THE LEGAL AND SOCIAL INFIRMITIES OF *ZELMAN V. SIMMONS-HARRIS*

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With a spirited criticism of Zelman v. Simmons-Harris *(2002), this article summarizes many arguments against the voucher decision, including the dissenting opinions of U.S. Supreme Court justices, opponents of the decision, and* amicus curiae *briefs from the American Jewish Committee, the Anti-Defamation League, and the Ohio School Boards Association, all of whom argued against the Cleveland Plan. In the end, the decision may prove dangerous to Catholic schools that accept public voucher monies.*

> If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. (*Zelman v. Simmons-Harris*, 2002, p. 2485)

In June 2002, the Supreme Court issued its opinion in *Zelman v. Simmons-Harris*, upholding the constitutionality of private school vouchers in Cleveland, Ohio, by a narrow 5-4 margin, even though the vast majority of private schools receiving tuition funds from the state were religiously affiliated (*Zelman*, 2002). In sustaining the voucher plan, the Court made several key findings, including the facts that the program was one of "true private choice" and was "entirely neutral with respect to religion" (*Zelman*, p. 2473). Other supporting justifications outlined by the Justices included the dire educational needs of Cleveland students who were trapped in a failing school system and the belief that the presence of a wide range of public school options counterbalanced the religiously dominant nature of the voucher program (*Zelman*). Thus, for the first time, the Court validated a governmental plan that resulted in the direct, unrestricted flow of public monies to private, religious educational entities. In the weeks that followed *Zelman*, supporters hailed the opinion as a victory for parents and families, especially those of poor minority students in disadvantaged urban schools (Center for Education Reform, 2002).

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Unfortunately, the Court's ruling rested on wobbly legal ground. Although *Zelman* has the full force and authority of the Supreme Court behind it, there were extraordinary infirmities in its legal reasoning. Moreover, several important negative social consequences may occur as a result of the Court's decision. The purpose of this article is to highlight these legal and social deficits as well as other issues surrounding *Zelman*. Other articles in this issue describe in great detail the reasoning behind the majority opinion in *Zelman* and the positive implications of the Court's ruling for Catholic and other private schools. This article refrains from repeating background information from those articles except to illustrate points relevant to the central thesis that the *Zelman* decision was both unwise and legally unsound. As Catholic and other religious educational organizations act in reliance on *Zelman*, it is imperative that they understand the limitations and concerns that should accompany the acceptance of tuition monies from state departments of education and other public educational entities if they are to make responsible financial and enrollment decisions.

LEGAL INFIRMITIES

The reasons why *Zelman* is both bad law and poor policy fall into two primary categories: legal and social. On the legal front, *Zelman* exhibited several major deficiencies, including an inappropriate reliance on magnet, community, and other public schools as viable alternatives for parental choice; a lack of concern with both prior precedent and the implications of spending public money for private religious education; and a failure to recognize that the voucher program at issue was set up to financially favor religious institutions. Each of these issues is discussed in more detail in the sections below.

FAILURE TO FOLLOW PRECEDENT

Of the numerous legal concerns surrounding *Zelman*, probably none is more important than the Court's abrupt departure from the coherent, well-reasoned body of law it developed over the past four decades. By ignoring its own precedent, the Court created doctrinal uncertainty where none existed before and where it clearly had no need to do so.

In a line of cases stretching over the past four decades, the Court focused on several key factors when determining the constitutionality of state plans designed to benefit private religious instruction: neutrality, free choice, and the flow and substantiality of public aid. Thus, in *Board of Education of Central School District No. 1 v. Allen* (1968), the Court upheld a New York law allowing school boards to lend textbooks to students in religious schools, both because the aid was secular in nature and because monies never flowed directly to the religious institutions. Similarly, in *Mueller v. Allen* (1983) the Court upheld a Minnesota tax deduction for parents' expenses related to

school tuition, transportation, and textbooks because no money ever flowed to religious schools and because it was neutrally available to parents of both public and private school students. In contrast, in *Committee for Public Education and Religious Liberty v. Nyquist* (1973), the Court struck down a New York program that used state monies to give partial reimbursements to low-income parents for tuition at certain private schools since the impact of the program was "unmistakably to provide desired financial support for nonpublic, sectarian institutions" (p. 783). The Court premised its ruling on the conclusion that the "substantive impact" of an overwhelming presence of religious institutions in the program was more relevant than the particular route by which the state funds traveled (*Nyquist*, p. 786). The Court also was troubled by the lack of an attempt to limit use of the public aid to secular school functions.

