St. Mary's University

St. Mary's Law Journal

Volume 35 | Number 2 Article 5

1-1-2004

# School Voucher Programs: Has the Supreme Court Pulled up the Gangplank to Establishment Clause Challenges.

Cecil C. Kuhne III

Follow this and additional works at: https://commons.stmarytx.edu/thestmaryslawjournal

Part of the Environmental Law Commons, Health Law and Policy Commons, Immigration Law Commons, Jurisprudence Commons, Law and Society Commons, Legal Ethics and Professional Responsibility Commons, Military, War, and Peace Commons, Oil, Gas, and Mineral Law Commons, and the State and Local Government Law Commons

## Recommended Citation

Cecil C. Kuhne III, *School Voucher Programs: Has the Supreme Court Pulled up the Gangplank to Establishment Clause Challenges.*, 35 St. Mary's L.J. (2004).
Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol35/iss2/5

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

# ESSAY

## SCHOOL VOUCHER PROGRAMS: HAS THE SUPREME COURT PULLED UP THE GANGPLANK TO ESTABLISHMENT CLAUSE CHALLENGES?

CECIL C. KUHNE, III*


I. Introduction .......................................... 379
II. A Brief Historical Perspective........................ 382
III. The Devil Is in the Details ........................... 387
IV. The Court's Slowly Evolved Standards ................ 391
V. Conclusion ............................................ 396


### I. INTRODUCTION

In what is surely a death knell for Establishment Clause challenges to carefully crafted school voucher programs, the United States Supreme Court in *Zelman v. Simmons-Harris*[1] has ruled constitutional an extensive financial assistance program established for the parents of schoolchildren in Cleveland, Ohio, where the vast majority of funds are eventually spent for tuition in religious institutions.[2] In holding that the Cleveland program does not con-

---

* Counsel in the Dallas office of Fulbright & Jaworski L.L.P.

1. 536 U.S. 639 (2002). The Court decided the issue in a 5-4 split, publishing two concurring and three dissenting opinions.

2. Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002). The Supreme Court has long recognized the difficulty of Establishment Clause challenges. It is easy enough to quote the few words constituting that Clause: "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I. It is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions "[the Court has] expressly or implicitly acknowledged that '[it] can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of consti-



Published by Digital Commons at St. Mary's University, 2003

St. Mary's Law Journal, Vol. 35 [2003], No. 2, Art. 5



stitute "an establishment of religion" by the state,[3] the Court reiterated its rationale from a twenty-year line of cases upholding neutral educational assistance programs when offered to a broad class of recipients who are allowed to exercise genuine choice among available school options.[4] The decision in *Zelman* emphasized the distinction between programs allowing true private choice and those providing aid directly to religious schools.[5] In the context of schemes allowing an array of religious and nonreligious educational alternatives, the Court reasoned that any funds which reach sectarian institutions do so only because an individual recipient, not the government, has made that choice.[6]

The Court in *Zelman* concluded:

> [T]he 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

---

tutional law.'" Mueller v. Allen, 463 U.S. 388, 392-93 (1983) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)); *see also* Tilton v. Richardson, 403 U.S. 672, 678 (1971) (acknowledging that the standards used to identify instances of infringement on the Establishment Clause are merely guidelines because the boundaries of permissible governmental action are not clear).

3. *Zelman*, 536 U.S. at 649 (stating, "There 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 public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden 'effect' of advancing or inhibiting religion."). The First Amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

4. *Zelman*, 536 U.S. at 649 (stating that "[w]hile our jurisprudence with respect to the constitutionality of direct aid programs has 'changed significantly' over the past two decades, . . . our jurisprudence with respect to true private choice programs has remained consistent and unbroken" (quoting Agostini v. Felton, 521 U.S. 203, 236 (1997))).

5. *Id.*; *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993) (discussing that a "State may not grant aid to a religious school, . . . where the effect of the aid is 'that of a direct subsidy to the religious school' from the State" (quoting Witters v. Wash. Dep't of Servs. For the Blind, 474 U.S. 481 487 (1986) and School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985))); Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973) (observing that although the program was enacted for ostensibly secular purposes, its function was "unmistakably to provide desired financial support for nonpublic, sectarian institutions").

6. *Zelman*, 536 U.S. at 652 (reasoning that "[t]he 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").

