

2003

## Funding Religion in a Post-Zelman World

James G. Dwyer

*William & Mary Law School*, [jgdwye@wm.edu](mailto:jgdwye@wm.edu)

---

### Repository Citation

Dwyer, James G., "Funding Religion in a Post-Zelman World" (2003). *Faculty Publications*. 1517.  
<https://scholarship.law.wm.edu/facpubs/1517>

# Funding Religion in a Post-Zelman World

By James G. Dwyer

In *Zelman v. Simmons-Harris*,<sup>1</sup> the Supreme Court upheld against Establishment Clause challenge the Ohio Pilot Project Scholarship Program, also known as the Cleveland school voucher program. That program facilitates transfer of children from one of the worst public school systems in the nation to private schools in the Cleveland area. As such, the Cleveland program, like similar programs in Milwaukee and Florida, undoubtedly benefits some children. From a child welfare perspective, then, there is reason to be pleased with the Court's decision.



However, the Court in *Zelman* also established—not explicitly, but in effect—a legal principle with far-ranging and troubling implications. This principle becomes apparent when one reads the Court's explicit analysis in light of the fact that the Cleveland program, like the other voucher programs currently in place, contains no restrictions on how private schools use voucher money and no meaningful educational requirements for recipient schools.<sup>2</sup> The Court's only reference to the nature of the schools to which children are transferred under the program is to say that a private school "may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards."<sup>3</sup> The Court manifested no awareness that statewide educational standards for private schools in Ohio, as in other states, are quite superficial and by no means ensure that private schools provide significant secular education, let alone secular education of any particular quality.<sup>4</sup> Absent meaningful regulation, in the voucher program or in general state laws governing private schools, the state can, under the voucher program, fund almost the entire operating budget of a school that provides little or no secular education, a school that might instead have children spending the entire day reading the Bible and saying prayers or, as was true in at least one school participating in the program, watching religious videos.<sup>5</sup> The Cleveland program therefore can, and the evidence suggests actually does, pay for purely religious activity. More disturbingly, it is also facilitating transfer of some children from public schools, which at least aim to provide a secular education, to private schools that do not aim to provide a secular education.

In the Court's analysis, two perceived aspects of the voucher program were sufficient to immunize it from Establishment Clause challenge—first, that state payments to religious schools are indirect,<sup>6</sup> and second, that the program does not coerce parents into sending their children to religious schools.<sup>7</sup> The payments to schools are indirect, in the Court's view, even though the state in fact sends a check directly to participating schools, because schools receive a check from the state only after parents who have received state-issued vouchers choose the school for their children and bring the voucher to the school. The program does not coerce parents, because parents have a variety of school alternatives available to them, including non-sectarian private schools that participate in the voucher program, as well as several public school options, such as community schools and magnet schools.

---

---

*“. . . the state can, under the voucher program, fund almost the entire operating budget of a school that provides little or no secular education, a school that might instead have children spending the entire day reading the Bible and saying prayers or . . . watching religious videos.”*

---

---

In light of the fact that nothing in the voucher program ensures that recipient schools provide any secular education, the Court's analysis thus implicitly rests on the remarkable principle that states may pay for purely religious activities, so long as (1) states do so only when asked to do so by private parties, and (2) the private parties could instead have directed the state to pay for non-religious activities that take place in a setting resembling, at least superficially, the setting in which the religious activities take place.<sup>8</sup> If the Court were to apply this principle consistently in the future, states might be permitted to pay for every aspect of religious practice in America. As illustrated below, it would not be difficult for a state to find some loosely analogous secular activity to include in a program of funding and to issue vouchers to individuals to use either at the religious or the secular activity.

This principle is clearly at odds with one the Court had affirmed in numerous prior cases involving state aid to private entities—namely, that any program of

state aid for private service providers must contain safeguards (i.e., regulations) to ensure that the public money is used by private recipients, even those affiliated with religious organizations, only for secular functions. In *Roemer v. Maryland Public Works Board*,<sup>9</sup> for example, every member of the Court took the view that state aid may not be used for the religious functions of any private entity. The plurality opinion in that case stated, with respect to educational institutions specifically, that

a secular purpose and facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.<sup>10</sup>

Remarkably, the *Zelman* majority did not even mention *Roemer*, yet implicitly overturned this aspect of the *Roemer* decision. *Zelman* implicitly holds that states may pay not only for religious instruction, but also for religious worship.