In *Agostini v. Felton* (1997), the Court upheld the onsite delivery of remedial Title I services to students who attended religiously affiliated nonpublic schools by public school teachers, not only because no public monies ever reached private schools but also because the supplemental state aid was secular in nature. Similarly, in *Mitchell v. Helms* (2000), the Court held that a state program that "provided [secular, supplemental] educational materials such as library books and computers to qualifying public and private schools" (Brief of *Amicus Curiae*, The American Jewish Committee [AJC] et al., in Support of Respondents, *Zelman v. Simmons-Harris,* 2002, p. 12) was constitutional since it included safeguards restricting the direct flow of public monies to religious institutions. Other Supreme Court cases upheld a state's provision of an interpreter to a deaf religious school student (*Zobrest v. Catalina Foothills School District*, 1993), a student's use of a state vocational training subsidy at a religious college (*Witters v. Washington Department of Services for the Blind*, 1986), and the use of public monies to print a state university extracurricular student group's evangelical magazine (*Rosenberger v. Rector and Visitors of the University of Virginia*, 1995) where the public aid was neutrally available, insubstantial, and did not directly benefit religious instruction. In *Zobrest* and *Witters*, the Court also noted that any money that flowed to religious institutions did so as a result of independent student choices from a variety of competing secular possibilities.

All of these cases were consistent with each other and with other important Supreme Court precedents (see *Bowen v. Kendrick*, 1988; *Everson v. Board of Education of Ewing*, 1947; *Roemer v. Maryland Public Works Board*, 1976). The key issues of neutrality, unhindered choice, indirect flow, and insubstantiality of public aid were identified and solidified into a coherent body of case law. It was clear that state aid programs would be struck down if they favored religious institutions, did not allow for true choice by individuals from a wide range of secular and sectarian options, or contributed directly and substantially to the religious mission of private schools.

Zelman is at odds with these cases. No longer is the direct, substantial, deliberate flow of public monies to private religious institutions unconstitutional. No longer is the unrestricted use of public money for religious instruction disallowed. Given the enormity of its shift from previous case law, the dissenting justices and other critics of *Zelman* were rightfully concerned about its potential impact on the separation of church and state in our nation's educational systems.

FAILURE TO REJECT INVENTED PUBLIC SCHOOL ALTERNATIVES

One key reason for its unprecedented acceptance of the Cleveland voucher program was the Court's willingness to accept public magnet schools, "community schools" (known as charter schools elsewhere), and schools in adjacent school districts as legally viable alternatives for the vouchers program. Rather than treating vouchers as a separate program "to be judged on its own merits" (Brief for Respondents, *Zelman v. Simmons-Harris*, 2002, p. 8), as in *Nyquist*, *Sloan v. Lemon* (1973), and *Witters*, the Court looked "to every provision for educational opportunity" (*Zelman*, 2002, p. 2491 (Justice Souter, dissenting)) available to Cleveland school children. The Court then upheld the neutrality of the overall program because "the better part of total state educational expenditures goes to public schools" (*Zelman*, p. 2491).

This inclusion of other educational options in the decision-making rubric contrasted sharply with the Court's own precedents and is patently illogical. Although such a conclusion was necessary to undergird the rationale in *Zelman*, in actuality

> the wide range of choices that have been made available to students *within the public school system* [should have] no bearing on the question whether the State may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education. (*Zelman*, 2002, p. 2484 (Justice Stevens, dissenting), emphasis in original)

As Justice Souter noted in his dissent, "the question [should be] whether [a parent] is genuinely free to send the money in either a secular direction or a religious one.... When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose" (*Zelman*, p. 2492 (Justice Souter, dissenting)).