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.[7]

In his lengthy dissent, Justice Souter contended that regardless of its formalistic and seemingly neutral structure, the ultimate effect of the program at issue is an advancement of religion because the vast bulk of funds do in fact migrate toward sectarian schools, which in many instances are the only alternatives available.[8] But Justice Rehnquist, writing for the majority, countered that such criteria would strangely invalidate a program in one school district and yet not in another, depending upon the mix and choice of religious and nonreligious educational options, leading to an unwieldy and inconsistent patchwork of assistance.[9] The majority opinion in *Zelman* is clear that whether the vast preponderance of voucher funds ultimately goes to religious schools is irrelevant to the deter-

---

7. *Id.* at 653.

8. *Id.* at 687 (noting that "[t]he [voucher] money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension"). Justice Souter argued that the almost 100% of school voucher money going to religious schools in Cleveland does not reflect a free choice because so few religious choices are available. *Id.* at 707.

9. *Id.* at 656 n.4.

> To attribute constitutional significance to [statistics showing that Cleveland has a preponderance of religiously affiliated private schools] would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools . . . but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater.

*Id.* at 657; *see also* Mueller v. Allen, 463 U.S. 388, 401 (1983) (discussing tax deductions for school children attending sectarian schools). In *Mueller*, Justice Rehnquist wrote:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

*Id.*

mination of the program's constitutionality when the program is neutral and true choice is exercised.[10]

## II. A BRIEF HISTORICAL PERSPECTIVE

Over the last half century, the Supreme Court has dealt with a number of Establishment Clause challenges to a wide range of programs providing aid to those who attend secular schools: scholarships,[11] tax deductions for educational expenses,[12] grants for repair and maintenance of school facilities,[13] reimbursement of transportation costs,[14] book loans,[15] sign-language interpreters,[16] and remedial classes.[17]

In 1947, the modern development of Establishment Clause interpretation was inaugurated in the landmark decision of *Everson v. Board of Education*.[18] In *Everson*, the Court tersely stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called,

10. *Zelman*, 536 U.S. at 658 (stating that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school").

11. *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986) (holding that the extension of assistance under a state vocational rehabilitation assistance program to a person who chose to study at a Christian college does not violate the First Amendment).

12. *See Mueller*, 463 U.S. at 402 (holding that a tax deduction for educational expenses does not violate the Establishment Clause).

13. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779 (1973) (holding that maintenance and repair provisions violate the Establishment Clause because religious missions are advanced when sectarian schools are subsidized).

14. *See* Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (authorizing school district boards to provide for transportation of pupils to and from schools because the First Amendment is not violated).

15. *See* Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 248 (1968) (holding that requiring local public school authorities to lend textbooks free of charge to all students was not, because it authorized textbook loans to students attending parochial schools, a law respecting an establishment of religion or prohibiting the free exercise of religion).

16. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993) (holding that furnishing a disabled child enrolled in a sectarian school with a sign-language interpreter in order to facilitate his education does not violate the Establishment Clause just because sectarian institutions may also receive a financial benefit).

17. *See* Agostini v. Felton, 521 U.S. 203, 229 (1997) (concluding that placing public employees in parochial schools to provide remedial classes does not impermissibly finance religion).

18. 330 U.S. 1 (1947).

Kuhne: School Voucher Programs: Has the Supreme Court Pulled up the Gang



or whatever form they may adopt to teach or practice religion."[19] Nevertheless, the Court found that the Establishment Clause does not prevent a state from extending the benefits of state laws to all citizens without regard for their religious affiliation.[20] *Everson* involved a state statute that provided for public funds to pay bus fares for parochial-school students on regular city buses as part of a general scheme to reimburse public transportation costs of children attending both public and private nonprofit schools.[21] The majority upheld the state law under the Free Exercise Clause,[22] which was said to entitle free public transportation when offered as a general government service to all schoolchildren.[23] As with public provision for streets, police departments, and fire protection, the Court admitted that payment of bus fares was of some value to religious schools; however, the Court concluded that it was not such support as to constitute establishment of religion.[24]

Twenty years later, in *Board of Education of Central School District No. 1 v. Allen*,[25] the Court upheld a New York law authorizing local school boards to lend textbooks in secular subjects to students attending religious schools.[26] The Court, reiterating that the books could only be used for secular educational purposes,[27] found it relevant that "no funds or books are furnished [directly] to parochial schools, and the financial benefit is to parents and children, not to schools."[28] The following year, in *Walz v. Tax Commission*, the

19. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).
20. *Id.* at 17.
21. *Id.* at 3.
22. *Id.* at 15-16. The Court also stated that

> [w]hile we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

*Id.* at 16.

