

# ZELMAN, DAVEY, AND THE CASE FOR MANDATORY GOVERNMENT FUNDING FOR RELIGIOUS EDUCATION

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## I. INTRODUCTION

*Zelman v. Simmons-Harris*<sup>1</sup> was not the wrecking ball to Thomas Jefferson's famous "wall of separation" between church and state.<sup>2</sup> That ball swung a long time ago. Those who understand the First Amendment as requiring an impregnable wall between church and state would have difficulty believing that the Supreme Court has declared constitutional a government program that pays for students' private religious education.<sup>3</sup> Yet that is exactly what the Supreme Court

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1. 536 U.S. 639 (2002).

2. Letter from President Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), in 15 THE WRITINGS OF THOMAS JEFFERSON 281-82 (Albert E. Bergh ed., 1904). Thomas Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature would "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.

*Id.*

3. *Zelman v. Simmons-Harris*, 536 U.S. 639, 687 (2002). Justice Souter, quoting *Everson*, explains:

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." The Court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson*.

did in *Zelman*.<sup>4</sup> By denying a constitutional challenge to an Ohio school voucher program, the Court has reduced to rubble the already crumbling wall of separation between church and state.<sup>5</sup>

In *Zelman*, the Court addressed the constitutionality of an Ohio pilot program designed to provide educational alternatives to students in low-income families in the Cleveland City School District.<sup>6</sup> The pilot program provided parents of students within the Cleveland City School District the option of obtaining a voucher, for up to \$2,250, to use for tuition at a participating public or private school.<sup>7</sup> Any private schools within the Cleveland City School District, religious and nonreligious, could accept voucher students as long as the schools met minimum state educational standards.<sup>8</sup> Public schools in school districts adjacent to the Cleveland City School District could also accept voucher students,<sup>9</sup> although none have chosen to participate in the voucher program.<sup>10</sup> In the 1999–2000 school year, 96.6% of participating students used vouchers to enroll in private religious schools.<sup>11</sup>

The Establishment Clause states, “Congress shall make no law respecting an establishment of religion.”<sup>12</sup> Before *Zelman*, *Everson v. Board of Education of Ewing Tp.*<sup>13</sup> defined how the Establishment Clause applies to government aid programs benefiting religious schools.<sup>14</sup> The Supreme Court, in *Everson*, announced unanimously, “No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”<sup>15</sup> However, in the five and a half decades since *Everson*, the Supreme Court’s interpretation of the Establishment Clause has evolved considerably.<sup>16</sup> Consequently, *Zelman* should not be viewed as a radical constitutional change. Rather, *Zelman* is an affirmation of the Court’s current view of the Establishment Clause.<sup>17</sup> In finding the Ohio

*Id.* (quoting *Everson v. Board of Educ. of Ewing Tp.*, 330 U.S. 1, 16 (1947)).

4. *Id.*

5. *Id.* Justice Souter, arguing that the decision in *Zelman* overrules the proclamation in *Everson* that government money may not be used to aid religion, remarked, “How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot.” *Id.* at 688.

6. *Id.* at 643–44.

7. *Id.* at 645.

8. *Id.* at 646.

9. *Id.*

10. *Id.* at 707.

11. *Id.* at 703.

12. U.S. CONST. amend. I.

13. 330 U.S. 1 (1947).

14. *Zelman*, 536 U.S. at 686–87 (“The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson v. Board of Education of Ewing Tp.* . . . which inaugurated the modern era of establishment doctrine.”).

15. *Everson*, 330 U.S. at 16.

16. *Zelman*, 536 U.S. at 695–96 (“[I]t has taken half a century since *Everson* to reach the majority’s twin standards of neutrality and free choice. . . .”).

17. *Id.* at 668; see also Justice O’Connor’s concurrence in *Zelman*.

school voucher program constitutionally sound, the Supreme Court has taken perhaps its biggest step toward government inclusion of religion.

In the wake of *Zelman*, the door is open for the proliferation of school voucher programs.<sup>18</sup> Many voucher programs, varying in amount and character, will likely survive constitutional challenge.<sup>19</sup> *Zelman* accepts and builds on the Court's recent shift in interpretation of the Establishment Clause.<sup>20</sup> That interpretation essentially permits government aid of religion if the aid is "neutral" and there is "genuine and independent private choice." This Note argues that neutrality and private choice, as described in *Zelman*, are easy to find in a voucher program. Therefore, *Zelman's* twin requirements of neutrality and private choice will not prove to be a high hurdle for future voucher programs to pass.<sup>21</sup>

*Zelman* expands on a line of Supreme Court cases that declared exclusion of religion from government aid unconstitutional.<sup>22</sup> One possible implication of such expansion is that religious schools are actually entitled to government aid. If, after *Zelman*, it is now permissible for the government to fund religious education, may it be "impermissible viewpoint discrimination" for the government not to fund religious education?

The Court in *Zelman* held that the Ohio voucher program did not favor religion because the vast bulk of state educational spending was on public, nonreligious schools.<sup>23</sup> However, this raises a new question. Do general state educational expenditures disfavor religion because funding for religious schools is so inferior to nonreligious schools? If government aid disfavors religion there could be impermissible viewpoint discrimination against religion. Although difficult to imagine, one consequence of *Zelman* not intended by the Court could be an eventual mandate to fund religious schools equally with public schools.

This Note predicts the proliferation of school voucher programs and addresses whether the Court's decisions in *Zelman* and similar cases are likely to lead to a mandate for equal funding between religious and secular schools. In Section II, this Note examines the role of *stare decisis* in the Court's interpretation of the Establishment Clause. The *Zelman* decision follows recent case law, giving school vouchers strong constitutional footing, as long as such a program is neutral and one of genuine independent private choice. Section III analyzes the Court's

18. *Id.* at 700–02.

19. *See infra* Section III.

20. *See infra* Section II.

21. *See infra* Section III; *see also* Allen M. Brabender, *The Crumbling Wall and Free Competition: Formula for Success in America's Schools*, 79 N.D. L. REV. 11, 33–38 (2003). *But see* Sara J. Crisafulli, *Zelman v. Simmons-Harris: Is the Supreme Court's Latest Word on School Voucher Programs Really the Last Word?* 71 FORDHAM L. REV. 2227, 2276–77 (2003) (arguing that only school voucher programs closely modeled after the Cleveland program will be constitutional, with the key being a wide range of educational alternatives).

22. *See* *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

23. *Zelman*, 536 U.S. at 697.

dual requirements of neutrality and private choice and concludes that because these elements are low constitutional barriers, voucher programs will likely thrive. Section IV examines a line of cases declaring that exclusion of religion from some forms of government aid is impermissible viewpoint discrimination and explores the intersection of this line of cases with the *Zelman* decision. In Section V, this Note concludes that because of *Zelman*, *Davey v. Locke*,<sup>24</sup> and other recent cases, exclusion of religion from government aid may now be impermissible viewpoint discrimination. Religious schools may be entitled to the same state funding nonreligious schools receive.

## II. NOW THAT ONE SCHOOL VOUCHER PROGRAM HAS BEEN HELD CONSTITUTIONAL, WILL ALL VOUCHER PROGRAMS BE HELD CONSTITUTIONAL?

The Cleveland program was intended to provide financial assistance to low-income families in a failing school district.<sup>25</sup> But can a voucher program that is designed to help all children—rich or poor—attend private schools, the bulk of which are religious, pass constitutional muster? The *Zelman* precedent suggests that the answer is “yes.” Most voucher programs will probably not offend the Constitution.

The Court recognized that voucher programs bring into question the Establishment Clause of the First Amendment to the Constitution. However, the Establishment Clause has evolved considerably in recent years.<sup>26</sup> In *Everson v. Board of Education of Ewing Tp.*,<sup>27</sup> the Supreme Court announced, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”<sup>28</sup> Despite this statement, the Court in *Everson* allowed public bussing of children to private religious schools.<sup>29</sup> As such, the wall erected between church and state did not prevent all state aid to religious institutions.<sup>30</sup> How did the Court determine when some aid to religion was too much aid? The Court began with the test asserted in *Lemon v. Kurtzman*,<sup>31</sup> rearticulated the test in

24. 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 123 S.Ct. 2075 (U.S. May 19, 2003) (No. 02-1315).