The problem with *Zelman* is that, under its reasoning, a voucher program paying tuition at religious schools would be constitutional even if no secular, private schools existed as alternative choices (*Zelman*, 2002, p. 2492 (Justice Souter, dissenting)), because students always will have a range of public school options to counterbalance such a religiously-skewed program. This is

essentially what occurred in Cleveland, except that instead of a "100%-sectarian-school-universe tuition voucher program" (Brief for Respondents, 2002, p. 19), there existed an "82%-sectarian-school-universe tuition voucher program" (Brief for Respondents, p. 19) in which 96% of voucher-using students attended religious schools. Moreover, "a government program of direct unrestricted payments to sectarian private schools, secular private schools and free public schools 'of choice' based on the number of students attending such schools also would be constitutionally justified [under *Zelman*]" (Brief for Respondents, p. 28), a result that past case law shows is patently unconstitutional.

The Cleveland voucher program was structured and operated "in a manner that [made] it inevitable that, no matter what 'private choices' individual...parents [made], 'a significant portion of the aid...[would] end up flowing to religious education'" (Brief for Respondents, 2002, p. 12, quoting *Witters*, 1986, pp. 487-88). Parents had little choice regarding where they could spend their state aid; they were "not permitted to select among a 'huge variety' or a 'broad spectrum' of options" (Brief of *Amicus,* AJC, 2002, p. 22, quoting *Witters*, p. 488 and *Mueller*, 1983, p. 397). Voucher tuition checks were sent directly to the schools; parents never obtained title to or custody of the funds. The only involvement of parents was to go to schools participating in the program and sign over their tuition checks. This "hollow formalism" (Brief of *Amicus Curiae*, Anti-Defamation League [ADL], in Support of Respondents, *Zelman v. Simmons-Harris*, 2002, p. 15) was not a program of "true private choice" (*Zelman*, 2002, p. 2473), and the Court's own past decisions teach that the Establishment Clause is violated when

> a government program of tuition grants to parents/students...is so heavily 'skewed toward religion' as to make it inevitable that, no matter what 'private choices' [they] make, a 'significant portion of the aid...will end up flowing to religious education.' (Brief for Respondents, p. 24, quoting *Witters*, pp. 487-89)

As the Anti-Defamation League noted in its *amicus curiae* brief, "'choice' has meaning in this context only if there is real ability to employ government aid for secular as well as religious uses" (p. 16).

In addition to the Court's flawed reasoning, its inclusion of public schools in adjacent districts as viable options for parents is clearly a legal fiction. No public school in another district ever participated in the Cleveland voucher program and none likely ever will absent a state order to do so. Other public school districts have clear disincentives to participating in the program, as are outlined in the next section, and the program's "permission for [them] to participate—which [they] consistently and uniformly have declined to do—does not expand the educational options that are in fact available to

voucher program parents or alter the nature of their choices" (Brief for Respondents, 2002, p. 30).

This factual context is important. Indeed, the Court "has consistently found that context is as important as the face of [a] statute" (Brief of *Amicus*, AJC, 2002, p. 16, citing *Board of Education of Kiryas Joel Village School District v. Grumet*, 1994) and that "facial neutrality...may not trump 'empirical evidence that religious groups will dominate' as beneficiaries of [a] challenged program" (Brief of *Amicus*, AJC, p. 16, citing *Widmar v. Vincent*, 1981). No Cleveland parent has ever "been able to use a tuition voucher to send his/her child to an adjacent suburban public school" (Brief for Respondents, 2002, p. 31). The Court's argument to the contrary "has no touch with reality" and makes "a mockery of the concept of 'genuinely independent and private choices'" as articulated in *Witters* (Brief for Respondents, p. 9, quoting *Witters*, 1986, p. 487).