23. *Id.* at 17. Commenting on the nature of the funds, the Court stated: "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18.
24. *Everson*, 330 U.S. at 17-18.
25. 392 U.S. 236 (1968).
26. Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 248 (1968).
27. *Id.* at 244-45.
28. Walz v. Tax Comm'n, 397 U.S. 664, 666 (1970).

Published by Digital Commons at St. Mary's University, 2003

Court examined property tax exemptions for properties used for religious worship.[29] In upholding the New York statute, the Court noted that the legislative purpose of property tax exemptions "is neither the advancement nor the inhibition of religion."[30]

Since the *Walz* decision, an important tool in the analysis of Establishment Clause cases has been the three-prong test set forth in 1971 in *Lemon v. Kurtzman*.[31] *Lemon* held that a statute is constitutional if it: (1) has a secular purpose; (2) has a primary effect of neither advancing nor inhibiting religion; and (3) does not create an excessive entanglement between government and religion.[32] The court in *Lynch v. Donnelly* interpreted the purpose prong of the *Lemon* test to require an inquiry into whether the government "intends to convey a message of endorsement or disapproval of religion."[33] In the 1997 case of *Agostini v. Felton*,[34] the Court merged the entanglement inquiry of *Lemon*'s third prong into the primary effect inquiry of its second prong.[35] *Agostini* then set out three criteria to determine that the primary effect of government aid is the advancement of religion when it: (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement.[36]

In its analysis of Cleveland's voucher program, the Supreme Court in *Zelman* specifically referred to three previous decisions

---

29. *Id.* at 672, 680.

30. *Id.* at 672. But in his dissent in *Allen*, Justice Black wrote that textbooks, even "secular" ones, will "in some way inevitably tend to propagate the religious views of the favored sect." *Allen*, 392 U.S. at 252 (Black, J., dissenting); *see also* Cochran v. La. State Bd. of Educ., 281 U.S. 370, 375 (1930) (finding that taxation for the purpose of purchasing school books did not constitute an unconstitutional taking of property for public use, and explaining that the children and the state, rather than the schools, benefit from the appropriations).

31. 403 U.S. 602 (1971).

32. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

33. Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984).

34. 521 U.S. 203 (1997).

35. Agostini v. Felton, 521 U.S. 203, 218, 232-33 (1997); *see also* Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (outlining the merging of the three-pronged *Lemon* test into a two-pronged test in which entanglement became "one criterion relevant to determining a statute's effect").

36. *Agostini*, 521 U.S. at 234; *see also Lemon*, 403 U.S. at 615 (explaining that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.").

Kuhne: School Voucher Programs: Has the Supreme Court Pulled up the Gang



upholding similar programs.[37] In each instance the program contained the attributes of neutrality and free choice required by the Court to avoid offending the Establishment Clause, even though most of the funds were eventually spent at religious schools.[38] Justice Rehnquist noted the similarities:

> *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.[39]

The first of these three cases, *Mueller v. Allen*,[40] dealt with a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs.[41] The Court found the program constitutional because it included *all* parents, including those whose children attended nonsectarian private schools,[42] and because it provided aid to parochial schools only as a result of decisions of individual parents, rather than directly from the state to the schools themselves.[43] However, the majority of tuition fund beneficiaries—some ninety-six percent—were parents of

37. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002) (citing Mueller v. Allen, 463 U.S. 388 (1983); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); and Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)). "Three times we have confronted Establishment Clause challenges to neutral government programs that direct aid to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges." *Id.*

38. *Id.* at 650-52.

39. *Id.* at 652.

40. 463 U.S. 388 (1983).

41. Mueller v. Allen, 463 U.S. 388, 391 (1983). Deductions for instructional books and materials used in the teaching of religious tenets, doctrines, or worship were specifically disallowed under the statute. *Id.* at 403.

42. *Id.* at 398-99. "The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400.

