

Zelman v. Simmons-Harris: **Remarks from a National Press Club Panel**

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The following is the text of remarks made at a panel discussion sponsored by the Pew Forum on Religion in Public Life and held at the National Press Club in Washington D.C. the day after the Supreme Court's decision in the school voucher case of Zelman v. Simmons-Harris. In that case, a majority of the court upheld the constitutionality of a voucher system run in the City of Cleveland, Ohio. The decision deeply divided the Court, with five justices broadly upholding the program as constitutional because the government aid was neutral towards religion and passed through the hands of parents who themselves made the final decision where to send the aid, whether secular or religious schools. Four justices strongly dissented. They questioned the neutrality of a program where 96% of the students using vouchers attended religious schools, and argued that the decision was a dramatic departure from the long-standing constitutional principle that tax-payers should not be compelled to support religious views they do not believe in.

I should say at the outset that I am sympathetic to school choice and religious schools, I'm the grateful product of 16 years of Christian education, and I plan to send own children to church schools, I belong to a church, the Seventh-day Adventist church, that has the 2nd largest parochial school system in the world behind the Catholic church.

Therefore, I hope that this decision is good for religious schools, but I fear it is not. I think Zelman is bad for religious freedom generally, and bad for religious schools in particular . . . I will explain why, but first let me put this decision in some larger context.

Smith & Zelman

Twelve years ago in the Smith decision the Supreme Court, in the words of the The Harvard Law Review, "eviscerated" the free exercise clause.

24 *Religion & Education*

Yesterday, in *Zelman*, the Court appears has basically abandoned the longstanding Establishment Clause principles that prohibit tax support of religion.

Many observers view these two decisions as being in tension or in downright conflict. The *Smith* decision is viewed as being hostile to religion cutting back on religion's constitutional protections and rights, whereas yesterday's decision is, I believe, viewed as supportive and favorable towards religion, allowing it to use tax monies for religious teaching and mission.

But I think there is an underlying theme or principle that unifies these decisions, and it is not support or hostility or even neutrality towards religion, rather, the unifying principle of these cases can be expressed in one word, majoritarianism – giving power to the majority in religious matters.

The *Smith* decision left the protection of religion to the majority controlled legislatures; now, *Zelman* has given power over the funding of religion to those same legislatures, meaning inevitably that state funds will find their way, disproportionately into the coffers of large and/or popular religious groups

Both decisions, I believe, misconceive the role of the courts in our constitutional scheme, which is to protect religious minorities under the bill of rights against the insensitivity or hostility of majorities, or from having to support popular religious views with their tax dollars. For this reason, both decisions, I believe, represent tremendous set-backs for religious freedom in America, although for different reasons.

Society and the Legislature

Now, it will be argued that *Zelman* does not allow the legislature to support any particular religion, whether it be popular or unpopular, large or small, as the money is guided by private, individual choice and not by the government.

First, the assumption that truly “neutral” voucher schemes can be created is unsafe, to begin, such schemes will only benefit religions that actually have educational systems presently, Catholic and Adventist theologies will receive far more state support than other religious views. And I believe that very quickly we will see disfavorable treatment of less popular groups. I question whether Muslim schools or those sponsored by Farrakhan will get funds. This is one of Justice Breyer's main points in his dissent.

But even more profoundly, the public/private choice distinction, at least as embraced in this case assumes that society can do directly what it cannot do indirectly through the legislature. That is, use tax-payer money to fund systems of religious teaching.

The founding fathers directly considered this distinction between the legislature and society carrying out religious programs with taxpayer funds and rejected it. In the closest analog to vouchers we have in the 18th century, Patrick Henry and James Madison debated over Henry's bill in Virginia To "Establish Teachers of the Christian Religion . . ." This was a bill that was as neutral as you could get in the 1700s. It levied a tax that was distributed to the religious organization of the tax-payers choice. There was an exemption for Quakers who did not have a professional clergy and for those with no religious preference; there was a general legislative fund for education

But Madison memorably rejected this scheme in his "Memorial and Remonstrance." His first point was that society had no business forcing people to support religion, and his second was that the legislature, deriving its authority from society, certainly had no authority to do so.

Now, the Supreme Court has stood Madison's point on its head, and ruled that what the legislature may not do, the people, or society, may do—use tax monies to fund religious schools. This means that where a particular religious group predominates, the Mormons in Utah, Southern Baptists in the South, or even on the county or city level, they will through "neutral" legislation be able to use public funds to create religious school systems that will rival public school systems in quality and resources and educational opportunity, thereby creating distinct pressures for non-members to attend these religious schools, creating a de facto establishment that is contrary to constitutional principles.

I think this will be bad for our constitutional system of religious freedom, creating, as Justice Breyer so eloquently points out, political fissures along religious lines, which drives the conflicts in so many of our world's troubled spots.

Bad for Religious Schools

But it will also be bad for the religious schools themselves, as it will attract students for academic rather than primarily religious reasons, thereby watering down the religious commitment of the student body. This is no speculation; but rather, it is illustrated in Cleveland, where 2/3 of the voucher users attended schools sponsored by religions of which they were not members. The schools will become more responsive to government goals and concerns and correspondingly less responsive to the religious goals of its church and it will be constrained by government regulation in student admissions and faculty hiring and employment decisions.

This is also no speculation, but is part of this very case, as Justice Souter points out. The voucher law at issue in *Zelman* forbade discrimination on the basis of religion, the language of the statute encompasses both student admissions and faculty hiring and this, at least for religious schools, is the real reason to be concerned about this decision.

Now that vouchers are going to be instituted, religious schools may well have to accept them to survive in a competitive educational market, but to accept the vouchers means that they will likely have to give up the main way in which they define and carry out their religious mission—the ability to choose students and staff that have a commitment to the school’s religious ideals. The cost of the voucher system to the state legislature and even the public school system, may be miniscule compared to the cost of the voucher system to the mission and identity of religious schools.

I may be wrong. I hope that I am wrong. But I fear that this will happen, and it will serve as another indicator of the practical, moral, and legal bankruptcy of the majoritarian view of the bill of rights now espoused by a majority of the court.