FAILURE TO RECOGNIZE THE PROGRAM'S STRUCTURAL RELIGIOUS BIAS

In *Zelman* the Court observed that a

> governmental aid program [that] is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct [that] aid to religious schools wholly as a result of their own genuine and independent private choice...is not readily subject to challenge under the Establishment Clause. (2002, p. 2467)

While this was the primary basis for the Court's ruling, unfortunately this was not what actually occurred in Cleveland. Instead, what existed was a program that structurally and intentionally constrained parent choice to a "small self-selected group of overwhelmingly religious options" (Brief of *Amicus*, AJC, 2002, p. 23).

As the Court explained in *Agostini*, "the criteria by which an aid program identifies its beneficiaries...might themselves have the [impermissible] effect of advancing religion by creating a financial incentive to undertake religious indoctrination" (1997, pp. 230-231). Similarly, a program can create such an incentive "if the criteria that structure the universe of participating schools...so constrain the available program options that the great majority of parents must send their children to sectarian private schools...in order to obtain the benefits that the program offers" (Brief for Respondents, 2002, pp. 35-36). This is precisely what occurred in Ohio.

In its amicus curiae brief, the Ohio School Boards Association et al. noted that the "overwhelming presence of religious schools in the voucher program...[reflected] the special ability of these schools to augment through other funding sources the otherwise-insufficient vouchers provided by the

state" (Brief of *Amicus Curiae*, Ohio School Boards Association [OSBA] et al., in Support of Respondents, *Zelman v. Simmons-Harris*, 2002, p. 18).

Religious schools, particularly Catholic schools, are "often subsidized by the churches with which they are affiliated; have lower overhead costs, with members of the clergy often serving as teachers; and have the extra-economic goal of exposing potential adherents to a specific religious faith" (Brief of *Amicus*, AJC, 2002, p. 21). Since Ohio's voucher amount was actually higher than the tuition costs of most of the participating schools, religious schools had "every incentive to participate...because they [could] increase student enrollment and receive unrestricted government subsidies...while still preserving the central role of their respective religious faiths in their educational enterprise" (Brief of *Amicus*, AJC, p. 21). Few secular private schools are able to set their tuition as low as religious schools or Ohio's statutory cap, as evidenced by the paucity of such schools participating in the program and the low numbers of students they enrolled.

In addition to the financial inability of secular private schools to accept Cleveland voucher students, the program had "strong financial disincentives" to participation by adjacent public school districts as well (Brief of *Amicus*, Ohio 2002, p. 18). Insofar as local sources of funding often constitute more than 90% of Ohio school districts' budgets, the amount of state aid per voucher student fell "well short" of the amount districts normally receive and spend per student (Brief of *Amicus*, AJC, 2002, p. 19). Districts adjacent to Cleveland thus predictably declined to participate in the program rather than dilute their school funding pool by enduring a budget deficit for each voucher student they agreed to accept. The amount of the tuition grant was so low that even the Cleveland City School District itself could not hypothetically accept voucher students without diluting its funding pool (Brief of *Amicus*, AJC, 2002, p. 20). The voucher program also provided "no benefit to parents whose children remain[ed] in the Cleveland public schools" (Brief of *Amicus*, ADL, 2002, p. 18).

Given that these financial disincentives were foreseeable when the program was enacted and the "considerable evidence that the program was motivated by an intent to aid parochial schools and to fulfill certain political commitments of financial assistance previously made to [those] schools" (Brief of *Amicus*, OSBA, 2002, p. 22), the Sixth Circuit unsurprisingly found that the program was "designed [from the start] in a manner calculated to attract religious institutions" (Brief of *Amicus*, OSBA, p. 4). As the American Jewish Committee et al. posited in its amicus curiae brief, "the exceedingly low value of the tuition grants, relative to the tuition of secular schools, [resulted] in the over-participation of religious schools and the under- or non-participation of private and public secular schools [and thus constrained] the institutional choices of voucher recipients" (2002, p. 22). Such a design is patently unconstitutional and should have been struck down by the Court as

it has so many other statutes favoring religion; instead the Court deemed it was a program of "true private choice" (*Zelman*, 2002, p. 2473).