43. *Id.* at 397. The Court in *Mueller* commented that

Published by Digital Commons at St. Mary's University, 2003

St. Mary's Law Journal, Vol. 35 [2003], No. 2, Art. 5



children attending religious schools.[44] The Court found this fact of no moment:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.[45]

In *Witters v. Washington Department of Services for the Blind*,[46] the Court upheld a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor.[47] The Court noted that any aid which ultimately flowed to religious institutions did so only because of the "genuinely independent and private choices" made by aid recipients:[48]

> [A]id recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals

---

> [i]t is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children.

*Id.* at 399.

44. *Id.* at 401.

45. *Id.*

46. 474 U.S. 481 (1986).

47. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986) (concluding that "[the program of] providing vocational assistance to the visually handicapped, does not seem well suited to serve as the vehicle for such a subsidy [to religious education]").

48. *Id.* (noting that "aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so").

means that the decision to support religious education is made by the individual, not the State.[49]

The Court concluded that

> [the program] is not one of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court" . . . . It creates no financial incentive for students to undertake sectarian education. . . . It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions.[50]

In *Zobrest v. Catalina Foothills School District*,[51] the Court upheld a program that permitted sign-language interpreters to assist deaf children enrolled in a religious school.[52] The Court pointed out that the program distributed benefits neutrally to any child qualifying as disabled,[53] and that its primary beneficiaries were "[d]isabled children, not sectarian schools."[54] The Court saw no violation of the Establishment Clause:

> The IDEA [Individuals with Disabilities Education Act] creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education.[55]

## III. The Devil Is in the Details

As past jurisprudence of the Supreme Court has made clear, the form of educational aid under constitutional scrutiny is all-impor-

49. *Id.* In concurring opinions, five Justices in *Witters* emphasized the general rule that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. *Id.* at 490-91.

50. *Id.* at 488 (internal citations omitted).

51. 509 U.S. 1 (1993).

52. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993).

53. *Id.* at 10.

54. *Id.* at 12. The Court noted that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.* at 8.

55. *Id.* at 13-14.

St. Mary's Law Journal, Vol. 35 [2003], No. 2, Art. 5



tant.[56] In *Zelman*, the Court concluded that where a program is neutral toward religion[57] and provides assistance directly to a broad class of citizens who in turn voluntarily direct the aid to religious schools,[58] the program does not violate the Establishment Clause.[59] A program containing these features, the Court said, permits government aid to reach religious institutions only because of deliberate choices of individuals,[60] and any incidental advancement or endorsement of religion is attributable to the individual recipient—*not* the government, which simply acts as a disburser.[61]

Justice O'Connor, in her concurring opinion, set forth the test for a voucher program to meet constitutional scrutiny:

> Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and most importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down under the Establishment Clause.[62]

56. Mueller v. Allen, 463 U.S. 388, 394 (1983). The Supreme Court has been reluctant "to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Id.* at 394-95.

57. Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002); *see also* Rosenberger v. Rector, 515 U.S. 819, 839 (1995) (noting "that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse").

58. *Zelman*, 536 U.S. at 651; *see also* Mitchell v. Helms, 530 U.S. 793, 810 (2000) (stating that "if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment").

59. *Zelman*, 536 U.S. at 663; *see also Mueller*, 463 U.S. at 399 (noting that "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents, no 'imprimatur of State approval,' . . . can be deemed to have been conferred on any particular religion, or on religion generally" (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981))).

60. *See Zelman*, 536 U.S. at 654-55 (providing that "we have repeatedly recognized 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").

61. *Id.* at 652.

62. *Id.* at 669.

Under the Ohio Pilot Project Scholarship Program at issue in *Zelman*, tuition aid for certain students in the Cleveland City School District is provided to parents who then choose among participating public or private schools.[63] Both religious and nonreligious schools in the district may participate, as may public schools in adjacent school districts.[64]

The Court found that Cleveland parents could select from genuine educational choices that allowed their students to: (1) remain in public school; (2) remain in public school with funded tutoring; (3) obtain a scholarship and attend a religious school; (4) obtain a scholarship and attend a nonreligious private school; (5) enroll in a community school; or (6) enroll in a magnet school.[65] The issue of whether Ohio encourages parents to send their children to religious schools was resolved by the Court after examining all the available options, only one of which is to obtain a scholarship and attend a religious school.[66] The only preference in the program is for lower-income families, who receive greater assistance and higher priority for admission.[67] The Court concluded that Cleveland's preponderance of religiously affiliated schools did not result from the program, but rather is a phenomenon common to many American cities.[68]

Justice Stevens, in his dissenting opinion, did not see the choices facing Cleveland parents as redeeming what he considered an unconstitutional establishment of religion:

---

63. *Id.* at 645.

