Playing in the Joints:
Anderson v. Town of Durham
895 A.2d 944 (Me. 2006)

By: Gerard P. Hudak*

On April 26, 2006, the Supreme Judicial Court of Maine ruled that the State's tuition payment statute does not violate the First and Fourteenth Amendments to the United States Constitution.[1] Section 2951(2) of the tuition statute, which allows school districts that do not operate a public high school to provide public funds for students to attend private high schools, states that "[a] private school may be approved for the receipt of public funds for tuition purposes only if it: . . . (2) . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution."[2]

Although section 2951(2) was upheld against a constitutional challenge in 1999[3], a more recent decision of the United States Supreme Court, *Zelman v. Simmons-Harris*[4], upholding the constitutionality of Ohio's private school voucher program, prompted lawmakers to introduce a bill in Maine's state legislature to repeal the section of the state's tuition statute prohibiting school districts from paying for the attendance of sectarian schools.[5] The legislative effort's ultimate failure led a group of parents to bring suit in federal court challenging the section on

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* Associate New Developments Editor, Rutgers Journal of Law & Religion; J.D. Candidate May 2007, Rutgers-Camden School of Law; B.A. 2004, Monmouth University.

[1] Anderson v. Town of Durham, 895 A.2d 944 (Me. 2006).

[2] ME. REV. STAT. ANN. tit. 20-A, § 2951(2) (2005).

[3] *See* Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999).

[4] 536 U.S. 639 (2002).

[5] *Anderson*, 895 A.2d at 947-48.

Fourteenth Amendment equal protection grounds.[6] The case, *Eulitt v. Maine, Department of Education*[7], resulted in a ruling by the United States Court of Appeals for the First Circuit that, even after *Zelman*, the United States Constitution does not *require* Maine to fund tuition at sectarian schools.[8]

The *Eulitt* court also relied on the Supreme Court's ruling in *Locke v. Davey*[9], concluding "there is room for play in the joints" between the Religion Clauses and that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[10]

Here, parents seeking to enroll their children in private, sectarian high schools filed the present suit in state court against three municipalities.[11] They sought a declarative judgment that the section of the statute barring the use of public funds for private, sectarian high schools violated the Establishment, Free Exercise, and Equal Protection clauses of the First and

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[6] *Id.* at 949.

[7] 386 F.3d 344 (1st Cir. 2004).

[8] *Anderson*, 895 A.2d at 949. In *Zelman*, even though ninety-six percent of the children participating in Ohio's tuition assistance program enrolled in religious-affiliated schools, *Zelman*, 536 U.S. at 647, the Supreme Court focused on the fact that funds were channeled indirectly to such institutions as a matter of private, independent choice. *Id.* at 652-53.

[9] 540 U.S. 712 (2004). In *Locke*, the Supreme Court was again addressing application of the First Amendment to educational funding issues, and the Court upheld a Washington State college scholarship program that prohibited the use of scholarship funds for pursuit of a devotional theology degree. *Id.* at 725. Although finding that the State could permit a scholarship recipient to pursue a theology degree, the Court held that it could also *deny* funding for that purpose without violating the Free Exercise Clause. *Id.* at 719.

[10] *Eulitt*, 386 F.3d at 348 (quoting *Locke*, 540 U.S. at 718-19) (internal citations and quotation marks omitted).

[11] *Anderson*, 895 A.2d at 949-50. Plaintiffs are parents of high school age children who reside in Minot, Raymond, and Durham, municipalities which do not operate a public school. *Id.*

Fourteenth Amendments to the United States Constitution.[12] The trial court granted summary judgment in favor of the municipalities.[13] The Supreme Judicial Court of Maine, per Justice Alexander, affirmed the lower court's decision.[14]

After reviewing the state and federal court decisions concerning the Maine statute,[15] the Supreme Judicial Court concluded that regardless of whether the rulings were made prior to or after the *Zelman* decision, section 2951(2) of Maine's tuition payment statute, prohibiting payments to private sectarian schools, did not infringe on parents' free exercise of religion rights or violate the Establishment Clause.[16] Further, the court also failed to find any equal protection violation because the "statute merely prohibits the State from funding [the party's] school choice,

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[12] *Id.* at 950-51. The parents brought the action against each of the Towns, the Town School Departments, and Town School Superintendents, in addition to the Maine Department of Education. *Id.* Plaintiffs also sought an injunction against enforcement of section 2951(2) and reimbursement for tuitions paid to religious schools, attorney fees, and costs. *Id.* at 951.