To the extent that the voucher program's "channeling of funds to religious schools [was]...a result of the nature and structure of the program itself" (Brief of *Amicus*, ADL, 2002, p. 20), it would not be surprising if widespread public perception was that the State of Ohio was endorsing religious instruction. Although the Court stated that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement" (*Zelman*, 2002, p. 2468), such was not the case in Cleveland. By structurally constraining the options available to voucher recipients so that the vast bulk of state vouchers reached religious schools, the Ohio program created "the public perception that the state [was] endorsing religious practices and beliefs" (Brief for Respondents, 2002, p. 38). By "plainly and publicly posit[ing that] the program it designed to favor religious schools [was] superior in quality to Cleveland's public schools...it strains credulity to claim the state [did not send]...families a powerful message that the city's religious schools, and those who attend them, [were] preferred by the state" (Brief of *Amicus*, AJC, 2002, p. 22). By legally accepting narrowly-constrained criteria that in effect created "an incentive [for] parents to send their children to sectarian schools," (*Nyquist*, 1973, p. 786), the Court lent its weight to this unconstitutional proposition and guaranteed that "public perception hardly could be otherwise" (Brief for Respondents, p. 36).

FAILURE TO ABIDE BY PRINCIPLES OF *STARE DECISIS*

Given the myriad deficiencies of the voucher program, it should have been easy for the Court to find it unconstitutional. Instead, the Court ignored its own precedent despite the fact that it had no compelling reason to do so. By overruling portions of *Nyquist* and *Sloan* in sustaining the voucher program, the Court destroyed the "coherent doctrinal base that those decisions and *Witters* form[ed]" (Brief for Respondents, 2002, p. 42).

In the past, the Court has "always required a departure from precedent to be supported by some special justification" (*Dickerson v. United States*, 2000, p. 443). No such justification was present in *Zelman:* "no evolution of legal principle...left [the] doctrinal footings [of *Nyquist* and *Sloan*] weaker than they were in 1973" (*Planned Parenthood v. Casey*, 1992, p. 857). To the contrary,

> *Witters*—the Court's one post-*Nyquist/Sloan* Establishment Clause case involving a government program of tuition grants to parents/students—fully embrace[d] *Nyquist* and *Sloan*, and treat[ed] them as setting out the proper

> legal principles for assessing Establishment Clause challenges to this type of government program. (Brief for Respondents, 2002, p. 43)

Moreover, the legal principles embodied by *Nyquist*, *Sloan*, and *Witters* have "in no sense proved unworkable" (*Planned Parenthood*, 1992, p. 860).

> It is precisely where the Court after due deliberation has established a precedent in a sensitive and difficult area of constitutional law that the Court has been most mindful of the need for continuity in the law, most sensitive to the harm to the law worked by the overruling of precedents,...and most insistent that a break in the law's continuity is warranted only by subsequent developments in the Court's jurisprudence that demand such a break.... There have been no such subsequent developments in the Court's post-*Nyquist/Sloan* Establishment Clause jurisprudence. (Brief for Respondents, p. 44)

As Justice Souter asserted in his dissent, "if there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here" (*Zelman*, 2002, p. 2485). Yet, there is no excuse, just as there was not in *Nyquist*. On the side of every Constitutional line "is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government" (*Agostini*, 1997, p. 254).

SOCIAL INFIRMITIES

The legal infirmities present in *Zelman* are compounded by the negative social impacts that may occur as a result of the decision and the Court's rationale supporting it. The Court has now sent a message to states that they need not remedy impoverished teaching-learning environments within their boundaries, even if they are responsible for sustaining them. Moreover, in regard to the apparent benefit to religious institutions that *Zelman* represents, the ruling "effectively achieves exactly the sort of state involvement with religious institutions that the Framers [of the Constitution] meant to foreclose" (Brief of *Amicus*, AJC, 2002, p. 26) and of which religious schools should be wary.