64. *Id.*

65. *Zelman*, 536 U.S. at 655-56.

66. *Id.* at 654 (finding that "[a]lthough [the various] 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'" (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993))).

67. *Id.* at 655. Rather than creating financial incentives that skew it toward religious schools, the program reviewed by *Zelman* actually creates disincentives. *Id.* at 653. "Private schools receive only half the government assistance given to community schools and one-third that given to magnet schools, and adjacent public schools would receive two to three times that given to private schools." *Id.* at 654. Families also have a disincentive, for they must co-pay a portion of private school tuition, but they pay nothing at a community, magnet, or traditional public school. *Id.*

68. *See id.* at 656-57 (noting that the majority of Cleveland's private schools are religious, regardless of the program). Furthermore, Justice O'Connor notes in her concurring opinion that "[w]hen one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent," and to 16.5 percent when magnet schools are included. *Id.* at 664.

St. Mary's Law Journal, Vol. 35 [2003], No. 2, Art. 5



> [T]he wide range of choices that have been made available to students *within the public school system* has 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. The fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at state expense does, however, support the claim that the law is one "respecting an establishment of religion."[69]

On the other hand, *direct* aid to parochial schools runs contrary to the Establishment Clause, a point the Supreme Court has enunciated for decades. For example, in 1983, the decision in *Mueller v. Allen* observed that in all except one of the prior cases before the Court where state aid to parochial schools was invalidated, a transmission of assistance from a state directly to a school was involved. Here, where aid to parochial schools was available only because of decisions made by individual parents, no "imprimatur of state approval . . . can be deemed to have been conferred on any particular religion, or on religion generally."[70]

However, as the line of cases beginning with *Mueller* has shown, the mere fact that most of the funds go to religious schools is ultimately irrelevant. Justice Rehnquist elaborated on the rationale in *Zelman*: "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are [run by] religious [organizations], or most recipients choose to use the aid at a religious school."[71] As the Court stated in *Mueller*, "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated."[72]

As long as the program under consideration is neutral toward religion and provides assistance to a broad class of citizens who in turn voluntarily direct the aid to religious institutions, the Court is seemingly unconcerned with the eventual composition of secular versus sectarian schools.

---

69. *Id.* at 685.
70. Mueller v. Allen, 463 U.S. 388, 399 (1983).
71. *Zelman*, 536 U.S. at 641.
72. *Mueller*, 463 U.S. at 401.

## IV. THE COURT'S SLOWLY EVOLVED STANDARDS

It is ironic that the two sides of the Court in *Zelman* have each accused the other of formalism.[73] Justice Thomas, in concurring with the majority decision to uphold the Cleveland program as constitutional, remarked that the minority raises formalistic objections.[74] The minority view, on the other hand, sees the majority as rigidly applying a formalistic test that ignores the realities of the situation.[75] In his dissent, Justice Souter characterizes the fact that public funds pay for instruction in religious subjects as constitutionally offensive because such funding violates the Establishment Clause by furthering religious doctrine with public money.[76] Justice Souter does not see any real choice in the Cleveland program.[77] In his mind, the beneficial end—that of improving the

---

73. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (noting that the Court must not "engage in a legalistic minuet in which precise rules and forms must govern" because "[a] true minuet is a matter of pure form and style, the observance of which is itself the substantive end"; whereas, "[h]ere we examine the form of the relationship for the light that it casts on the substance").

74. *Zelman*, 536 U.S. at 682 (stating that "[o]pponents of [school choice programs] raise *formalistic* concerns about the Establishment Clause but ignore the core purposes of the Fourteenth Amendment" (emphasis added)).

75. *Id.* at 708 (Souter, J., dissenting). In his dissenting opinion, Justice Souter states:

> Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely *formal* criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools. Today's cases are notable for their stark illustration of the inadequacy of the majority's chosen *formal* analysis.