25. *Zelman*, 536 U.S. at 649 (“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.”).

26. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See generally* John C. Eastman, *The Magic of Vouchers Is No Sleight of Hand: A Reply to Steven K. Green*, 39 WILLAMETTE L. REV. 195 (2003).

27. 330 U.S. 1 (1947).

28. *Id.* at 18.

29. *Id.*

30. *Id.*

31. *Lemon*, 403 U.S. at 612–13.

*Agostini v. Felton*<sup>32</sup> and *Mitchell v. Helms*,<sup>33</sup> and announced the current test in *Zelman*.<sup>34</sup>

#### A. The Lemon Test<sup>35</sup>

If public bussing did not breach the First Amendment separation of church and state, as discussed in *Everson*,<sup>36</sup> what does? For the last thirty years the Court has often relied on the three-part test articulated in *Lemon v. Kurtzman* in answering this question.<sup>37</sup> First, government aid to religious institutions must have a secular purpose.<sup>38</sup> Second, the primary effect of government aid must neither advance nor inhibit religion.<sup>39</sup> Finally, the legislation must not foster "an excessive government entanglement with religion."<sup>40</sup> In *Lemon*, the Court used this test to invalidate two statutes that provided state funds to religious schools.<sup>41</sup> The state funds subsidized teacher's salaries, textbooks, and instructional materials for secular subjects.<sup>42</sup>

#### B. The Agostini Test<sup>43</sup>

In 1997, the Court signaled a shift in Establishment Clause interpretation in *Agostini v. Felton*.<sup>44</sup> Justice O'Connor, writing for the majority, revised the *Lemon* test and set forth three new requirements to decide when government aid advances religion.<sup>45</sup> First, aid cannot result in government indoctrination of a religion.<sup>46</sup> Second, there can be no discrimination among religions.<sup>47</sup> Third, there can be no "excessive entanglement" with religion.<sup>48</sup>

32. *Agostini*, 521 U.S. at 234.

33. *Mitchell*, 530 U.S. at 807-08.

34. *Zelman*, 536 U.S. at 662-63.

35. *Lemon*, 403 U.S. 602.

36. *Everson*, 330 U.S. at 18.

37. *Lemon*, 403 U.S. at 612-13.

38. *Id.*

39. *Id.*

40. *Id.* at 613.

41. *Id.* at 606-07.

42. *Id.*

43. *Agostini v. Felton*, 521 U.S. 203 (1997).

44. *Id.*

45. *Id.* at 234.

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.

*Id.*

46. *Id.*

47. *Id.*

48. *Id.*

The Court used the new test to validate a New York program that sent public school teachers to private religious schools.<sup>49</sup> Under this program, the teachers provided remedial education to students in need.<sup>50</sup> In upholding the constitutionality of the program, the Court stated that when the aid is "neutral," that is when the aid is available to a broad spectrum of religious and non-religious schools alike, the aid will not have the impermissible effect of advancing religion.<sup>51</sup> The New York program provided aid to all children who qualified, regardless of where they went to school.<sup>52</sup> Therefore, the program was neutral and did not advance religion.<sup>53</sup>

In *Mitchell v. Helms*,<sup>54</sup> the Court endorsed and defined the new *Agostini* test.<sup>55</sup> The Court held that a government school-aid program providing educational materials and equipment to both public and private religious schools does not violate the Establishment Clause.<sup>56</sup> In reaching its decision, the Court considered the first two prongs of the *Lemon* test.<sup>57</sup> First, the Court determined that the government aid to religious schools in *Mitchell* had a secular purpose in educating children.<sup>58</sup> Second, the primary effect of the government aid neither advanced nor hindered religion.<sup>59</sup>

The Court used the *Agostini* test to determine if the primary effect of the program advanced religion.<sup>60</sup> Under this test, the Court examined if the aid resulted in religious indoctrination, differentiated between religions, or caused an excessive entanglement with government and religion.<sup>61</sup>

In determining whether government aid results in religious indoctrination, the Court considered if any indoctrination could "reasonably be attributed" to the government.<sup>62</sup> The indoctrination is not attributed to the government if the

49. *Id.* at 209.

50. *Id.*

51. *Id.* at 231.

52. *Id.* at 232.

53. *Id.*

54. 530 U.S. 793 (2000).

55. *Id.* at 807.

In *Agostini*, however, we brought some clarity to our case law, . . . by consolidating some of our previously disparate considerations under a revised test. Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion . . . in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors.

*Id.*

56. *Id.* at 801.

57. *Id.* at 807-08.

58. *Id.* at 808.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 809.

As we indicated in *Agostini*, and have indicated elsewhere, the question whether governmental aid to religious schools results in governmental

program is “neutral.”<sup>63</sup> A program is neutral if aid is offered to a broad range of groups or people, regardless of their religion.<sup>64</sup> “If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”<sup>65</sup> In defining neutrality, the Court in *Mitchell* again drew heavily on *Agostini* to find that a program was neutral only if the government aid was directed to religious institutions as a result of “genuinely independent and private choices of individuals.”<sup>66</sup> Neutrality and private individual choice would prove to be the cornerstones of the *Zelman* decision.<sup>67</sup>

### C. The *Zelman* Test<sup>68</sup>

In *Zelman*, the Supreme Court followed the reasoning in *Agostini* and *Mitchell* to validate a Cleveland program that allowed parents to use vouchers to send their children to private religious schools.<sup>69</sup> *Zelman* addressed an Ohio pilot program designed to provide educational choices to families with students in the Cleveland City School District.<sup>70</sup> The Cleveland City School District provided students little hope for a competitive education, and was one of the worst school districts in the nation.<sup>71</sup> In 1995, a Federal District Court ordered the School District be placed under state control.<sup>72</sup> The Cleveland City School District did not meet any of Ohio’s 18 standards for minimal acceptable performance.<sup>73</sup> Two-thirds of the students within the School District did not graduate high school, and students at all levels performed much lower in proficiency examinations than other Ohio public school students.<sup>74</sup> The pilot program provided students within the Cleveland City School District tuition aid to attend a participating public or private

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indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonable be attributed to governmental action.

*Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 810.

67. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

[W]here 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.

*Id.*

68. *Id.*

69. *Id.* at 652, 662–63.

70. *Id.* at 643–44.

71. *Id.* at 644.

72. *Id.*

73. *Id.*

74. *Id.*

school.<sup>75</sup> In the 1999–2000 school-year, 96.6% of participating students used the vouchers to enroll in private religious schools.<sup>76</sup>

As in *Mitchell*, the Court in *Zelman* looked only at the first two prongs of the *Lemon* Test.<sup>77</sup> Because there was no dispute that addressing the needs of students in a failing school district maintained a valid secular purpose,<sup>78</sup> in *Zelman* the Court examined only if the primary effect of the program was the advancement of religion.<sup>79</sup> The Court reiterated that a program does not have the effect of advancing or inhibiting religion if the program is neutral with respect to religion.<sup>80</sup> Again, as determined in *Mitchell*, a program is neutral if it does not discriminate among religions or against the non-religious,<sup>81</sup> and religious institutions obtain aid only as a result of genuine and independent choices made by private individuals.<sup>82</sup>

Chief Justice Rehnquist, writing for the majority in *Zelman*, relied on precedent<sup>83</sup> to demonstrate that programs of true private choice do not offend the Establishment Clause.<sup>84</sup> In *Mueller v. Allen*,<sup>85</sup> the Court upheld a Minnesota scheme that provided tax deductions for public and private school student expenses.<sup>86</sup> Although 96% of the deductions were used to send children to private religious schools,<sup>87</sup> because all parents were eligible to participate in the program,<sup>88</sup> and religious schools were aided only because of choices made by the parents,<sup>89</sup> there was no Establishment Clause violation.<sup>90</sup>

The Court also relied on *Witters v. Washington Department of Services for Blind*,<sup>91</sup> in which the Court ruled it was constitutional for a blind person to use

75. *Id.*  
 76. *Id.* at 703.  
 77. *Id.* at 648–49.  
 78. *Id.*  
 79. *Id.*  
 80. *Id.* at 652–53.  
 81. *Id.* at 653.