---

*“. . . states wishing to pay for Sunday school and church construction could lend an air of religious neutrality to their spending by structuring the programs to subsidize ‘any Sunday morning educational programs for children’ or ‘any construction of buildings in which non-profit organizations hold regular gatherings open to the public.’”*

---

Along the way to establishing this new and remarkable principle, the Court (a) further trivialized the secular-purpose prong of the post-*Agostini Lemon* test, (b) effectively gave private individuals the power to waive constitutional restrictions on state action, and (c) further entrenched an approach to deciding constitutional disputes relating to children’s education that treats as relevant only the effects of state action on adults.

Although the secular-purpose requirement was not contested, the Court indicated that it perceived a valid secular purpose, and in doing so signaled a willingness to allow the most general characterization of the state’s motivation to serve as a basis for finding a valid purpose.<sup>11</sup> As such, it would appear virtually impossible

for a state with a minimally competent legal staff to fail to satisfy the requirement. The Court articulated the purpose of the Cleveland voucher program in two ways.

First, in its summary of the facts, the Court repeatedly described the purpose of the Pilot Project Scholarship Program as one of providing choice for parents,<sup>12</sup> rather than one of improving secular education for children. The Court thereby masked the reality that the Cleveland program, by design, facilitates the choice of schooling that provides little or no secular education, but instead provides primarily or solely religious instruction and worship. If a purpose so general as “providing choice” suffices for Establishment Clause purposes, it is difficult to imagine a program of public subsidies that could not satisfy the purpose prong. Payments for Sunday school could be said to have the very same purpose as that identified for Cleveland’s voucher program—namely, providing educational choices for parents. A state could justify paying for construction of churches and synagogues by asserting a purpose of providing citizens choices with respect to social activities or forms of self-expression, or a purpose of providing more buildings for people to use. While the Court’s discussion of the secular-purpose requirement in *Zelman* does not suggest the need to do so, states wishing to pay for Sunday school and church construction could lend an air of religious neutrality to their spending by structuring the programs to subsidize “any Sunday morning educational programs for children” or “any construction of buildings in which non-profit organizations hold regular gatherings open to the public.”

Second, in its constitutional analysis, the Court cursorily dispensed with the secular-purpose requirement by stating that there was “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.”<sup>13</sup> “Educational assistance” is less amorphous than “choice,” but it is also a very broad concept, sufficiently so as to accommodate assistance for Sunday school or mid-week after-school catechism classes, given that the ordinary meaning of “educational” includes religious instruction, no matter how indoctrinatory in nature. Similarly broad purposes could be ascribed to state subsidies for any other kind of religious activity; subsidies for worship by religious congregations would provide “assistance for social activities” or “self-expression support,” subsidies for purchase of Bibles for distribution on the streets would provide “assistance for purchase and public distribution of ancient texts,” and subsidies for Catholic priests to perform sacraments, such as baptisms and last rites, would provide “assistance for stage-of-life ceremonies performed by recognized lead-

ers of cultural groups." Such purposes might seem more disingenuous than "educational assistance" seems in the circumstances of the Cleveland program, but presumably a vague reference to "providing educational assistance" will also satisfy the secular-purpose requirement in the potentially far different circumstances in which other voucher programs will likely be created following *Zelman*, where the actual motivation is more clearly to advance religion.

If the Court had wished to characterize the state's purpose in a more specific, and thereby meaningful way, it would have had a couple of choices. The Court could have said the purpose of the program is to improve the secular education that children in Cleveland receive. Justice Rehnquist, who authored the majority opinion, might have avoided characterizing the purpose of the program in this way because nothing in the design of the program supports a conclusion that this was actually the state's purpose. As noted above, the program does not contain academic requirements and standards that would ensure schools receiving state money actually provide a minimally adequate secular education. The Court might also have avoided characterizing the purpose in this way because doing so would have made it more difficult to ignore, in its effects analysis, whether that purpose is actually being served by the program as a whole, or by payments to each participating private school. By characterizing the purpose as "choice," the Court could instead focus exclusively on whether parents in fact have a choice.

Alternatively, the Court might have characterized the state's purpose as one of paying for children to attend whatever sort of non-public school their parents wish them to attend, within the range of schools that satisfy the state's superficial curricular requirements for operating a non-public school. The Court might have avoided characterizing the purpose of the program in this way because it would make it more apparent that the state must have known some parents would use the state money to place their children in schools that provide little or no secular education, a use of state money for which it would be difficult to discern a secular purpose.

Because the plaintiffs actually did not contest the existence of a secular purpose, the bulk of the Court's analysis in *Zelman* is devoted to the question of whether the voucher program has the effect of advancing or inhibiting religion. In answering that question, the Court appeared simply to assume that the program does nothing other than provide "educational assistance,"<sup>14</sup> which the Court must have understood to mean money to purchase what *the state* regards as "education" for children and what the state can permissibly aim to assist—that is, instruction in secular subjects.

