

THE SUPREME COURT AND VOUCHERS: AN OVERVIEW FOR EDUCATORS IN CATHOLIC SCHOOLS

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This article provides a critical summary of the current state of the voucher question as it relates to Catholic schools. After an in-depth look at the recent U.S. Supreme Court decision upholding the constitutionality of the Cleveland program (Zelman v. Simmons-Harris), the authors conclude that while voucher programs might be part of an overall solution for educating the urban poor, they will have limited impact on Catholic schools.

The Supreme Court's long-awaited decision in *Zelman v. Simmons-Harris* (2002), upholding the voucher portion of the Ohio Pilot Project Scholarship Program (OPPSP), affords poor inner-city parents the opportunity to send their children to the schools of their choice, most of which are Roman Catholic. Whether *Zelman* is, as President Bush (Bumiller, 2002) and others suggest (Will, 2002), the most significant case on equal educational opportunities since *Brown v. Board of Education* (1954) remains to be seen. Further, given the narrowness of the facts in *Zelman*, its impact on education in general, and Catholic schools in particular, is also an open question.

In light of potential significance of *Zelman* for Catholic and other schools, this article is divided into three sections. The article opens with a brief overview of the legal status of vouchers in the United States. The second part of the article extensively examines the OPPSP and its judicial history along with a detailed review of the ruling in *Zelman*. The final portion reflects on the meaning of *Zelman* for educators in Catholic schools.

LITIGATION INVOLVING VOUCHERS

The lower courts have treated vouchers inconsistently. For example, the Supreme Court of Wisconsin (*Jackson v. Benson*, 1998) and an appellate

court in Florida (*Holmes v. Bush*, 2000, 2001) upheld vouchers for students who attended religious schools. Yet, shortly after *Zelman*, a state trial court in Florida struck the program down under the state constitution because “additional discovery has developed further evidence that the vast majority of students participating in the [program] (47 of 51) have enrolled in ‘sectarian’ institutions” (*Holmes v. Bush*, 2002 at *1). Further appeals are pending in this case.

On the other hand, the Supreme Court of Maine (*Bagely v. Raymond School Department*, 1999) and the First Circuit (*Bagely v. Raymond School Department*, 1999) upheld a law from Maine that included nonsectarian schools but specifically excluded religious schools from taking part in a tuition vouchers program. Further, the Supreme Court of Vermont affirmed the unconstitutionality of a state law that would have permitted taxpayer support to reimburse parents for tuition for sectarian schools (*Chittenden Town School District v. Department of Education*, 1999). Moreover, in affirming an earlier judgment that the vouchers portion of the OPPSP was unconstitutional, the Sixth Circuit (*Simmons-Harris v. Zelman*, 2000) set the stage for *Zelman*.

ZELMAN V. SIMMONS-HARRIS

LEGISLATIVE HISTORY

In March 1995, the Ohio General Assembly enacted the Ohio Pilot Project Scholarship Program (OPPSP) in response to the state takeover of Cleveland’s failing public schools as part of a long-running desegregation effort (*Reed v. Rhodes*, 1994). The primary goal of the statute was to “provide for a number of students...to receive scholarships to attend alternative schools, and for an equal number of students to receive tutorial assistance grants while attending public school” (Ohio Rev. Code Ann. § 3313.975(A)). Other aspects of the law provide tutorial assistance to children (Ohio Rev. Code Ann. § 3313.975(A)) and afford parents and children greater choices through the creation of community, typically referred to as charter schools in other places, and magnet schools (Ohio Rev. Code Ann. §§ 3314.01 *et seq.*). Community schools, which cannot have a religious affiliation and are operated by their own boards, had great independence from state mandates on hiring staff and curricular content. The Cleveland Board of Education also operated 23 magnet schools that emphasized particular subject areas, teaching methods, and/or services for students (*Zelman v. Simmons-Harris*, at 2464). These parts of the law have not been subject to litigation.

The vouchers program, which went into effect during the 1996-1997 school year, provides scholarships for students to attend an alternative school of their choice defined as “a registered private school located in [Cleveland]

or in a public school located in an adjacent school district” (Ohio Rev. Code Ann. § 3313.974(G)). Eligible private schools must be located within city boundaries (Ohio Rev. Code Ann. § 3313.976(A)(3)); must not discriminate “on the basis of race, religion, or ethnic origin” (Ohio Rev. Code Ann. § 3313.976(A)(4)) or “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)); must enroll “a minimum of ten students per class or at least twenty-five students in all the classes offered” (Ohio Rev. Code Ann. § 3313.976(A)(5)); and must agree

not to charge any tuition to low-income families participating in the scholarship program in excess of ten percent of the scholarship amount...[and] shall permit any such tuition, at the discretion of the parent, to be satisfied by the low income family’s provision of in-kind contributions or services. (Ohio Rev. Code Ann. § 3313.976(A)(8))