[T]he Ohio program is neutral in all respects toward religion. . . . 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. . . . Program benefits are available to participating families on neutral terms, with no reference to religion.

*Id.* (emphasis in original).

82. *Id.* at 652.  
 83. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).  
 84. *Zelman*, 536 U.S. at 651–52.  
 85. 463 U.S. 388 (1983).  
 86. *Id.* at 391.  
 87. *Id.* at 401.  
 88. *Id.* at 397.  
 89. *Id.* at 399.  
 90. *Id.* at 404.  
 91. 474 U.S. 481 (1986).



state vocational rehabilitation assistance to study to become a pastor at a Christian college.<sup>92</sup> Again, aid was made available without regard to religion, and such aid flowed to religious schools only as a result of “genuinely independent and private choices of aid recipients.”<sup>93</sup> Because the program was neutral with regard to religion,<sup>94</sup> and because private choices determined where the money went,<sup>95</sup> the program survived an Establishment Clause challenge.<sup>96</sup>

Likewise, in *Zobrest v. Catalina Foothills School District*,<sup>97</sup> the Court allowed state funds to be used for sign-language interpreters in religious schools.<sup>98</sup> The two features required for government aid to survive a constitutional attack were present in *Zobrest*.<sup>99</sup> First, the program was open to all disabled children without regard to religion, therefore the program was neutral with regard to religion.<sup>100</sup> Second, the aid was used in a religious setting only because of independent individual choices.<sup>101</sup> In *Mueller, Witters, and Zobrest*, the programs were neutral with regard to religion, and the aid went to religious schools by the affirmative action of individuals who had a genuine and independent choice.<sup>102</sup> Accordingly, the Court found the programs constitutional.

Similarly, in *Zelman* the Court found that the Ohio program met the two main criteria necessary for government aid to be consistent with the Establishment Clause.<sup>103</sup> Ohio only dispersed tuition to private religious schools by the direction of individuals,<sup>104</sup> so it was a program of true private choice.<sup>105</sup> Because the Ohio

92. *Id.* at 482.

93. *Id.* at 488.

94. *Id.* The program was deemed neutral toward religion because it did not discriminate between religions or between the religious and the non-religious. Washington’s program is “made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,” and is in no way skewed towards religion. (quoting *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 782–83, n.38 (1973)).

95. *Id.* at 488. The private choices by individuals means there is no appearance of government indoctrination.

[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State. . . . [I]t does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a state action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion.

*Id.* at 488–89.

96. *Id.* at 489.

97. 509 U.S. 1 (1993).

98. *Id.* at 3.

99. *Id.* at 10.

100. *Id.*

101. *Id.*

102. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

103. *Id.* at 662–63.

104. *Id.*

105. *Id.*

program was open to students of all religions,<sup>106</sup> and schools with any religious affiliation—or no religious affiliation—were allowed to participate,<sup>107</sup> the Ohio program was neutral with regard to religion.<sup>108</sup>

Clearly, within the last fifty years, the Establishment Clause has moved from mandating a wall of separation between church and state, to something considerably less. As *Zelman* and preceding case law suggest, as long as there is neutrality and independent private choice, the government can aid religion.<sup>109</sup> The day has arrived in Establishment Clause thinking when government can pay for students to attend private religious schools without offending the First Amendment of the Constitution.

### III. NEUTRALITY AND GENUINE INDIVIDUAL PRIVATE CHOICE: IF YOU CAN FIND THEM HERE YOU CAN FIND THEM ANYWHERE

Precedent plays a crucial role in affirming the constitutionality of future school voucher programs. However, the Court's evolving definition of neutrality and genuine private choice will be the determining factor. In *Zelman*, the Court found neutrality by referring to the wording of the Ohio statute permitting participation in the voucher program of "all schools" in the district, whether religious or nonreligious.<sup>110</sup> The Court then found that the vast majority of state money spent on education goes to public schools.<sup>111</sup> Therefore, religious schools were not favored over nonreligious.<sup>112</sup> By this reasoning, a voucher program could be neutral even if there were no secular private schools in the district.<sup>113</sup> Therefore, until there are equal numbers of students at religious schools and public schools, so that both are funded equally, more public funds will flow to nonreligious schools than religious schools, and religious schools will not be favored.

#### A. The Amount of School Vouchers and Neutrality

School vouchers may likely be any amount without offending neutrality. The Ohio voucher program allows as much as \$2,250 in tuition per student at a

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 697.

111. *Id.*

112. *Id.* (Souter, J., dissenting). "The majority . . . finds confirmation that participation of *all schools*' satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools . . . thus showing there is no favor of religion." *Id.*

113. *Id.* (Souter, J., dissenting).

If regular, public schools (which can get no voucher payments) "participate" in a voucher scheme with schools that can, and public expenditure is still predominately on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all.

private school.<sup>114</sup> Justice Souter dissents in *Zelman*, that this amount could favor religious schools over secular schools.<sup>115</sup> This is so, Justice Souter posits, because the Ohio voucher program is aimed at helping low-income students.<sup>116</sup> However, the amount provided by the voucher is not nearly enough to pay for secular private school tuition.<sup>117</sup> This amount is only adequate to pay for the bulk of religious school tuition.<sup>118</sup>

In *Zelman*, Chief Justice Rehnquist responds to Souter's argument with some slightly circular logic. Rehnquist first relies on *Witters* and *Agostini*, in which the Supreme Court ruled that financial incentives do not tilt government aid in favor of religion as long as the aid program is neutral.<sup>119</sup> Rehnquist then states that because the Ohio program satisfies neutrality,<sup>120</sup> money flowing to religious schools cannot be viewed as a government incentive to send children to religious schools.<sup>121</sup>

Chief Justice Rehnquist argues that there is actually a financial disincentive for students to attend religious schools because a family must make a co-payment.<sup>122</sup> Students can attend charter schools, magnet schools, or traditional public schools for free.<sup>123</sup> While it is true students face a financial disincentive by attending a private religious school,<sup>124</sup> an even greater financial disincentive exists when such students attend a private secular school.<sup>125</sup>

Although the students in *Zelman* attended numerous school types, the *Zelman* majority found that the Ohio program did not financially favor religious schools.<sup>126</sup> Thus, it seems that the amount of the tuition voucher is not a factor affecting constitutionality. If the voucher amount is increased, private secular

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114. *Id.* at 697–98.

115. *Id.* at 705.

116. *Id.*

117. *Id.* On average this amount is around \$4,000. *Id.*

118. *Id.* This amount is \$1,592 on average for Catholic schools in Cleveland and \$2,213 for other religious schools. *Id.*

119. *Id.* at 653.

120. *Id.*

121. *Id.*

122. *Id.* at 646. The amount of the Ohio program's co-payment varies depending on the parent's financial need. *Id.* Families below 200% of the poverty line are eligible to receive 90% of private school tuition, up to \$2,250. *Id.* All other families may receive vouchers for 75% of private school tuition up to \$1,875. *Id.*

123. *Id.* at 653–54.

124. *Id.* at 646.

125. *Id.* Families that qualify to receive 75% of private school tuition costs up to \$1,875 must pay the remaining tuition. *Id.* Because secular private schools cost on average around twice as much as private religious schools, a higher co-payment is required to attend a private secular school rather than a religious school. *Id.* at 704–05.

126. *Id.* at 653. "There are no 'financial incentive[s]' that 'ske[w]' the program toward religious schools." *Id.*

schools would become more competitive, and neutrality would be less in question.<sup>127</sup> Thus, a voucher of any amount may be upheld as constitutional.

