of religion.' " *Id.*

78. Johnson, *supra* note 74, at 8.

79. *Zobrest*, 113 S. Ct. at 2469.

80. As one commentator notes, there is enough diverse precedent to allow the Court to reach any decision it wants to make. Johnson, *supra* note 74, at 8. Likewise, the Court noted in Mueller v. Allen, 463 U.S. 388, 392-93 (1983) that "It is easy enough to quote the few words comprising the [Establishment Clause] . . . [i]t is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools."

Establishment Clause questions on a case-by-case basis, thereby leaving lower courts to continue guessing.

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