FAILURE TO HOLD THE STATE LEGALLY ACCOUNTABLE FOR ITS ACTIONS

Zelman showed plainly that the State of Ohio was no "benign rescuer" of Cleveland schoolchildren (Brief of *Amicus*, OSBA, 2002, pp. 5-6). Instead, the state was itself "the agent of educational neglect, having been entrusted by the Ohio Constitution with responsibility for the very public education system it [condemned]" (Brief of *Amicus*, OSBA, pp. 5-6). In 1998, the

Supreme Court of Ohio found that the state violated its own constitution by failing "to ensure that public schoolchildren throughout Ohio were safely and adequately educated" (Brief of *Amicus*, OSBA, p. 6), and it is obvious that "but for the state's unconstitutional neglect of public education, there would [have been] no need for a voucher program" (Brief of *Amicus*, OSBA, pp. 6-7). Similarly, "but for the voucher program, public funds and public school students would not [have been] diverted to religious schools" (Brief of *Amicus*, OSBA, p. 7).

The Court's contention that any indoctrination that occurred in religious schools was attributable to parental choice rather than state action was "patently unbelievable" (Brief of *Amicus*, OSBA, 2002, p. 10). Justice Thomas, in his concurrence, explained that "the failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives" (*Zelman*, 2002, pp. 2483-2484). This position was reinforced by the fact that "voucher parents [said] that they [were] choosing physical safety and effective educational programs for their children,...[not that they were] deliberately choosing religious indoctrination" (Brief of *Amicus*, OSBA, p. 10, emphasis in original). The voucher program thus "insidiously—and unconstitutionally—imposed religious indoctrination upon students whose families [were] willing to see them rescued even on these terms" (Brief of *Amicus*, OSBA, pp. 5-6). By denying "the coercive effect of the voucher program [and] arguing the absence of financial or social incentive, [the Court] disingenuously [closed its] eyes to the desperation created by the intolerable conditions in the [Cleveland] public schools" (Brief of *Amicus*, OSBA, p. 11). "For the overwhelming number of children in the voucher scheme, the only alternative to the public schools [was] religious...[and if] the essential criterion is one of genuinely free choice on the part of the private individuals who choose,...a Hobson's choice is not a choice" (*Zelman*, pp. 2496-97 (Justice Souter, dissenting)).

Under the doctrine of unconstitutional conditions, the government may not condition "even a discretionary benefit...upon the surrender of a constitutional right" (Brief of *Amicus*, OSBA, 2002, p. 11). Ohio's voucher program thus "was especially repugnant because it effectively conditioned not a discretionary benefit but a state constitutional entitlement—adequate education—upon the waiver of the right to free exercise of religion" (Brief of *Amicus*, OSBA, p. 12). In the past the Court found that a state "cannot exact religious conformity as the price of attending high school graduation ceremonies (*Lee v. Weisman*, 1992) or a varsity football game (*Santa Fe Independent School District v. Doe*, 2000)" (Brief of *Amicus*, OSBA, p. 14). In *Zelman*, the "harm to those involved and the constitutional infirmity [were] incalculably greater, [where] such conformance [was] exacted in exchange for a safe and adequate education" (Brief of *Amicus*, OSBA, p. 14).

The Court should have held that Ohio, as the entity ultimately legally responsible for the quality of education in Cleveland, could "no more condition a Cleveland student's receipt of a constitutionally-adequate education on submission to religious indoctrination than it could routinely subject prisoners to unconstitutional conditions of confinement in state-operated prisons [while] offering the option to transfer to superior prison facilities operated by a religious order and infused with religious practice" (Brief of *Amicus,* OSBA, 2002, p. 14). By coercing families into "choosing" a religious education for their children, Ohio violated the Establishment Clause instead of complying with its constitutional obligation to reform its educational system "so that every public school student was assured a constitutionally-adequate education" (Brief of *Amicus,* OSBA, p. 15). By upholding the voucher program, the Court not only allowed Ohio to divert precious resources from an incredibly troubled school system in order to benefit private school competitors, it also appeared to give it and other states carte blanche to ignore the underperforming school districts for which they are legally responsible.

FAILURE TO APPRECIATE THE DANGER TO RELIGIOUS SCHOOLS

In addition to the inappropriate absolution it grants states regarding their culpability for inadequate educational environments, *Zelman* may turn out to be a mixed blessing for private religious schools, its seeming beneficiaries. While *Zelman's* outcome appears to be greater access by Catholic and other religious schools to state-funded tuition support, institutions accepting such support may in the end see an erosion of their religious missions and purposes.