### B. The Character of the Aid and Neutrality

The character of the aid to religious schools is now an unimportant factor in assessing the neutrality and constitutionality of programs funneling money into religious institutions.<sup>128</sup> Beginning in 1947 with *Everson*,<sup>129</sup> in which public money was used to bus children to both public and private schools,<sup>130</sup> the Court interpreted the Establishment Clause to allow some aid to flow to religious schools as long as the aid was secular in nature and was only an incidental and insignificant benefit to religious institutions.<sup>131</sup> In *Zelman*, for the first time,<sup>132</sup> the majority lends no significance to the fact that government money will be used directly for religious instruction,<sup>133</sup> or whether the aid to religious schools is substantial.<sup>134</sup>

#### 1. Divertibility of Government Aid

After *Everson*, but before *Zelman*, *Mitchell* and *Agostini*, the Court struggled with the concept of "divertibility."<sup>135</sup> The easier it was to divert state aid to religious instruction, the more suspect the aid became.<sup>136</sup> For example, in *Committee for Public Education & Religious Liberty v. Nyquist*,<sup>137</sup> the Court invalidated tuition grants for low-income students to attend private schools

127. *Id.* at 650–51. If the amount of a voucher is greater, the amount of a family's co-payment is reduced, and the cost of attending a private secular school becomes closer to the cost of a religious school. *Id.*

128. *Id.* at 695.

129. 330 U.S. 1 (1947).

130. *Id.* at 24.

131. *Zelman*, 536 U.S. at 690–91.

132. *Id.* at 688–89.

133. *See generally id.* (Souter, J., dissenting) (regarding the assertion that money can be used directly for religious instruction).

In the city 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.

134. *Id.* at 695.

135. *Id.* at 692 (Souter, J., dissenting). "The Court's focus . . . was on the principle of divertibility, on discerning when ostensibly secular government aid to religious schools was susceptible to religious uses. The greater the risk of diversion to religion (and the monitoring necessary to avoid it), the less legitimate the aid scheme was. . . ." *Id.*

136. *Id.* Even when state aid seemed secular on its face, there was a presumption of divertibility that had to be overcome by the proponents of the government aid to religious institutions. *Id.*

137. 413 U.S. 756 (1973).

because there was no separation between the use of the money for secular and religious instruction.<sup>138</sup> In *Nyquist*, the Court also rejected state funding for maintenance and repair of private school buildings because there was no guarantee that the facilities being repaired would only be used for secular purposes.<sup>139</sup> Segregation of public money from religious use was completely bypassed in *Zelman*, which held that government aid could be used directly for religious instruction.

## 2. Substantiality of Government Aid

Although *Zelman* not only officially murdered the divertibility test, it danced on its grave, a line of cases starting with *Mueller* rejected *Nyquist* and its divertibility test as long as there were neutrality and private choice.<sup>140</sup> However, the Court had always ignored the divertibility test in circumstances where aid to religious schools was insubstantial.<sup>141</sup> For example, *Witters*<sup>142</sup> allowed one blind student to use a vocational training subsidy at a religious college.<sup>143</sup> *Zobrest*<sup>144</sup> allowed one student to use a sign-language interpreter paid for from a neutral state program at a religious school.<sup>145</sup> In *Rosenberger v. Rector and Visitors of University of Virginia*,<sup>146</sup> the Court upheld a student group's right to use neutrally available public funds to print a religious magazine.<sup>147</sup> In each case the aid to the religious institution was not substantial, and the religious school was not the primary beneficiary of the aid.<sup>148</sup> Instead, the individuals in each case were the primary beneficiaries of the government aid.<sup>149</sup> Thus, *Zelman* is a stark departure from earlier cases because the aid in *Zelman* is substantial and used directly for religious instruction.<sup>150</sup>

Even in *Agostini* and *Mitchell*, the Court demonstrated that aid should only supplement religious schools' budgets rather than fund them completely.<sup>151</sup> In *Zelman*, the majority found the substantiality of aid completely irrelevant.<sup>152</sup> By

138. *Id.* at 783.

139. *Id.* at 774.

140. *Zelman*, 536 U.S. at 694–95.

141. *Id.* at 695. "It was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court. . . ." *Id.* (Souter, J., dissenting).

142. 474 U.S. 481 (1986).

143. *Id.* at 482.

144. 509 U.S. 1 (1993).

145. *Id.* at 3.

146. 515 U.S. 819 (1995).

147. *Id.* at 845.

148. *Zelman v. Simmons-Harris*, 536 U.S. 639, 694–95 (2002).

149. *Id.*

150. *Id.* at 711 (Souter, J., dissenting). Justice Souter, speaking about the Ohio voucher program, states that "the majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination." *Id.*

151. *Id.* at 708–09. Among other reasons, the aid was constitutional in *Mitchell* because it only covered a "portion" of religious schools' budgets. *Id.* at 695.

152. *Id.* at 711.

paying for almost all of a student's tuition at a religious school, state aid subsidized religious instruction.<sup>153</sup> Justice Souter dissents in *Zelman*,

Public 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.<sup>154</sup>

Based on the Court's lack of concern for the substantiality of government funding in *Zelman*,<sup>155</sup> there is nothing preventing school vouchers from operating as a religious school's primary source of income, even if the religious institution could not exist without the aid.<sup>156</sup> The implications are clear. As long as a voucher statute does not facially discriminate between religions or against the non-religious,<sup>157</sup> the voucher should be found neutral since the amount of a voucher and the character of aid are no longer determinative factors in neutrality.<sup>158</sup>

### C. Independent and Genuine Private Choice

Based on the Court's prior decisions, the *Zelman* majority appeared to go out of its way to find independent and genuine private choice. This suggests that the Court will more easily find private choice in future cases. To paraphrase from Justice Souter's dissent in *Zelman*, if the Court can find genuine and independent choice here it can find it anywhere.<sup>159</sup> The problem with calling the Ohio voucher program a program of "true private choice" is that 96.6% of voucher recipients under the program attend religious schools.<sup>160</sup> Thus, one argument is that, if private religious and secular schools were equally affordable and available, a higher percentage of parents would prefer to send their children to private secular schools.<sup>161</sup>

153. *Id.* at 687 (Souter, J., dissenting).

154. *Id.*

155. *Id.* at 708–11 (Souter, J., dissenting). "The scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported." *Id.* at 708.

156. *Id.* at 708.

157. *Id.* at 662. An example of this would be a statute that only allowed money to religious schools. See *id.* (distinguishing the Ohio voucher program from the program in *Nyquist*, which gave benefits exclusively to parents of private school enrollees).

158. *Id.* at 662–63.

159. *Id.* at 700; see also Russell L. Weaver, *Like a Ghoul in a Late Night Horror Movie*, 41 BRANDEIS L.J. 587, 590–91 (2003). Weaver discusses the possibility that *Zelman*'s "neutrality / private choice" test may not produce a meaningful workable standard under the Establishment Clause and may be analogous to Justice Antonin Scalia's assessment of the Lemon Test as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . ." *Id.* (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring)).

160. *Zelman*, 536 U.S. at 703.

161. *Id.* at 707 (Souter, J., dissenting).

In 1999–2000, 46 of the 53 private schools accepting voucher students in the Cleveland School District were religious schools.<sup>162</sup> Almost two-thirds of parents used the vouchers to send their children to schools with different religious affiliations than their own.<sup>163</sup> When surveyed, 96.4% of parents said that they enrolled their children in the voucher program to ensure a better education than available in public schools.<sup>164</sup> Only 15% of parents considered the school's religion as a primary positive determining factor when deciding upon the proper educational institution for their children.<sup>165</sup> For this reason it appears that parents are choosing to “opt out” of a horrendous public school district. However, their choice to send their children to schools that preach a different religion than their own may not necessarily be free.<sup>166</sup>

The *Zelman* majority purportedly addressed this dilemma by expanding the category of secular alternatives to using the vouchers at private religious schools.<sup>167</sup> The majority considered all options Ohio provided to students in the Cleveland City School District.<sup>168</sup> In Ohio, students could enroll in a private religious school, a private secular school, a public community school, a public magnet school, or remain in a traditional public school with publicly funded tutorial aid.<sup>169</sup> By considering all scholastic options open to Cleveland students, the Court found “true private choice” even though school vouchers could not be used at community schools, magnet schools, or regular public schools.<sup>170</sup>

In *Zelman*, Justice Souter enunciated in dissent,

The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school.<sup>171</sup>

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There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students.

