


# Is the Wall Between Church Crumbli



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# Church and State

United States Supreme Court  
upholds school vouchers primarily  
benefiting religious schools in  
*Zelman v Simmons-Harris*

I t appears that the wall between church and state is indeed crumbling. The First Amendment to the United States Constitution contains two provisions addressing religion: the free exercise and establishment of religion clauses. The Free Exercise Clause guarantees that individuals are free to believe, from a religious standpoint, as they wish, without interference from the government unless the practice of their beliefs harms others. The Establishment Clause guarantees separation of church and state by requiring the government to remain neutral in religious matters and to refrain from compelling citizen participation in religious activities. In recent years, United States Supreme Court Establishment Clause jurisprudence has been moving in the direction of true neutrality, away from what some perceive as an anti-religious stance. The Court's most recent Establishment Clause ruling authorizing the use of public funds to send students to religious schools is a bold step that has engendered impassioned nationwide debate.

In *Zelman v Simmons-Harris*,<sup>1</sup> a deeply divided Court held, in a 5 to 4 decision, that an Ohio school voucher program does not offend the Establishment Clause even though 96 percent of students participating in the program during the 1999–2000 school year were enrolled in religiously affiliated schools. The majority opinion emphasized that the challenged program passed constitutional muster because it is one of “true private choice.” Enrollment in religious schools occurs solely as a result of parents exercising independent choices regarding where their children would be educated. The program met the constitutional neutrality requirement and did not involve any direct aid to religious schools.

The Michigan Establishment Clause is more restrictive than the federal clause because it specifically prohibits tuition vouchers and public monies and property from being used to directly or indirectly aid any private school. Given the additional barrier posed by our own Constitution, the impact of the *Zelman* decision is likely to be more limited in Michigan.

### Public Reaction to the *Zelman* Decision

Proponents of school voucher programs see the *Zelman* decision as a victory for liberty and equality in education. In their view, voucher programs not only provide an alternative to public education, but also provide an effective means of promoting healthy competition that will ultimately improve the overall quality of primary and secondary education. In addition, voucher programs empower parents to have greater influence over their children's education. President Bush, a vocal proponent of school choice, declared: “This landmark ruling is a victory for parents and children throughout America . . . [and] clears the way for other innovative school choice programs so that no child in America will be left behind.” He compared this decision to *Brown v Board of Education*, which struck down racially segregated public schools on equal protection grounds, suggesting that it was as historically significant and could have a comparable transforming effect. United States Department of Educa-

## Fast Facts:

- In *Zelman v Simmons-Harris*, the Court held that an Ohio school voucher program does not offend the Establishment Clause.
- The Michigan Establishment Clause prohibits tuition vouchers and public aid to private schools.
- Ten states have some form of voucher or tax-credits applicable to private schools.



tion Secretary Rod Paige lauded the decision for lifting the “constitutional cloud that has been hanging over school-choice for years” and for opening “the doors of opportunity to thousands of children who need and deserve the best possible education.”

Opponents of voucher programs believe the decision will result in further diversion of limited funds and resources away from public schools by encouraging vast expansion of voucher programs nationwide. They view the decision as a devastating blow to public education, which promotes poor educational policy and creates “a serious crack in the constitutional wall between church and state” by using taxpayer money to indoctrinate religious beliefs. They contend public money should be used to improve the public school system, not to finance private religious schools. Critics also have expressed concern about the financial gap between the voucher value and the cost of private tuition, as well as the potential adverse impact of vouchers on students with disabilities, especially if private schools are permitted to continue to choose the children they will accept and to remove those who prove to be unacceptable for a variety of reasons.

### The *Zelman* Decision

Writing for the majority, Chief Justice Rehnquist recited the two-part inquiry applicable to Establishment Clause challenges: first, did the government act with a purpose to advance or inhibit religion; and, second, did the governmental aid have the effect of advancing or inhibiting religion? Justice Rehnquist found no dispute with respect to the first inquiry because the Ohio program was enacted for the “valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system.”<sup>2</sup> The Ohio legislature established the Pilot Project Scholarship Program to provide financial educational assistance to families with children in any Ohio school district

placed under a federal court order of supervision and management because of failure to meet certain minimal educational standards.

The Cleveland City School District is the only district in Ohio covered by this program. In 1995, a federal district court declared an educational crisis in the Cleveland district and placed it under state control. Cleveland public schools had a history of very poor performance and failed to meet state standards for minimally acceptable performance. Children enrolled in the district were primarily from low-income and minority families. The Ohio program includes not only tuition assistance for children to attend a private or public school of their parents' choice, but also tutorial assistance for children who choose to remain in public school.