The Court never grappled with the problem that the voucher program does not actually require parents to use the vouchers to purchase that kind of schooling, and does not preclude them from using state money to pay for purely religious activities. For the Court, where the state money went and what it was used for were rendered irrelevant by the fact that parents decided those things.

But this position is equivalent to holding that private parties are empowered to waive constitutional restrictions on state spending, or that the state is free to do indirectly what it may not constitutionally do directly, another principle that the Court had rejected in prior cases, albeit in other contexts.<sup>15</sup> The Court acknowledged that if the state simply started sending money to private schools, including religious schools, without also creating slips of paper called "vouchers" that the state mails to parents, parents give to schools, and schools send back to the state, it could not constitutionally do so. Presumably this would be true even if the state made the payments on a per-pupil basis. By reaching the opposite outcome based solely on the fact that Ohio does first issue a slip of paper called a "voucher" to parents and sends money to a religious school only after the parents give the paper to the school and the school returns the paper to the state, the Court in effect held that states may do something otherwise unconstitutional so long as they create a mechanism for making apparent to the world that some private parties want them to do it.

There is nothing in the Court's decision to prevent this holding from being extended to state payment for private schools that admit only white people and/or only males (as long as vouchers are also available for non-exclusionary schools), or to state subsidies for racially exclusive parks, clubs, and residential developments (e.g., by issuing user fee, dues, or housing vouchers). At a further reach, the principle might extend to non-spending state activity. May police now assist private business owners in keeping all African-Americans out of their establishments, because this state assistance is provided only at the request of a private party? The Court might some day develop a way of distinguishing Establishment Clause constraints from other constitutional constraints, but it might find it difficult rationally to do so, and it would still have to grapple with the possibility of state vouchers for every other kind of religious activity.

The reason why the Court focused on parental choice and the range of school options available to parents—in terms of the superficial characteristic of being affiliated with a religious denomination or not, rather than on what was actually going on in the schools receiving state aid—is that its perspective is entirely

adult-centered. All of the Justices were preoccupied with whether parents were being coerced to patronize religious schools, and for the majority that was all that mattered. The dissenters were also concerned about taxpayers having to pay for religious indoctrination. None of the Justices manifested concern that some children might be denied a secular education as a result of the voucher program, if their parents shifted them from a public school to a religious school that provided little or no secular education, or that the state might be paying for some parents to place their children in an environment hostile to the children's interests in autonomy, in freedom of thought and expression, and in gender equality. Insofar as these things are happening, the state is clearly advancing religion, and potentially violating the rights of some children.

---

*"[T]he public controversy over school vouchers has not really been very much about helping children."*

---

More generally, the public controversy over school vouchers has not really been very much about helping children. For most voucher supporters, it has been about increasing the power of parents over their children's lives, advancing the cause of religious groups that run schools, and reducing the redistribution of wealth that state spending on education entails. For their part, most opponents of vouchers have not argued that voucher programs should be designed so as to advance the educational interests of all children (e.g., by requiring that spending on public schools remain constant or increase and by requiring voucher schools to satisfy academic standards), but rather have taken a stance of absolute opposition to any and all subsidies for private schools. This suggests that their concerns, too, are other than for the well-being of children. They have manifested no concern, for example, about the fact that many children are currently in private schools that, like many public schools, lack adequate resources.

As noted at the outset, the Cleveland voucher program is probably doing good for some students, so it is not tragic that the Court has allowed the program to continue. What is regrettable is that the Court did not command Ohio and other states that are operating voucher programs, or that might do so in the future, to do it right—that is, to incorporate into their voucher programs adequate regulations to ensure that state money is actually spent for the valid public purpose of enhancing the secular education children receive. The Court has instead let states loose to fund any and all kinds of schools, regardless of whether the schools are providing for children what the state regards as an education. Indeed, the Court has implicitly let states loose

to fund every kind of religious practice in every kind of setting, so long as the states are able to include superficially analogous secular activities in the same funding program, and so long as they allow private parties to decide how much they spend on religious practices and how much on the secular analogues. If states run with this new license, the Court might find itself in the future scrambling to scale it back by creating new limiting principles, and if so we can look forward to many more years of incoherent Establishment Clause doctrine.