*Id.*; see also Steven K. Green, *The Illusionary Aspect of “Private Choice” for Constitutional Analysis*, 38 WILLAMETTE L. REV. 549, 571–74 (2002) (arguing in favor of narrowly defining the range of educational alternatives available to voucher students).

162. *Zelman*, 536 U.S. at 703.

163. *Id.* at 704.

164. *Id.*

165. *Id.* at 704.

166. *Id.* at 707 (Souter, J., dissenting). “For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious.” *Id.*

167. *Id.* at 655.

168. *Id.*

169. *Id.*

170. *Id.* at 653.

171. *Id.* at 699.

Public schools receive aid directly from the state while aid to religious schools must pass through individuals with genuine private choice.<sup>172</sup> Although individuals can choose to send their children to charter schools or magnet schools, they cannot choose to direct voucher money to those schools.<sup>173</sup>

The Ohio voucher program also authorizes tutorial assistance for students who remain in traditional public schools within the district.<sup>174</sup> Additionally, the Ohio voucher program allows public schools in districts adjacent to the Cleveland City School District to participate in the voucher program by accepting voucher students.<sup>175</sup> The majority relies on these options as evidence of “genuine and independent choice.”<sup>176</sup> The Court reaches this conclusion although tutorial aid is capped at \$360,<sup>177</sup> and no public schools in adjacent districts (which receive funds on a per student basis) have elected to participate in the program.<sup>178</sup>

Further, because public schools in adjacent districts are not participating, parents can only direct voucher money to one of three places.<sup>179</sup> Vouchers can be used at a private religious school, a private secular school, or for tutorial assistance at a public school.<sup>180</sup> However, the *Zelman* majority defined choice by including all schools where state money was spent as an option to parents, whether or not the money passed through individual hands.<sup>181</sup>

In response, Justice Souter again stated in dissent,

If the choice of relevant alternatives is an open one, proponents of voucher aid will always win, because they will always be able to find a “choice” somewhere that will show the bulk of public spending to be secular. The choice enquiry will be diluted to the point that it can screen out nothing . . . .<sup>182</sup>

Genuine and independent private choice is easy to find when all educational alternatives are considered, regardless of whether such alternatives are practically available under the voucher program in question.<sup>183</sup>

In the wake of *Zelman*, the door could be wide open for school voucher programs.<sup>184</sup> Neutrality and genuine independent private choice will be easy to

172. *See id.* at 662–63.

173. *See id.* at 697.

174. *Id.* at 655.

175. *Id.*

176. *Id.* at 653.

177. *Id.* at 646. This figure is much lower than the \$2,250 allowed for tuition at private schools. *Id.*

178. *Id.* at 707.

179. *Id.* at 655.

180. *Id.*

181. *Id.* at 698–99.

182. *Id.* at 701 (Souter, J., dissenting).

183. *Id.*

184. *See id.* at 701–02; *see also* George S. Swan, *The Law and Economics of the Blaine Amendments: Zelman v. Simmons-Harris and Romer v. Evans*, 80 U. DET. MERCY L. REV. 301, 314–15 (2003). Thirty-eight states considered voucher or charter school legislation in 2001. *Id.* Swan cites various national leaders and school voucher proponents



find.<sup>185</sup> School vouchers can be for any amount.<sup>186</sup> Voucher programs may be constitutional in school districts that do not have any private secular schools.<sup>187</sup> State money can be used directly for religious instruction and is not limited to secular uses,<sup>188</sup> and such aid can constitute a substantial portion of a religious school's budget.<sup>189</sup> In the future, school voucher programs of all shapes and sizes will probably withstand constitutional scrutiny.<sup>190</sup> As long as there is "neutrality" and "genuine individual private choice," voucher programs designed to pay private school tuition for wealthy suburban students and poor inner-city students alike should pass constitutional muster.

With an unprecedented proliferation of school voucher programs possible on the horizon, religious schools may be entitled to equal access to state educational funds. A line of cases finding that government exclusion of religion can be unconstitutional suggests that there may be unintended consequences of the *Zelman* decision.

#### IV. IS EXCLUSION OF RELIGIOUS SCHOOLS FROM STATE FUNDS IMPERMISSIBLE VIEWPOINT DISCRIMINATION?

In Justice Souter's *Zelman* dissent, he notes that the majority justifies neutrality in the Cleveland voucher program by stating that most state educational funds are directed toward public schools, so the vouchers do not favor religion.<sup>191</sup>

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in asserting that the *Zelman* decision is viewed as a green light for future voucher programs. *Id.* at 314–16.

Senior scholar at the Freedom Forum First Amendment Center (in Arlington, Virginia) Charles C. Haynes propounded: "Any kind of voucher arrangements for government grants to religious groups for social services are now certainly going to be seen as not only possible, but constitutional." Meanwhile, the Legal Director for the American Jewish Congress (which supported the *Zelman* plaintiffs), Marc Stern, said: "We are going to see a wave of legislation trying to funnel government money to religious schools and programs. All the caveats are going to be ignored because people don't read opinions. They're just going to see this as a green light."

*Id.* at 314.

185. *Zelman*, 536 U.S. at 701–02.

186. *See id.* at 706; *see also supra* text accompanying notes 151–57.

187. *Zelman*, 536 U.S. at 697.

188. *See id.* at 687.

189. *Id.* at 708.

190. *See generally* Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 919 (2003) ("By holding in no uncertain terms that the Cleveland school voucher program satisfies constitutional requirements, the Supreme Court has opened the door for a wide range of relationships, once thought impermissible, between government and religious institutions.").

191. *Zelman*, 536 U.S. at 697 (Souter, J., dissenting) ("The majority . . . finds confirmation that 'participation of *all* schools' satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools . . . thus showing there is no favor of religion.").

But does this mean that because such a relatively small amount of state money goes to religious schools, the program *disfavors* religion? And if so, is it possible that the exclusion of religious schools from the vast majority of state money spent on education is unconstitutional discrimination against religion? If the concepts of neutrality and independent private choice discussed in *Zelman* are combined with an emerging line of Supreme Court cases finding that government exclusion of religion may be impermissible viewpoint discrimination, an argument can be made that religious schools may be entitled to an equal share of state funds.

The concept of exclusion of religion as impermissible discrimination against religion first appeared in a line of cases addressing attempts by religious groups to use public school facilities.<sup>192</sup> The Court decided in *Widmar v. Vincent*,<sup>193</sup> that a state university must allow religious student groups to use university facilities if the facilities are generally made available to other registered student groups.<sup>194</sup>

The University of Missouri at Kansas City officially recognized over 100 student groups and provided university facilities for these groups to meet.<sup>195</sup> The university adopted a regulation in 1972 prohibiting using university facilities for religious worship or religious teaching.<sup>196</sup>

Cornerstone, an evangelical Christian student group that held meetings consisting of prayer, hymns, Bible commentary, and religious discussion, challenged the regulation as an unconstitutional violation of their rights to free exercise of religion, equal protection, and freedom of speech under the First Amendment.<sup>197</sup> The Court held that the University of Missouri had created an open forum for student groups to use.<sup>198</sup> To exclude religion from an open forum, the University must have a narrowly tailored, compelling interest.<sup>199</sup>

The University claimed that a compelling interest existed in maintaining strict separation of church and state to avoid an Establishment Clause violation.<sup>200</sup> While acknowledging that compliance with the Constitution was a compelling interest, the Court in *Widmar* held that religious groups could use public facilities without violating the Establishment Clause.<sup>201</sup> Justice Powell, writing for the

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192. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); see also Laura T. Rahe, *Zelman v. Simmons-Harris and the Private Choice Doctrine*, 50 CLEV. ST. L. REV. 221, 223 (2002-03) ("Zelman is only the latest in a series of cases that forbid state disfavor of religion.").

