



Legal Summary Of U.S. Supreme Court Decision in *Zelman V. Simmons-Harris*, 436 U.S.

June 27, 2002

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On June 27, 2002, the United States Supreme Court ruled that that the state of Ohio was within its constitutional power to enact a school choice program for Cleveland's children. Below is a summary of that decision.

Legal Summary of U.S. Supreme Court decision in *Zelman v. Simmons-Harris*, 436 U.S. --- (2002)

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Facts & Legal Background

The Cleveland Scholarship and Tutoring Program was adopted by the Ohio Legislature in 1996 after thirty years of desegregation litigation and education reform programs had failed to improve the Cleveland City School District. *See Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 711 N.E.2d 203, 214 (Ohio 1999); *Reed v. Rhodes*, 179 F.3d 453 (6th Cir. 1999). Students receiving scholarships may use them to attend an "alternative school," (defined as a registered private school or a public school in an adjacent school district), or to hire private tutors. The amount of the scholarship depends upon the income level of the student but cannot exceed \$2,500. The Scholarship payments are made available in the form of checks payable to the parents, who designate the school to which the checks will be sent. In order to ensure that the money is spent on education, the parents must go to the school and endorse the check. Other educational options available to parents in Cleveland and Ohio include community (charter) schools, magnet schools and statewide, inter-district transfers (open enrollment).

The Ohio Supreme Court upheld the program. In its view, "[w]hatever link between government and religion is created by the School Voucher Program is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government." After an extensive review of the facts and factual context, it concluded that the "School Voucher Program has a secular legislative purpose, does not have the primary effect of advancing religion, and does not excessively entangle government with religion." It also rejected a challenge under Ohio's religious liberty guarantee.

The plaintiffs then filed suit in the United States District Court for the Northern District of Ohio, and obtained a ruling that the program violated the Establishment Clause. Disagreeing with the Ohio Supreme Court's conclusion that "money goes to religious institutions as a result of a 'genuinely independent and private choice of individuals,'" the federal District Court held that the program unconstitutionally "advances religion" because the "overwhelming majority of schools from which a student may choose are sectarian and ... no adjacent public school has chosen to participate in the Program." The United States Court of Appeals for the Sixth Circuit affirmed.

In a 5-4 decision entered on June 27, 2002, the United States Supreme Court reversed, holding that "neutral educational assistance programs that ... offer aid directly to a broad class of individual recipients defined without regard to religion" are constitutional.

Summary of Opinions

Majority Opinion by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas.



Similar to the brief submitted by the Center for Education Reform, the Court's majority opinion focused on the context in which the program was enacted and the multiple educational options available to Cleveland parents of school-age children.

In this case the State of Ohio asked the United States Supreme Court to determine whether the Establishment Clause prohibits Ohio's program from authorizing parents to use the scholarships at any private school, whether religious or not. The majority opinion holds that "neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion" are constitutional. The number of students who choose to use that assistance at a religiously affiliated private school is irrelevant for constitutional purposes. The Court found that "[t]here is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing school system."

Further, the Court determined that the Establishment Clause question "must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." The Court also mentioned that "none of the dissenting opinions explain how there is any perceptible difference between scholarship schools, community schools, or magnet schools from the perspective of Cleveland parents looking to choose the best educational option for their school-age children. Parents who choose a program school in fact receive from the State precisely what parents who choose a community or magnet school receive – the opportunity to send their children largely at state expense to schools they prefer to their local public school."

In reaching this conclusion the Court answered several questions raised by those challenging the statute. First it determined whether the money provided through the program to participating sectarian private schools was "properly attributable to the State," as a form of "an impermissible 'direct [State] subsidy'" to the schools, or was "a permissible [parental] transfer" to the schools "similar to [a] hypothetical salary donation" by a government employee from a government paycheck to a religious institution. Previous case law in the Establishment Clause area such as "*Mueller*, *Witters*, and *Zobrest*" thus make clear that where a government 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 challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." This program is one of "true private choice," consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. The Court noted that they "have never found a program of true private choice to offend the Establishment Clause."

Second, the Court considered whether the program has "the [impermissible] effect of advancing religion by creating a financial incentive to undertake religious indoctrination." It found that "the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion." Financial incentives "[are] not present ... where 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. ... The program here in fact creates financial *disincentives* for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools." Despite this analysis the Court went on to hold that "[a]lthough such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program 'creates... financial incentive[s] for parents to choose a sectarian school.'"

Third, the Court addressed whether the program impermissibly confers a message of the state endorsement of religion. It held that "[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general."



The Court's responses to these questions are significant given the facts of the case.

Concurring opinion by Justice Sandra Day O'Connor

Justice O'Connor's concurring opinion focused on a few specific points. First, like the full majority, she emphasized that their inquiry requires an evaluation of all reasonable educational options Ohio provides the Cleveland school system, regardless of whether they are formally made available in the same section of the Ohio Code as the voucher program." She insisted that the facts are critical in cases arising under the Establishment Clause, saying that failing to look at all of the educational options is "to ignore how the educational system in Cleveland actually functions."

Second, she believed that this "decision, when considered in light of other longstanding government programs that impact religious organizations and our prior Establishment Clause jurisprudence, [does not] mark a dramatic break from the past."

Finally, Justice O'Connor believed that "[t]he share of public resources that reach religious schools is not ... as significant as respondents suggest" because, while "\$8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions" without there being any serious question regarding the constitutionality of such support.

Her conclusion in this case, as in many other cases, was tied closely to the facts of the case.

Concurring opinion by Justice Clarence Thomas

Much like the brief submitted by the Center for Education Reform, Justice Thomas' opinion focused on the civil rights implications of the case. Specifically he said:

Frederick Douglass once said that "[e]ducation ... means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown v. Board of Education*, that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," urban children have been forced into a system that continually fails them. These cases present an example of such failures. Besieged by escalating financial problems and declining academic achievement, the Cleveland City School District was in the midst of an academic emergency when Ohio enacted its scholarship program.

In Justice Thomas' view, those who object to school vouchers are engaged in a "formalistic" attempt to turn the First and Fourteenth Amendments on their head. Specifically, "[r]espondents (in this case) advocate using the Fourteenth Amendment to handcuff the State's ability to experiment with education. But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment.... While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society.... 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. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects."

Dissent by Justice John Paul Stevens

Justice Stevens' dissent focused on the *method* by which the majority reached its conclusions. In his view, the Court "should ignore three factual matters that are discussed at length." Specifically, he argued that the Court should NOT consider:



the severe educational crisis that confronted the Cleveland City School District when Ohio enacted its voucher program,

the wide range of choices that have been made available to students within the public school system, nor

the voluntary character of the private choice to prefer a parochial education over an education in the public school system.

Dissent by Justice David Souter, joined by Justices Stevens, Breyer, and Ginsburg

Justice Souter's dissent focused on his objection to the use of *any* public funds to support educational programs run by religious institutions. He contended that "[p]ublic tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic." In Justice Souter's view, the Court was wrong when it focused on *all* of the funds the State of Ohio makes available for public education as the backdrop for a decision on whether the program is "neutral" with respect to religion.

Dissent by Justice Steven Breyer, joined by Justices Stevens and Souter.

Justice Breyer concurred with the other dissenters to "emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict." In his view, the Court's prior interpretation of the Establishment Clause "appreciated the religious diversity of contemporary American society."

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Additional information:

- [Full text of U.S. Supreme Court Decision](#) (.pdf format).
- [CER's Full Coverage of U.S. Supreme Court Decision](#) and additional weblinks.

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