[13] *Id. See also* Anderson v. Town of Durham, 2003 WL 21386768 (Me. Super. May 14, 2003).

[14] *Anderson*, 895 A.2d at 961.

[15] The Supreme Judicial Court paid particular attention to the *Eulitt* court's assessment that section 2951(2) was not unconstitutional on the ground of non-neutrality, as "the mere exclusion of sectarian schools as recipients of public funds does not create a presumption of animosity against religion." *Id.* at 959 (citing *Eulitt*, 386 F.3d at 355). The court felt strongly enough to quote *Eulitt*'s analysis:

> Maine's decision not to extend tuition funding to religious schools does not threaten any civil or criminal penalty. By the same token, it does not in any way inhibit political participation. Finally, it does not require residents to forgo religious convictions in order to receive the benefit offered by the state--a secular education.

Id. (citing *Eulitt*, 386 F.3d at 355).

[16] *Id.* at 961.

and as such, it does not infringe burden or inhibit [the free exercise] of religion in a constitutionally significant manner."[17]

The court concluded quite clearly, basing their holding that *Zelman* does not compel the funding of tuition payments for attending religious schools on the more recent cases of *Locke* and *Eulitt*:

> After *Zelman,* the State may be permitted to pass a statute authorizing some form of tuition payments to religious schools, but *Locke* and *Eulitt* hold that it is not compelled to do so. Section 2951(2) falls within the "play in the joints" between the two religion clauses. Section 2951(2) neither improperly infringes on the free exercise of religion, nor violates the Establishment Clause. With respect to the parents' claim of religious discrimination based on the Equal Protection Clause, the statute does not infringe upon the fundamental right to free exercise of religion in a constitutionally significant manner. The remaining claims of religious discrimination are subject only to rational basis scrutiny. The State has supplied a reasonably conceivable set of facts that establish a rational relationship between the statute and a legitimate government interest in avoiding excessive entanglements with religion.[18]

This case illustrates the effect of Supreme Court decisions, albeit only a couple of years apart, handed down in seeming opposition to one another: individuals, states, and institutions are left with a sense of lingering confusion as to which side of the dividing line their laws and/or programs fall. There is a further complication in this particular situation for those desiring a solid precedent upon which to base legislation or policy promulgation: in the most recent Supreme Court decision, issues with First Amendment application to educational funding were

[17] *Id.* at 959.

[18] *Id.* at 961.

found to reside somewhere "in the joints" between the Establishment and Free Exercise clauses.[19]

With two recent conservative appointees to the United States Supreme Court, this case may be ripe for an appeal to the high court. State constitutional provisions that expressly forbid aid to religious schools present barriers to state legislatures seeking to expand options for publicly funded education to religious schools.[20] Petitioning an increasingly conservative Court may be a viable option for circumventing such provisions, known as Blaine Amendments[21], thus rendering them useless in the increasingly divisive battle over separation of church and state in this country.[22]

[19] *Locke*, 540 U.S. at 718 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)). *See also Locke*, 540 U.S. at 725 ("If any room exists between the two Religion Clauses, it must be here.").

[20] Krista Kafer, *School Choice in 2003: An Old Concept Gains New Life*, 59 N.Y.U. ANN. SURV. AM. L. 439, 450-51 (2003).

[21] *See* Anderson, 895 A.2d at 956 n.13 (describing origin of Blaine Amendments).

[22] On July 25, 2006, the Institute for Justice, representing eight families from Durham, Minot and Raymond, Maine filed a Petition for Certiorari of the Maine high court's ruling with the United States Supreme Court. *See* Associated Press, *Maine high court reaffirms ban of state funds for parochial schools*, FIRST AMENDMENT CENTER, Apr. 27, 2006, *available at* http://www.firstamendmentcenter.org/news.aspx?id=16821 (last visited Aug. 25, 2006). Whether the Supreme Court will hear the petition remains to be seen.