193. 454 U.S. 263 (1981).

194. *Id.* at 267.

195. *Id.* at 265.

196. *Id.*

197. *Id.* at 265-66.

198. *Id.* at 267.

199. *Id.* at 270.

200. *Id.* at 270.

201. *Id.* at 271.

majority, stated, "It does not follow . . . that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases."<sup>202</sup>

The Court applied the three-part *Lemon* test to show that an equal access policy in *Widmar* did not offend the Establishment Clause.<sup>203</sup> The Court found that the secular purpose prong and the excessive entanglement prong of the *Lemon* test were easily satisfied.<sup>204</sup> The secular purpose in the University establishing an open forum was to provide students with a free exchange of ideas.<sup>205</sup> The Court also found that there would be a greater risk of excessive entanglement in attempting to exclude religious groups than there would be under an equal access policy because there would be a constant need to determine what constitutes religious worship and teaching.<sup>206</sup>

In *Widmar*, the more difficult question under the *Lemon* test was whether an equal access policy, involving the nondiscrimination against religion, would have the primary effect of advancing religion.<sup>207</sup> The Court found that religious groups might benefit from access to university facilities.<sup>208</sup> However in the Court's view, the benefit was incidental, and the primary effect was not to advance religion.<sup>209</sup> The majority relied on two factors in finding that the benefit to religion was incidental.<sup>210</sup>

First, equal access of religion in an open forum, such as in a public university, did not present the appearance of state approval of religion.<sup>211</sup> By granting equal access, the University of Missouri was not advancing religious goals any more than it advanced the goals of the other student groups such as the Students for a Democratic Society or the Young Socialist Alliance.<sup>212</sup>

Second, the Court found that University facilities were open to a broad class of people, regardless of religion.<sup>213</sup> Thus, both religious and nonreligious groups could benefit from using facilities, reinforcing the secular nature of the open forum.<sup>214</sup> As long as religious groups did not dominate the University's open forum, the forum would not be primarily advancing religion.<sup>215</sup>

In analyzing whether a governmental action will have the primary effect of advancing religion, the factors the Court considered in *Widmar* are similar to the

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 272.

206. *Id.*

207. *Id.*

208. *Id.* at 273.

209. *Id.*

210. *Id.* at 274.

211. *Id.*

212. *Id.*

213. *Id.*

214. *See generally id.* at 266–74. The purpose of the open forum at the University was for a free exchange of ideas. By expanding the range of ideas rather than limiting them by excluding religion, the secular effect of the forum is advanced.

215. *Id.* at 275.

factors in *Zelman*. In *Widmar*, there must be no imprimatur of state approval of religion, and a benefit to a broad class of people, religious and nonreligious, for the government action not to have the primary effect of advancing religion.<sup>216</sup> Likewise, in *Zelman* there must be “independent private choice” and “neutrality” for government aid not to have the primary effect of advancing religion.<sup>217</sup> Independent private choice assured there was no appearance of government endorsement of religion,<sup>218</sup> just as *Widmar* required no imprimatur of state approval of religion so that government would not appear to endorse religion.<sup>219</sup> Neutrality in *Zelman* assured that the government would not discriminate between religions or the religious and the nonreligious.<sup>220</sup> This requirement was similar to *Widmar*’s broad class of benefited people requirement.<sup>221</sup> The Court in *Zelman* approved government funding for private religious schools.<sup>222</sup> Therefore, applying *Widmar*’s requirements to *Zelman*’s facts, excluding religious schools from government funds may be unconstitutional discrimination.

In *Lamb’s Chapel v. Center Moriches Union Free School District*,<sup>223</sup> the Court expanded on *Widmar*. In *Lamb’s Chapel*, the Center Moriches Union Free School District allowed private groups to use public school facilities but expressly excluded religious use.<sup>224</sup> *Lamb’s Chapel*, an evangelical church, was denied access to school facilities to show a film series dealing with family and parenting issues from a religious perspective.<sup>225</sup>

In *Lamb’s Chapel*, the Court held that the school district discriminated against a religious viewpoint and therefore, the government must have a compelling reason to sustain such action.<sup>226</sup> Citing *Widmar*, the Court held that fear of an Establishment Clause violation was not a compelling justification to allow viewpoint discrimination.<sup>227</sup> The majority addressed the potential danger that allowing religious activity on school grounds may be seen as endorsing religion.<sup>228</sup> However, since the film would not be shown during school hours, was not sponsored by the school, and was open to the general public, the Court ruled that there was no appearance of government endorsement of religion.<sup>229</sup>

Additionally, showing the film series would also not violate the *Lemon* test since there was a secular purpose, the primary effect was not to advance religion, and there was no excessive entanglement with religion.<sup>230</sup> The Court also

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- 216. *Id.* at 274.
  - 217. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).
  - 218. *Id.* at 652.
  - 219. *Widmar*, 454 U.S. at 274.
  - 220. *Zelman*, 536 U.S. at 653.
  - 221. *Widmar*, 454 U.S. at 274.
  - 222. *Zelman*, 536 U.S. at 646.
  - 223. 508 U.S. 384, 395 (1993).
  - 224. *Id.* at 387.
  - 225. *Id.* at 387–88.
  - 226. *Id.* at 394.
  - 227. *Id.* at 395.
  - 228. *Id.*
  - 229. *Id.*
  - 230. *Id.*

pointed out that any benefit to religion or to the Lamb's Chapel Church would be merely incidental.<sup>231</sup> Unlike *Widmar*, the Court did not launch into a lengthy discussion of why the benefit to religion was simply incidental, or why the primary effect did not advance religion. *Lamb's Chapel* signals a greater willingness to frame the debate over government aid to religion in the context of viewpoint discrimination against religion. If religious schools demand equal access to State educational funding, they might find an ally in a Supreme Court that sees the exclusion of religion from State funds as unconstitutional viewpoint discrimination.<sup>232</sup>

In its Establishment Clause analysis, the majority in *Lamb's Chapel* focused on the appearance of government endorsement of religion.<sup>233</sup> With school vouchers, the Court in *Zelman* held that there was no government endorsement of religion because money flowed to religious schools only at the behest of parents making individual private choices.<sup>234</sup> If there is no government endorsement of religion when the government earmarks money for religious schools, then denying religious schools access to state funds may be unconstitutional viewpoint discrimination. The question may turn on whether money can be considered the same type of forum as the use of school facilities. *Rosenberger v. Rector and Visitors of University of Virginia*<sup>235</sup> suggests that money may be a public forum for First Amendment purposes.<sup>236</sup> Therefore, based on *Widmar*, *Lamb's Chapel*, *Zelman* and *Rosenberger*, excluding religion from equal access funding may be impermissible viewpoint discrimination.

In *Rosenberger*, the University of Virginia provided money from the Student Activities Fund ("SAF") to pay the printing costs of various student publications.<sup>237</sup> However, the University denied funding to Wide Awake Productions ("WAP"), a student group that published *Wide Awake*, a magazine offering an expressly Christian perspective.<sup>238</sup> The Court held that denying funding

231. *Id.*

232. *Id.* at 396–97.

233. *Id.* at 395.

234. *Zelman v. Simmons-Harris*, 536 U.S. 639, 651–52 (2002).

235. 515 U.S. 819 (1995).

236. *Id.* at 830. *see also* Christopher P. Coval, *Good News for Religious Schools and The Freedom of Speech*, 83 B.U. L. REV. 705, 713–22 (2003). Coval argues that vouchers are limited public fora and exclusion of religious schools from a voucher program would be unconstitutional viewpoint discrimination. *Id.*

In most public schools and many private non-religious schools . . . secular humanism pervades the entire learning process, producing good Americans often unconsciously committed to a particular set of social values, epistemological principles, and political assumptions. While "secular humanism" may not be a "religion" for Establishment Clause purposes, it certainly is a coherent "viewpoint" for Free Speech purposes.