As Justice Souter maintained in his dissent, "When government aid goes up, so does reliance on it; the only thing likely to go down is independence" (*Zelman*, 2002, p. 2501 (Justice Souter, dissenting)). This truism is exemplified by the Cleveland voucher program, which requires religious schools receiving voucher students not to discriminate on the basis of religion. Catholic schools participating in the program thus "cannot give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as nonbelievers" (*Zelman*, p. 2499). Insofar as this antidiscrimination ban is not limited to student admissions decisions, "a participating religious school [also] may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job" (*Zelman*, p. 2499).

The Ohio voucher 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'" (*Zelman*, 2002, p.

2505 (Justice Breyer, dissenting), citing Ohio Rev. Code Ann. §3313.976(A)(6) (West. Supp. 2002)). This prohibition can "be understood...to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others" (*Zelman*, p. 2500 (Justice Souter, dissenting)) and seems manifestly unfair to religious groups whose beliefs may not be widely held by mainstream Americans. Indeed, it is easily imaginable that under such a statute government officials will be pressured to regulate potentially contentious religious teachings such as Muslim views on differential treatment of the sexes, the beliefs of some Southern Baptists about wives' obligations to obey their husbands, or the religious Zionism that is present in many Jewish schools (*Zelman*, p. 2501 (Justice Souter, dissenting)). At the same time, as soon as government officials begin inquiring into the content of religious schools' teachings, the potential for discrimination against disfavored or less politically connected religions becomes increasingly likely. As Justice Breyer's dissent stated, the ability of states to "resolve...resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a nation, threaten social dissension" will be difficult (*Zelman*, 2002, p. 2505).

The "primacy of [religious] schools' mission to educate the children of the faithful according to the unaltered precepts of their faith" (*Zelman*, 2002, p. 2499 (Justice Souter, dissenting)) thus is threatened by *Zelman*. "Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition" (*Zelman*, p. 2501). While these views "have [to date] been safe in the sectarian...classrooms of this nation [because]...the ban on supporting religious establishment has protected free exercise by keeping it relatively private" (*Zelman*, p. 2501), even favored religions may be reformed as state aid brings increased public scrutiny and the threat of government regulation (*Zelman*, p. 2499).

Parental choice does not sufficiently offset these concerns. As Justice Breyer wrote:

> 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. (*Zelman*, 2002, pp. 2507-2508)

In short, it is "difficult to imagine a more divisive activity than the appointment of state officials as referees to determine whether a particular religious doctrine 'teaches hatred or advocates lawlessness'" (*Zelman*, 2002, p. 2506 (Justice Breyer, dissenting)), and it is exactly this kind of governmental involvement in the affairs of religious institutions against which the Establishment Clause is intended to safeguard (Brief of *Amicus,* AJC, 2002, p. 27). As the Court recognized in the past, "religion is not aided by government funding, but rather hurt by it" (Brief of *Amicus,* ADL, 2002, p. 3), because religion "may be compromised as political figures reshape [its] beliefs for their own purposes" (*Grand Rapids School District v. Ball*, 1985, p. 385). Since "such implicit government policing of the operations and composition of religious schools promotes entanglement between church and state and threatens the independence of...religious institutions [that] participate in [such programs]" (Brief of *Amicus,* AJC, p. 26), Catholic and other religious schools would be wise to be wary of participation in such voucher schemes, despite their financial attractiveness.

CONCLUSION

Due to the numerous legal and social infirmities described above, the Court's decision and reasoning in *Zelman* are difficult to accept at face value. The majority relied on a "hollow formalism" of parent choice in order to ignore the direct, substantial, unrestricted flow of public money for private religious education. The majority also upheld a program of school "choice" in which there was little to none that was not religious in nature. Such outcomes are unsupported by the Court's own precedent and the concept of separation of church and state, and the end result may be to the sorrow of religious educational institutions as well as the children and adolescents who are forced to choose between impoverished learning environments and religious indoctrination.

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