## Endnotes

1. *Zelman v. Simmons-Harris*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 2460 (2002).
2. *See id.* at 2473 (O'Connor, J., concurring) ("These cases are different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds.")
3. 122 S. Ct. at 2463.
4. For a description of the superficial requirements imposed on recipient schools by the voucher legislation and by the general laws governing private schools in Ohio, see James G. Dwyer, *Vouchers Within Reason: A Child-Centered Approach to Education Reform*, 178-80 (2002). The other two existing voucher programs that allow religious schools to participate, in Milwaukee and Florida, likewise contain no restrictions on how religious schools use state money and likewise impose no meaningful academic requirements on recipient schools. *See id.* at 175-78, 180-82. For a description of typical general state requirements for operating a private school, see James G. Dwyer, *Religious Schools v. Children's Rights* (1998): 8-13 and James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Law As Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. Rev. 1321, 1338-46 (1996).
5. There is great variety among the religious schools operating in the United States, ranging from those almost exclusively focused on secular education to those opposed in principle to most aspects of secular education. *See* Dwyer, *Religious Schools*, *supra*, at ch. 1 (1998). The Christian video school was discovered by a newspaper reporter. *See* Scott Stephens and Mark Vosburgh, *Voucher School Relies on Videos as Teachers*, *Plain Dealer* (Clev.), Jul. 10, 1999, at 1A.
6. 122 S. Ct. at 2465 ("our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.") (citations omitted).
7. *Id.* at 2468-71.
8. Some commentators view the Court's decision in *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986), as having established this principle, because in that case the state was paying part of the cost for a blind man to attend a seminary. However, the activity funded in *Witters* was not a purely religious one. The funding in *Witters* was for advanced training in a career chosen by adult aid recipients, designed to create equal opportunity for disabled persons. The primary, if not sole, function of religious instruction and worship in religious elementary and secondary schools, on the other hand, is religious indoctrination of children. While it is surely a legitimate aim of the state to create equal opportunity for disabled persons, it is as surely not a legitimate aim of the state to have children religiously indoctrinated.

9. 426 U.S. 736, 747 (1976) (upholding noncategorical grants to sectarian and non-sectarian colleges and universities, where recipients were permitted to use the grants only for the secular aspects of their operations).
10. *Id.* at 747 (plurality opinion). *See also id.* at 768 (White, J., concurring) (“It is enough for me that the [State is] financing a separable secular function of overriding importance in order to sustain the legislation here challenged”) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 664 (1971) (White, J., concurring)); *id.* at 770 (Brennan, J., dissenting) (opposing the grants because they might benefit the religious functions of the recipients); *id.* at 773 (Stewart, J., dissenting) (opposing the grants because they might be used to support compulsory theology classes). *See also Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding federal grants to programs for sex counseling of teens, while emphasizing the necessity of ensuring grant money is used only for secular counseling services).
11. One could say, alternatively, that the Court has made the secular purpose requirement too easily manipulable by judges to reach an outcome they desire, in precisely the same way the Court has made the “fundamental liberty” inquiry of substantive due process too easily manipulable—namely, by making it possible to articulate the fact in question (the state’s purpose in an Establishment Clause analysis, the liberty at stake in a due process analysis) at any level of generality.
12. *See, e.g., Zelman*, 122 S. Ct. at 2462 (“The State of Ohio has established a pilot program designed to provide education choices to families with children who reside in the Cleveland City School District”); *id.* at 2463 (“The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district”); *id.* at 2464 (“The program is part of a broader undertaking by the State to enhance the educational options of Cleveland’s schoolchildren”). As is evident from these quotations, the majority had some difficulty figuring out who exactly does the choosing with respect to where children attend schools. The reality, of course, is that children generally do not make the decision; rather, parents do the choosing, and typically do so without giving children a vote in a “family decision.”
13. *Id.* at 2465.
14. *Zelman*, 122 S. Ct. at 2468.
15. *See, e.g., Norwood v. Harrison*, 413 U.S. 465, 465 (1973) (holding that providing textbooks to children attending schools with racially exclusive admissions policies amounts to state encouragement of such discrimination, and stating that it is “axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.”) (citation omitted). Voucher supporters sometimes liken voucher payments to a tax refund, and point out that surely it is all right for private citizens to spend a tax refund on religious activity. But the two things are actually quite different. When the state refunds taxes to all taxpayers across the board in proportion to their relative tax liability, the state is acknowledging that it has taken private money that it should never have taken. If a taxpayer uses the refund to support a church, the taxpayer is spending private money. Far different is a government program under which money properly collected by the state is directed by the state to a particular type of activity engaged in by only a subset of citizens (some of whom might not be taxpayers). That is state spending and subject to constitutional constraints.

**James G. Dwyer is Associate Professor of Law at the College of William & Mary, Marshall-Wythe School of Law.**