*Id.* at 714. Since religious and non-religious schools teach from a viewpoint, Coval argues that schools are first amendment speakers entitled to constitutional protection against viewpoint discrimination. *Id.*

237. *Rosenberger*, 515 U.S. at 822.

238. *Id.* at 827.

to *Wide Awake*, while granting it to other student publications, was impermissible viewpoint discrimination.<sup>239</sup> The Court relied heavily on its decision in *Lamb's Chapel*:

The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid. The church group in *Lamb's Chapel* would have been qualified as a social or civic organization, save for its religious purposes. Furthermore, just as the school district in *Lamb's Chapel* pointed to nothing but the religious views of the group as the rationale for excluding its message, so in this case the University justifies its denial of SAF participation to WAP on the grounds that the contents of *Wide Awake* reveal an avowed religious perspective.<sup>240</sup>

The Court specifically applied *Lamb's Chapel* even though *Rosenberger* involved access to money and not access to facilities.<sup>241</sup> The Court stated, "The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."<sup>242</sup>

If general state educational funds were viewed as the same type of forum as the University's Student Activities Fund in *Rosenberger*, excluding religious schools from those funds could be impermissible viewpoint discrimination. The program in *Rosenberger* was neutral toward religion.<sup>243</sup> The program allowed any student group to participate as long as they complied with certain procedural requirements.<sup>244</sup> In this context it was unconstitutional to exclude religious groups from equal funding.<sup>245</sup> In *Zelman*, it was important that all private schools, religious and secular, were eligible to receive voucher students.<sup>246</sup> For funding to be neutral, all schools had to be viewed equally, so it may be impermissible to discriminate against one type of school because of the school's religious viewpoint.

239. *Id.* at 845.

240. *Id.* at 832.

241. *Id.*

242. *Id.* at 830 (emphasis added).

243. *Id.* at 840.

244. *Id.* at 823.

245. *Id.* at 845.

The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

*Id.*

246. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002). "The program permits the participation of *all* schools within the district, religious or nonreligious." *Id.* The italicization of the word "all" emphasizes the importance the Court puts on the fact that all schools in the district are permitted to participate.

*Good News Club v. Milford Central School*<sup>247</sup> followed the precedent established by *Lamb's Chapel* and *Rosenberger*.<sup>248</sup> *Good News Club* was a private Christian organization for children ages six to twelve.<sup>249</sup> *Good News Club's* meetings involved prayer, Bible reading, and scripture study.<sup>250</sup> The group was denied permission to use school facilities for their weekly after-school meetings.<sup>251</sup> Milford Central School allowed private organizations to use its facilities for uses pertaining to the "welfare of the community."<sup>252</sup> The school denied *Good News Club's* request to use the facilities because of the school's policy prohibiting the use of school facilities for religious purposes.<sup>253</sup>

The Supreme Court found that the exclusion of *Good News Club* was indistinguishable from the impermissible exclusions in *Lamb's Chapel* and *Rosenberger*.<sup>254</sup> The school had established a limited public forum,<sup>255</sup> and exclusion of *Good News Club* from that forum was unconstitutional viewpoint discrimination.<sup>256</sup>

The Court stated that allowing *Good News Club* to use the school's facilities did not violate the Establishment Clause.<sup>257</sup> An important factor in upholding government aid to the religious club was the principle of neutrality.<sup>258</sup> In *Good News Club*, aid was neutral if the aid was available to a broad range of groups or people without regard to religion.<sup>259</sup> Justice Thomas, writing for the majority, placed the burden on Milford Central School to show that allowing *Good News Club* to use its facilities offended neutrality:

The *Good News Club* seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the *Good News Club*.<sup>260</sup>

The Court held that allowing *Good News Club* to use school facilities did not violate neutrality or the Establishment Clause.<sup>261</sup>

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247. 533 U.S. 98 (2001).

248. *Id.* at 107.

249. *Id.* at 103.

250. *Id.*

251. *Id.*

252. *Id.* at 102.

253. *Id.* at 103.

254. *Id.* at 107.

255. *Id.* at 108.

256. *Id.* at 107.

257. *Id.* at 119.

258. *Id.* at 114. "First, we have held that 'a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion.'" (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 838 (1995)).

259. *Id.*

260. *Id.*

261. *Id.* at 119.

*Good News Club* represented a dramatic shift in Establishment Clause thinking. The majority found that exclusion of religion was a greater threat to neutrality than inclusion of religion.<sup>262</sup> Like *Good News Club*, *Zelman* required neutrality before allowing government to aid religion. In *Zelman*, the school voucher program was neutral because it included all schools, the voucher program did not discriminate between religions or against nonreligious schools.<sup>263</sup> In order for government aid to be neutral, it must not discriminate between religions, against the nonreligious, and as *Good News Club* demonstrates, against the religious.<sup>264</sup>

When government funds education, it arguably funds schools that teach from a particular viewpoint.<sup>265</sup> Magnet and charter schools design curriculums to fit the needs of a target student population.<sup>266</sup> Charter schools employ a specific method to teach kids and use a particular educational approach or mission.<sup>267</sup> After *Zelman*, that educational approach can be religious.

262. *Id.* at 114.

263. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

264. *Good News Club*, 533 U.S. at 118.

[E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.

*Id.*

265. Charles J. Russo & Ralph D. Mawksley, *Equal Educational Opportunities and Parental Choice: The Supreme Court Upholds the Cleveland Voucher Program*, 169 EDUC. L. REP. 485, 487–88 (2002). Russo and Mawksley comment on the nature of charter and magnet schools:

During the 1999–2000 academic year, Cleveland’s ten community schools, typically referred to as charter schools elsewhere . . . are operated by their own boards, had great independence from state mandates on hiring staff and curricular content. The Cleveland Board of Education also operated twenty-three magnet schools that emphasized particular subject areas, teaching methods, and/or services for students.

*Id.*

266. *Id.*

267. Paul T. O’Neill, Richard J. Wenning & Elizabeth Giovannetti, *Serving Students with Disabilities in Charter Schools: Legal Obligations and Policy Options*, 169 EDUC. L. REP. 1 (2002). “Charter schools are public schools, authorized under the laws of many states, which are freed from most state and local laws governing schools so that they are free to create innovative educational programs focused on a particular educational approach or mission.” *Id.*; see also Gerard v. Bradley, *An Unconstitutional Stereotype: Catholic Schools as “Pervasively Sectarian,”* 7 TEX. REV. L. & POL. 1, 9 (2002) (arguing that Catholic schools’ primary mission is not religious, but educational). Bradley argues that Catholic Schools do not infect secular subjects with religion. *Id.* at 17. The defining characteristic of Catholic schools as stated at the Second Vatican Council is “a special atmosphere animated by the Gospel spirit of freedom and charity.” *Id.* at 10. A school that has a religious atmosphere but teaches secular subjects without religious influence is analogous to a charter school that utilizes a particular method or atmosphere to facilitate its secular teaching, and discrimination against such a school may become impermissible viewpoint discrimination. *Id.*



Now that it is constitutional to spend government money on religious education,<sup>268</sup> how can the government discriminate against a religious viewpoint and not violate the principle of neutrality held so sacred in cases like *Good News Club* and *Zelman*? At the intersection of *Zelman* and the *Widmar*, *Lamb's Chapel*, *Rosenberger* and *Good News Club* cases, is the principle that religion must be treated equally with other viewpoints, not with hostility.<sup>269</sup> These cases open a can of worms because according to precedent, government has chosen to fund education so it should do so equally, without discrimination against religious or nonreligious institutions.<sup>270</sup> This mandate may mean that the government must fund religious schools equally with non-religious schools.