OPPSP-funded scholarships cannot “exceed the lesser of the tuition charges of the alternative school the scholarship recipient attends or an amount established by the superintendent not in excess of twenty-five hundred dollars” (Ohio Rev. Code Ann. § 3313.978 (C)(1)). Scholarships were prorated for any portion of a school year that a child did not attend a registered private school (Ohio Rev. Code Ann. § 3313.979(A)(2)). Parents whose

family income is at or above two-hundred percent of the maximum income level established by the state superintendent...shall qualify for seventy-five percent of the scholarship amount and students whose family income is below two hundred percent of that maximum income level shall qualify for ninety percent of the scholarship amount. (Ohio Rev. Code Ann. § 3313.978(A))

The net result is that parents of low income students may receive a maximum of \$2,250 while other participants can receive up to \$1,875. As an added safeguard, voucher checks must be made out to parents or guardians who must endorse them before the schools can use the funds (Ohio Rev. Code Ann. § 3313.979(A)(2)).

The most complete report on the OPPSP, by the United States Government Accounting Office (*GAO Report*) (2001), published before *Zelman* reached the Supreme Court, revealed dramatic demographic data. This report indicates that during the 1998-1999 school year, 70% of families with children participating in the OPPSP were headed by single mothers, with average family incomes of \$18,750 (U.S. Government, 2001); 73.4% of the children who participated were minorities; and 26.6% were White (U.S. Government, 2001).

Insofar as public schools opted not to do so, only private schools participated in the OPPSP. Relying on newer data than were contained in the *GAO Report*, Chief Justice Rehnquist's majority opinion in *Zelman* pointed out that during the 1999-2000 school year 46 of the 56 participating private schools were religiously affiliated and that 96% of the more than 3,700 students, 60% of whom came from families that were at or below the poverty level, attended religious schools (*Zelman*, 2002, p. 246). Yet, when placed in the larger context including children who enrolled in community and magnet schools, he viewed the 96% "as but a snapshot of one particular school year [since during] the 1997-1998 school year, by contrast, only 78% of scholarship recipients attended religious schools" (*Zelman*, 2002, p. 2471). Rehnquist maintained that if one were to examine the voucher program in light of Cleveland's having 1,900 students in community schools, more than 13,000 in alternative magnet programs, and 1,400 in traditional public schools with tutorial aid, the overall percentage of students enrolled in religious schools drops to under 20% (*Zelman*, 2002, p. 2471).

JUDICIAL HISTORY

Lower Courts

The voucher program survived an initial challenge in state court when a trial judge granted the state's motion for summary judgment on the basis that since the aid to private schools participating in the OPPSP was indirect, the statute did not violate the Establishment Clause (*Gatton v. Goff*, 1996). However, an intermediate appellate court struck the statute down on the ground that it had the impermissible effect of advancing religion (*Simmons-Harris v. Goff*, 1997).

The Supreme Court of Ohio upheld the constitutionality of the OPPSP (*Simmons-Harris v. Goff*, 1999) but severed the part of the law that gave priority to parents who belonged to a religious group. However, in deciding that the voucher program violated the state constitutional provision that requires every statute to have only one subject, the court struck it down but stayed enforcement of its order until June 30, 1999, to avoid disrupting that school year (*Simmons-Harris v. Goff*, 1999). The General Assembly of Ohio re-enacted a revised version of the statute on June 29, 1999 (*Simmons-Harris v. Zelman*, 2000).

Dissatisfied at having lost in state court and in light of the revised statute, opponents of the OPPSP filed suit in a federal trial court in Ohio. Relying largely on *Committee for Public Education and Liberty v. Nyquist* (1973) wherein the Supreme Court struck down a program that, in part, provided tuition for low-income children whose parents wished to send them to religious schools, the court enjoined the program on the basis that it violated the Establishment Clause (*Simmons-Harris v. Zelman*, 1999a). Two days later the

court partially stayed its own order for one semester or until it rendered a final judgment on the request for permanent injunctive relief, applicable only to students already participating in the OPPSP (*Simmons-Harris v. Zelman*, 1999b). Subsequently, a divided Supreme Court granted another stay pending the final disposition of the Sixth Circuit *Zelman v. Simmons-Harris* (1999).

Six weeks later, the federal trial court in Ohio permanently enjoined the statute, again relying on *Nyquist*, thereby preventing state officials from administering the voucher program (*Simmons-Harris v. Zelman*, 1999b). A split Sixth Circuit, also relying on *Nyquist*, affirmed that the law was unconstitutional since it violated the Establishment Clause (*Simmons-Harris v. Zelman*, 2000). The court focused on what it perceived as the factual similarities between *Zelman* and *Nyquist* since both cases involved low-income parents who received tuition assistance/vouchers that permitted their children to attend religious schools and there were no restrictions on how the funds were used. As could have been anticipated, the State of Ohio sought further review. The Supreme Court agreed to hear an appeal to resolve the split between the lower court on the constitutionality of vouchers and the OPPSP (*Zelman v. Simmons-Harris*, 2001).