Because the Court concluded that the Ohio legislature acted with a valid secular purpose in enacting the voucher program, the sole question presented was whether the program had the effect of advancing or inhibiting religion. Chief Justice Rehnquist pointed out that Supreme Court precedent establishes a key distinction between government programs that provide direct aid to religious schools and programs that involve “true private choice,” where government funds reach religious schools “only as a result of the genuine and independent choices of private individuals.”<sup>3</sup> The Court has consistently rejected Establishment Clause challenges to educational aid programs based on true private choice. See e.g., *Mueller v Allen*, 463 US 388 (1983) (Minnesota tax deduction for educational expenses, including tuition for religiously affiliated schools); *Witters v Washington Dep't of Servs for Blind*, 474 US 481 (1986) (vocational scholarship program providing tuition assistance to a student studying at a private seminary); *Zobrest v Catalina Foothills School Dist*, 509 US 1 (1993) (federal program funding sign language interpreter for a student enrolled in a religious school).



An important factor in each of these cases was that the government programs were available to a wide spectrum of individuals regardless of whether the chosen institution was secular or sectarian. In addition, because the school was selected by individuals according to what they believed was the best learning environment, the “circuit between government and religion was broken.”<sup>4</sup>

Applying this precedent, the Court concluded for several reasons that the Ohio program is one of true private choice. First, the program is neutral toward religion; educational assistance is provided regardless of whether the selected school is public, private, or religious. Under the Ohio scheme, parents are free to select from a diverse range of educational options, including remaining in public school; remaining in public school with publically funded tutorial assistance; transferring to an adjacent public school; enrolling in a community school, which is state funded but managed by an independent school board; enrolling in magnet schools, which are public schools with a special emphasis; or using vouchers to attend a religious or non-religious private school. Second, educational assistance is provided to a broad class of individuals without reference to religion. Any parent of a school-aged child residing in the Cleveland City School District can participate. Third, no financial incentives slant the program toward religious schools. In fact, the program creates financial disincentives for selecting private school options. Parents selecting private schools receive two to three times less in public funding than those who chose one of the public school options.

The Court rejected the respondents’ argument that constitutional significance should be attributed to the fact that 96 percent of

recipients enrolled in religious schools. Previously, the Court has rejected similar arguments even in the context of direct aid programs. To attach constitutional significance to the percentage would lead, in the Court’s opinion, to the “absurd result that a neutral school-choice program” might be permissible in some states or parts of a state; and unconstitutional elsewhere, depending on the concentration of religious schools in a particular area. For that reason, the constitutionality of such a program cannot be based on the percentage of recipients who choose to use the vouchers at religious schools. In any event, the Court found the 96 percent figure misleading because it did not take into account children enrolled in community and magnet schools or those receiving tutorial assistance in traditional public schools. When those children were factored in, the percentage enrolled in religious schools fell to less than 20 percent.

In conclusion, the majority ruled that the Ohio voucher program does not violate the Establishment Clause because it is “entirely neutral, . . . provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence,” and . . . “permits such individuals to exercise genuine choice among options private and public, secular and religious.”<sup>5</sup>

In her concurrence, Justice O’Connor highlighted the fact that many existing government programs provide substantial public funds to religious institutions. Religious organizations qualify for a multitude of exemptions from income and property taxes. Deductions for charitable contributions result in reduced federal tax revenues of nearly \$25 billion annually, with approximately 60 percent of this amount going to religious char-

ities. Federal funds also reach religious institutions through Medicare, Medicaid, and educational programs, such as the Pell Grant program for low income post-secondary students and the G.I. Bill of Rights for veterans. Many of these funds reach religious institutions without any restriction on their use. In her opinion, the Establishment Clause challenge to the Cleveland voucher program must be analyzed in light of the array of educational options available, regardless of whether the other options are specified in the same section of the state code as the voucher program.

Justice Thomas fully concurred in the Court’s decision upholding the constitutionality of the voucher program, but questioned whether the Establishment Clause test should even apply to the states. He pointed out that the First Amendment states that “*Congress* shall make no law respecting an establishment of religion.” (Emphasis added.) The plain language of the clause does not refer to or place any limitations on the states. Moreover, the original purpose of the Establishment Clause was to protect the states by preventing the Federal government from imposing an established religion. In his opinion, the states should be afforded “greater latitude in dealing with matters of religion and education.” He believes that it would be a “tragic irony” to convert the Fourteenth Amendment’s guarantee of individual religious liberty into a prohibition on the exercise of educational choice. In his view, there is nothing unconstitutional about school choice programs that include religious school options:

*[S]chool choice programs that involve religious schools appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause.*

Opponents of voucher programs believe the decision will result in further diversion of limited funds and resources away from public schools.





*Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disservices those in the greatest need.<sup>6</sup>*

Three of the four dissenters, Justices Breyer, Stevens, and Souter filed separate dissenting opinions. Justice Breyer focused on the risk of school vouchers creating social and religious conflict. The framers of the First Amendment intended to protect religious freedom in America and prevent the religious strife that plagued the European nations. Justice Breyer maintains that clear lines of separation between church and state are particularly necessary in the educational arena, because the minds and spirits of children are shaped by primary education. Additionally, the risk of religious divisiveness is greater because of the religious diversity of today's society.

The Ohio voucher program prohibits discrimination on the basis of "race, religion, or ethnic background" and insists that no school "teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."<sup>7</sup> The Ohio statute provides for revocation of a school's registration if the state superintendent determines that a violation has occurred. Justice Breyer pointed out that any major public funding program will require criteria. The selection and application of those criteria are problematic, and efforts to enforce them will entangle church and state and promote dissension among religious groups.

Justice Stevens characterized the majority's opinion as "profoundly misguided." He shares Justice Breyer's concern regarding the need for a clear separation between church and state: "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."<sup>8</sup> He dissented because the voucher program's authorization to use public funds to pay for religious indoctrination clearly violates the Establishment Clause. In his opinion, the educational crisis and parent choice aspect of the program are not valid reasons to uphold it; because the educational crisis in Cleveland may have forced families

to leave the public school system and accept religious indoctrination they would not have accepted otherwise.

In a lengthy and passionate dissent, joined by the other three dissenters, Justice Souter chastised the majority for giving "short shrift to the Establishment Clause" and for failing to uphold constitutional limitations in a case in which constitutional lines may be more difficult to draw. The majority's consideration of all educational options available, rather than the specific tuition voucher provisions is, in his opinion, illogical and misleading. Considering voucher programs in light of all other public school alternatives would result in a finding of neutrality, even if no private non-religious options existed, because voucher proponents would always be able to demonstrate that the vast majority of public funds are spent on secular schools.

Justice Souter characterized the Court's decision as "profoundly at odds with the Constitution" and a "dramatic departure from basic Establishment Clause principles."<sup>9</sup> He was deeply troubled by the scale of financial assistance to religious schools the Court approved. The amount, \$33 million since the inception of the Cleveland voucher program, is unprecedented. The greater the amount of aid, the greater the danger it will be spent to support religious instruction. Finally, he observed the divisiveness permitted by the majority's decision could be remedied, in the short term, only by legislative recognition of the threats posed by allowing school vouchers to be spent in religious schools.

Although a majority of the Court found that the Ohio voucher program is constitutional, the justices appeared to be greatly influenced by the multitude of public and private school options available. As Justice Souter suggested, the outcome might have been different if no private non-religious schools were available. The legislature carefully crafted the voucher program to meet Establishment Clause requirements of neutrality and private choice. Beneficiaries are defined without reference to religion; funds are available to religious and non-religious schools; and any religious indoctrination oc-

curs as a result of parent choice, not governmental coercion.

## Implications for the Future

At present, only Cleveland, Milwaukee, and Florida have voucher programs involving religious schools. Ten states have some form of voucher or tax-credits applicable to private schools. The *Zelman* decision removes the major constitutional barrier and opens the door for additional jurisdictions to consider instituting similar voucher programs. Several states joined Ohio in urging the Court to endorse voucher programs. Immediately following the issuance of the decision, a voucher bill for Washington, D.C. was introduced in the House of Representatives.

Approximately three dozen states have state constitutional Establishment Clauses that are more restrictive than the federal clause. The Michigan Constitution bans expenditure of public funds on private schools, regardless of whether they are religious or secular. In the 2000 election, Detroit voters rejected a voucher referendum by a wide margin.

Although the *Zelman* decision clears the way for more states to consider school voucher programs, the major hurdle to vouchers is likely to be legislative rather than judicial. The political process may well be a superior means for evaluating benefits and risks of school voucher programs, drafting carefully designed program criteria and responding to possible challenges or abuses. ◆

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## Footnotes

1. 70 USLW 4683 (2002).
2. Id. at 4686.
3. Id.
4. Id. at 4687.
5. Id. at 4690.
6. Id. at 4696.
7. Ohio Rev Code § 3313.976(A)(4) and (6).
8. 70 USLW at 4697.
9. Id. at 4703 and 4706.