*Id.* at 695 (emphasis added).

76. *Id.* at 710. Justice Souter explained:

> In the [C]ity of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension.

*Id.* at 687.

77. *Id.* at 703-04. Justice Souter reasoned:

> For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sake of channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian.

St. Mary's Law Journal, Vol. 35 [2003], No. 2, Art. 5



schools of Cleveland—does not justify a violation of constitutional principle.[78]

The dissenting opinions in *Zelman* refer to a number of previous decisions, primarily those from the early 1970s, finding an impermissible establishment of religion by the state. For example, in 1971, the Court concluded in *Lemon* that a state's reimbursement to nonpublic schools for the cost of teachers' salaries, textbooks, and instructional materials, as well as its payment of a salary supplement to teachers in nonpublic schools, resulted in excessive entanglement of church and state.[79] Two years later, in *Levitt v. Committee for Public Education*,[80] the Court struck down on Establishment Clause grounds a state program reimbursing nonpublic schools for the cost of teacher-prepared examinations.[81]

Furthermore, in 1973, the Court, in *Committee for Public Education & Religious Liberty v. Nyquist*,[82] struck down a New York program providing direct grants for maintenance and repair of school facilities. In *Nyquist*, payments were allocated per pupil, but were *only* available to private, non-profit schools in low-income areas—almost all of which were Catholic.[83] *Nyquist* established that a state may not support religious education through direct grants to parochial schools nor through financial aid to parents of parochial school students,[84] and that such aid is no more permissible if pro-

---

*Id.* at 707.

78. *Id.* at 686 (acknowledging that "[i]f there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here").

79. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

80. 413 U.S. 472 (1973).

81. Levitt v. Comm. for Pub. Educ., 413 U.S. 472, 480 (1973) (stating that "[w]e cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church").

82. 413 U.S. 756 (1973).

83. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973). The Court noted:

> By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.

*Id.*

84. *Id.* at 786.

https://commons.stmarytx.edu/thestmaryslawjournal/vol35/iss2/5

vided as a tax credit than as cash payments.[85] The Court remarked that the Establishment Clause requires more than a secular purpose: "[T]he propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State."[86] The Court concluded that: "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."[87] Contrariwise, the Court, in *Zelman*, emphasized that the Ohio program under consideration shared *none* of the features of the New York program disapproved in *Nyquist*.[88]

After numerous attempts by the Court to reconcile its positions on Establishment Clause cases over the years, several of the inconsistent decisions from the 1970s—most notably, *Meek v. Pittenger*[89] and *Wolman v. Walter*[90]—were overruled by *Mitchell v. Helms*.[91] In *Meek*, the Court had held unconstitutional a direct loan of instructional materials to nonpublic schools, concluding that "the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence."[92] The program in *Wolman* was essentially identical, except that the state, in an effort to comply with *Meek*, loaned the aid to the students rather than the schools.[93] The holdings in *Meek* and

85. *Id.* at 786-87.

86. *Id.* at 774.

87. *Id.* at 780. The dissenting opinion in the later case of *Mueller v. Allen* would complain: "The Minnesota tax statute [under consideration] violates the Establishment Clause for precisely the same reason as the statute struck down in *Nyquist*: it has a direct and immediate effect of advancing religion." Mueller v. Allen, 463 U.S. 388, 405 (1983).

88. Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002) (holding that "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion").

89. 421 U.S. 349 (1975).

90. 433 U.S. 229 (1977).

91. 530 U.S. 793, 835 (2000).

92. Meek v. Pittenger, 421 U.S. 349, 366 (1975) (citing Lemon v. Kurtzman, 403 U.S. 602, 657 (1971)), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

93. Wolman v. Walter, 433 U.S. 229, 250 (1977) (noting that "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*"), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

*Wolman* were difficult to justify in light of later cases—and the *Mitchell* Court finally admitted as much.[94]

The Court in *Zelman* maintained that the Supreme Court's "jurisprudence with respect to true private choice programs has remained consistent" over the last twenty years, but conceded that its position toward direct aid programs had changed significantly during that period.[95] The Court had previously been interested in discerning when ostensibly secular aid to religious schools was susceptible to religious uses, but at some point the more stringent criterion of indoctrination replaced that of divertibility.[96] The Court has therefore departed from the rigid rule that all government aid which directly assists the educational function of religious schools is invalid.[97] While the state may still not grant aid to a religious school where the effect is that of a direct subsidy,[98] aid which happens to reach religious schools is not necessarily impermissible: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[99]

---

94. Mitchell v. Helms, 530 U.S. 793, 835-36 (2000) (noting that "[t]oday we simply acknowledge what has long been evident and was evident to the Ninth and Fifth Circuits and to the District Court").

95. Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

96. *See Mitchell*, 530 U.S. at 824 (eliminating the divertibility test). The Court noted that

> [a] concern for divertibility, as opposed to improper content, is misplaced not only because it fails to explain why the sort of aid that we have allowed is permissible, but also because it is boundless enveloping all aid, no matter how trivial and thus has only the most attenuated (if any) link to any realistic concern for preventing an 'establishment of religion.'

*Id.*

97. *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986) (illustrating that, even though the grant recipient would use the tuition grant to obtain religious education, the grants were "made available generally without regard to the sectarian-non-sectarian, or public-nonpublic nature of the institution benefited" (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973))).

98. *See* Sch. Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373, 393-94 (1985) (explaining that the Court has invalidated state schemes "whose effect was indistinguishable from that of a direct subsidy to the religious school"), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

99. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947). Justice O'Connor also notes in her concurring opinion in *Zelman* that religious organizations qualify for exemptions from federal income tax, tax deductions for charitable contributions, and tax credits for educational

Notably, the Court has reasoned that a state employee is free to donate any portion of his or her paycheck to a religious institution without constitutional implication.[100] In addition, if the Establishment Clause is to "bar religious groups from receiving general government benefits, then 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'"[101] The Court in *Mitchell v. Helms* explained:

> We hasten to add, what should be obvious from the rule itself, that simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates, under *Agostini*'s second criterion, an "incentive" for parents to choose such an education for their children. For *any* aid will have some such effect.[102]

Several underlying public policies have been enunciated for denying Establishment Clause challenges to scholastic programs which are neutral and offer true choice.[103] First, the state's decision to help defray the cost of educational expenses, even those of religious schools, has been said to evidence a laudatory goal—a well-educated populace—that is both secular and reasonable.[104] Second, the financial benefits flowing to parochial schools from such programs are usually so attenuated that they are unlikely to lead to the abuses that the Constitution was designed to protect against.[105] Finally, religious schools have undoubtedly provided numerous benefits to society: "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools."[106] The effect of these public policies on the view of

---

expenses, all of which can be substantial in amount. *Zelman*, 536 U.S. at 665-67 (O'Connor, J., concurring).

100. *Witters*, 474 U.S. at 486-87.

101. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (quoting Widmar v. Vincent, 454 U.S. 263, 274-75 (1981)).

102. Mitchell v. Helms, 530 U.S. 793, 814 (2000).

103. Mueller v. Allen, 463 U.S. 388, 401-02 (1983).

104. *Id.* at 395.

105. *Id.* at 399.

106. *Id.* at 401-02 (quoting Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

St. Mary's Law Journal, Vol. 35 [2003], No. 2, Art. 5



the Court toward Establishment Clause challenges to school voucher programs is significant.

## V. Conclusion

The long line of Supreme Court opinions culminating in *Zelman* seemingly makes it incontrovertible that the Establishment Clause is not violated when a meticulously designed governmental school-aid program is held neutral with respect to religion and provides assistance directly to a broad class of citizens who direct the aid to religious schools as a result of genuine and independent choice. The distinction between the majority and the dissenting opinions in this most recent decision of the Court might best be explained by the extent to which "judicial activism" is seen to be appropriate by the various Justices. The majority of the Court, in its analysis of the statute under consideration, apparently does not see its role as an overseer of school systems once it has established that the program is neutral and allows free choice—in spite of later statistical results which might suggest otherwise. The dissenters, on the other hand, seem more interested in the eventual effect of the legislation than its structure, and would declare a program unconstitutional because of enrollment which eventually transpires to indicate public support for religious institutions. Whether future voucher programs, with their various facets, will be disputed remains to be seen, but for now a carefully-constructed program like that of Cleveland appears to be free from serious constitutional challenge.

https://commons.stmarytx.edu/thestmaryslawjournal/vol35/iss2/5