Supreme Court Analysis

Majority Opinion

Chief Justice Rehnquist, joined by Associate Justices O'Connor, Scalia, Kennedy, and Thomas, delivered the opinion of the Court. He began his rationale by citing the Court's most recent iteration of its Establishment Clause test in *Agostini*. The test asks "whether the government acted with the purpose of advancing or inhibiting religions [and] whether the aid has the 'effect' of advancing or inhibiting religion" (*Zelman*, 2002, p. 2465). Noting the lack of a dispute over the program's valid secular purpose in providing programming for poor children in a failing school system, he turned to the question of "whether the Ohio program nonetheless has the forbidden 'effect' of advancing or inhibiting religion" (*Zelman*, 2002, p. 2654).

Chief Justice Rehnquist reasoned that in addressing whether a program has the impermissible effect of advancing religion, the Court has distinguished between cases where the government provides direct aid to religious schools and those involving parental choice, wherein public funds are used in religious schools via the independent choices of private individuals. He acknowledged that while the Court's attitude to direct aid has evolved dramatically, its attitude toward true private choice has remained consistent. As such, Rehnquist emphasized that as long as

a governmental aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and

independent private choice, the program is not readily subject to a challenge under the Establishment Clause. (*Zelman*, 2002, p. 2467)

As to the Cleveland program, the Chief Justice stated that it was constitutionally acceptable because, as part of the state's far-reaching attempt to provide greater educational opportunities in a failing school system, it permits all city schools and adjacent suburban districts to participate. Further, he observed that the statute's only preference is to aid low-income families, and the program does not provide an incentive to religious schools, since "the aid is allocated on the basis of neutral secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis" (*Zelman*, 2002, p. 2467). If anything, he found that the program created a disincentive to religious schools since they received only one-half of the per pupil aid allocated for community schools and one-third of the assistance provided to magnet schools; suburban districts were eligible to receive double or triple the amount of per-pupil aid slated for religious schools. The program also costs parents who opt to send their children to non-public schools since they may have to supplement a small portion of tuition, not to exceed 10% of the scholarship amount (Ohio Rev. Code Ann. § 3313.976(A)(8)), while those who send their children to community, magnet, or traditional public schools pay nothing. Here the Chief Justice rebutted Justice Souter's concern that the program was not neutral since voucher funds cannot be used at public schools. Rehnquist commented that the amount of aid allocated for children in public schools far exceeds that amount available to students who participate in the OPPSP.

Rehnquist easily countered fears that even in the absence of a financial incentive, the program created the perception that the State endorsed religious practices and beliefs. He posited that the Court has repeatedly recognized that reasonable observers would not think that a neutral aid program under which a genuinely private choice directs the assistance to a religious school involved government endorsement of the schools. Such a fear is particularly misplaced in *Zelman*, he suggested, in light of the Ohio program's history and context of service to poor children in failed schools; the program also offers a range of secular choices. He added that even though 46 of the 56 participating schools are religiously affiliated, no constitutional problem exists since the state in no way coerced parents into making a private choice for their children's school (*Zelman*, 2002, p. 2469).

The Chief Justice responded to Justice Souter's concern that since most participating schools were religiously affiliated, private non-religious schools might be discouraged from taking part in the program. He was satisfied that this fact was of no concern because the rise of religious schools had nothing to do with the voucher program, since most non-public schools in urban areas are religiously affiliated. Rehnquist pointed out that while 82% of participat-

ing schools are religious, this percentage corresponds almost identically to Ohio's statewide total, 81% of non-public schools being religiously affiliated (Zelman, 2002, p. 2470). He was convinced that if the Court were to place constitutional significance on the figures that Justice Souter relied on, neutral school choice programs might have been acceptable in one part of a state but not another, depending on the proportion of different types of non-public schools in an area.

The Chief Justice rebuffed Justice Souter's next argument that, even if the Court was not concerned that most participating schools are religiously affiliated, it should worry that 96% of scholarship recipients attended such schools. Rehnquist said that the Court treated similar data in earlier cases, wherein the vast majority of parents had children in religious schools, as irrelevant since the "constitutionality of a neutral educational program simply does not turn on whether, and why, in a particular area, most private schools are run by religious organizations, or most recipients chose to use the aid at a religious school" (Zelman, 2002, p. 2470).

The Chief Justice advanced two reasons why the Sixth Circuit and voucher opponents misplaced their reliance on the almost 30-year old *Nyquist*. First, he explained that Ohio's program differed greatly from the one in *Nyquist*. The New York statute prohibited participation of public schools, provided direct aid only to private schools regardless of the amount that parents spent on tuition, and was designed explicitly as an incentive for parents to send their children to religious schools. Second, he noted that since *Nyquist* was resolved, the Court has affirmatively answered the question of whether some form of public assistance can be made available without regard to the religious or non-religious nature of the institution that received the aid. As such, he reasoned that *Nyquist* was not controlling in *Zelman*.

In conclusion, the Chief Justice was satisfied that the OPPSP followed an unbroken line of cases supporting true private choice that provided benefits directly to a wide range of needy private individuals. Thus, he reversed the judgment of the Sixth Circuit and, in so doing, upheld the constitutionality of the OPPSP.

Concurring Opinions

Justice O'Connor concurred separately because she was not convinced that *Zelman* marks a dramatic break from the past. She also wished to elaborate on the Court's discussion of the need to take parental choice into consideration when examining "all reasonable educational alternatives to religious schools that are available to parents" (2002, p. 2473).

Justice Thomas supported vouchers based on his observation that "today many of our inner-city public schools deny emancipation to urban minority students...[who] have been forced into a system that continually fails them" (p. 2480). Acknowledging the support for choice among Blacks and other

minorities, he noted that 10 states have enacted some form of publicly funded programs to assist a disproportionate number of underprivileged urban students.

Dissenting Opinions

Justice Stevens' dissent described "the Court's decision as extremely misguided." He thought that "whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy" (*Zelman*, 2002, p. 2455).

Justice Souter's dissent, joined by Justices Stevens, Ginsburg, and Breyer, was of the view that the majority abandoned the rule that "no tax in any amount...can be levied to support any religious activities or institutions...whatever form they may adopt to teach religion" (*Zelman*, 2002, p. 2495).

Justice Breyer's dissent was joined by Justices Stevens and Souter. He maintained that while he joined Justice Souter's dissent and substantially agreed with Justice Stevens, he thought it important "to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict" (*Zelman*, 2002, p. 2502).

REFLECTIONS

In *Zelman*, the Court relied on basic precedent-setting principles of educational equity from its own earlier rulings. Even so, *Zelman* is not likely to have a major impact on K-12 education, Catholic or public, for three closely related reasons.

First, as reflected by the most recent development from Florida (*Holmes v. Bush*, 2002), states are not obligated to adopt voucher programs. In fact, as revealed by this initial re-litigation in Florida, a question remains over whether voucher plans can satisfy state constitutions based on fears of excessive entanglement between religious schools and the state. Second, states that do adopt programs like the one in *Zelman* will not only need to target similar disenfranchised populations, but will have to take steps to avoid having too many participants from religious schools, a dicey proposal, if they are to withstand judicial challenges. Third, since the voucher program in Cleveland was part of a larger initiative including magnet and community schools, reform efforts elsewhere should adopt such a broad-based approach. Put another way, *Zelman* is highly unlikely to open the door to make voucher programs available to middle and upper class suburban families who wish to send their children to non-public schools at public expense. Rather, vouchers must be seen as an attempt to provide an alternative for poor, typically minority children to escape failing urban schools.

Despite the fears of voucher opponents (Murphy, Nelson, & Rosenberg, 2001) and regardless of whether more Catholic schools choose to participate, *Zelman* is unlikely to bring about the demise of public education, which serves the nation well in all but a handful of urban locales such as Cleveland, or to have a major impact on Catholic schools. While the June 2000 budget of the Cleveland schools allocated about \$5.2 million for the voucher program, its direct impact should be negligible considering that the overall budget there was \$712 million. Moreover, critics ignore the fact that the existence of non-public "schools saves government nearly \$39 billion," because of differences in per-pupil costs (O'Keefe, 2001, p. 428). In fact, the Supreme Court recognized as much in speaking about "church-related elementary and secondary schools," when Chief Justice Burger acknowledged that "Their contribution has been and is enormous.... Taxpayers generally have been spared vast sums of money by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents" (*Lemon v. Kurtzman*, 1971, p. 625).

Since the OPPSP funds voucher students at a lower level of per-pupil cost than allocated for their peers in public schools, there should be no loss of resources for public education; there may even be additional funds. If anything, assuming that Catholic schools are willing to participate in significantly increased numbers, based on the impact that taking part might have on their religious mission and identity, and if legislatures create larger, more generous and far-reaching voucher programs, it will be interesting to see whether they place limits on the amount of money that can be earmarked for children who attend religiously affiliated schools. If legislatures do not set a limit, it is likely that an additional round of litigation will ensue, at least in state courts. Thus, it is unlikely that vouchers will have a major impact on Catholic schools. However, *Zelman* does challenge state lawmakers to consider vouchers as yet another reform that may better serve all children regardless of where they attend school.

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