The Supreme Court's interpretation of the Ninth Circuit's decision in *Davey v. Locke*<sup>271</sup> may give an indication of how far the Court will go with government inclusion of religion and whether government may someday be required to fund religious education. In *Davey v. Locke*, the Ninth Circuit held that it was unconstitutional to deny a student a state-funded scholarship solely because the student decided to use the scholarship to pursue a degree in theology.<sup>272</sup> Washington's "Promise Scholarship" could be used at any accredited college in the state and was made available to students who qualified based on high school grades and family income.<sup>273</sup> Joshua Davey was awarded the scholarship and enrolled at Northwest College, an accredited institution affiliated with the Assembly of God.<sup>274</sup> Davey lost the scholarship when he declared a major in theology.<sup>275</sup> The Ninth Circuit held that the state policy denying scholarships to theology students lacked neutrality and unconstitutionally discriminated on the basis of religion.<sup>276</sup> The ruling essentially compelled the State of Washington to fund a student's religious education at a religious institution.<sup>277</sup>

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268. *Zelman*, 536 U.S. at 662–63.

269. See generally Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551 (2003) (arguing that most state Blaine Amendments that impede school voucher programs unconstitutionally discriminate against religion).

270. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (attesting that once government creates a public forum it cannot engage in viewpoint discrimination).

271. 299 F.3d 748 (9th Cir. 2002), cert. granted, 123 S.Ct. 2075 (U.S. May 19, 2003) (No. 02-1315).

272. *Id.* at 750.

273. *Id.*

274. *Id.* at 751.

275. *Id.*

276. *Id.* at 750.

We conclude that HECB's policy lacks neutrality on its face. It makes the Promise Scholarship (which is neutral toward religion) available to all students who meet generally applicable criteria, except for those who choose a religious major. As this classification facially discriminates on the basis of religion, it must survive strict scrutiny. We are not persuaded that it does . . .

*Id.*

277. See generally Derek D. Green, *Does Free Exercise Mean Free State Funding? In Davey v. Locke, the Ninth Circuit Undervalued Washington's Vision of*

In *Davey*, the Ninth Circuit clearly saw religion as just another viewpoint.

A Pastoral Ministries major at Northwest is designed to prepare students for a career as a Christian minister. Classes are taught from a viewpoint that the Bible represents truth and is foundational whereas . . . theology courses at public postsecondary institutions in Washington are taught from an historical and scholarly point of view.<sup>278</sup>

Once the state undertook this type of educational funding it could not favor a secular viewpoint over a religious viewpoint.

A major obstacle to mandatory state funding of religious education is the Supreme Court's decision in *Rust v. Sullivan*.<sup>279</sup> In *Rust* the court announced,

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>280</sup>

Thus, when government funds education it can selectively decide not to fund religious schools without discriminating unconstitutionally on the basis of viewpoint.

The Ninth Circuit in *Davey* circumvents *Rust* by distinguishing when the government acts for its own purpose as a speaker:

As a speaker, the government may selectively fund a program to encourage activities that it believes are in the public interest. By contrast, the purpose of the Promise Scholarship program is broad: to fund the educational pursuits of outstanding students. For this reason, administration of the Scholarship must be viewpoint neutral.<sup>281</sup>

Therefore, the government is not speaking when it is educating and it must be viewpoint neutral. The purpose of the Promise Scholarship was to fund the educational pursuits of *outstanding* students. The purpose of state educational spending in general is to fund the educational pursuits of *all* students. If the Supreme Court accepts the Ninth Circuit's reasoning in *Davey*, it appears to be a short leap to mandating that all government educational funding be viewpoint neutral. Indeed, the potential impact of the Supreme Court's treatment of *Davey* cannot be understated. As Justice Breyer said during the *Davey* oral arguments before the Supreme Court, if *Davey* is upheld "every program, not just educational programs, but nursing programs, hospital programs, social welfare programs,

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*Religious Liberty*, 78 WASH. L. REV. 653 (2003) (arguing that *Davey v. Locke* is at odds with Supreme Court precedent and should be overturned).

278. *Davey*, 299 F.3d at 751.

279. 500 U.S. 173 (1991).

280. *Id.* at 193.

281. *Davey*, 299 F.3d at 752.

contracting programs throughout the governments would be susceptible to the argument that they cannot be purely secular, that they must fund all religions who want to do the same thing."<sup>282</sup>

The definition of religion can be somewhat amorphous; any number of people or churches could claim they are entitled access to funds or cry discrimination.<sup>283</sup> Thus, although equal funding of religious and nonreligious schools is surely not imminent, arguments like the one presented in this section may ultimately find their way into courtrooms.<sup>284</sup> On the heels of cases such as *Good News Club*, *Mitchell*, *Agostini*, and *Rosenberger*, *Zelman* represents a move toward government inclusion of religion.<sup>285</sup> As this Note attempts to illustrate, when the wall between church and state comes down, a whole host of issues arise, and the law can lead many places that the Supreme Court did not intend.

## V. CONCLUSION

*Zelman v. Simmons-Harris* builds on case law that establishes a trend toward government inclusion of religion.<sup>286</sup> After *Zelman*, school voucher programs should proliferate.<sup>287</sup> *Zelman* articulates a new test for determining the constitutionality of government aid to religion.<sup>288</sup> An aid program must be neutral, and aid must be directed to a religious institution as a result of independent genuine private choice.<sup>289</sup> Neutrality and independent genuine private choice will not be difficult for the Supreme Court to find in a school voucher program.<sup>290</sup> School vouchers will most likely be any amount a legislature desires, and the

282. Linda Greenhouse, *Justices Resist Religious Study Using Subsidies*, N. Y. TIMES, Dec. 3, 2003, at A1.

283. *Zelman v. Simmons-Harris*, 536 U.S. 639, 723 (2002). "America boasts more than 55 different religious groups and subgroups with a significant number of members." *Id.* (Breyer, J., dissenting).

284. See Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 29 (2002) (arguing that after *Zelman*, a credible argument can be made that states may be required to sponsor voucher programs for religious education to promote parental choice, particularly for low-income families that do not have the same range of educational choices as wealthier families); see also Ira Bloom, *The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?*, 32 J.L. & EDUC. 139, 183 (2003). Bloom states that the Supreme Court decision in *Troxel v. Granville* "gives parents a constitutional right to challenge the decisions of state and local educational officials in matters affecting their children." *Id.* Bloom argues that parents in poorly performing schools could potentially attempt to use this right to demand mandatory voucher programs. *Id.*

285. See *supra* section IV; see also Paul E. Salamanca, *Choice Programs and Market-Based Separationism*, 50 BUFF. L. REV. 931, 931-32 (2002) ("If taken to its logical limits, the rule of law announced in *Zelman* appears competent to sustain any of a number of public programs in which the government joins with private organizations, both secular and non-secular, to provide secular services.").

286. See *supra* sections II and III.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

character of aid will not influence a voucher program's constitutionality.<sup>291</sup> Voucher programs for low-income urban students and more affluent suburban students should pass constitutional muster.<sup>292</sup>

The intersection of the *Witters*, *Mueller*, *Zobrest*, *Lemon*, *Agostini*, *Mitchell*, and *Zelman* case line along with the *Widmar*, *Lamb's Chapel*, *Rosenberger*, and *Good News Club* case line yields some interesting possibilities. One theoretical possibility is that religious schools may be entitled to equal access to government educational funds. *Zelman* establishes that the government can pay for students' religious education. *Widmar*, *Lamb's Chapel*, *Rosenberger*, and *Good News Club* establish that exclusion of religion from a public forum is unconstitutional viewpoint discrimination.<sup>293</sup> *Rosenberger* held that government funding can be a "public forum."<sup>294</sup> *Davey* required a state to fund a student's religious education.<sup>295</sup> If the Supreme Court follows the *Zelman* precedent to the limits of its own logic, a day may come when the government must fund religious schools in the same capacity as it funds non-religious schools.

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291. *Id.*

292. *Id.*

293. *See supra* section IV.

294. *See supra* text accompanying notes 242-43.

295. *Davey v. Locke*, 299 F.3d 748, 750 (9th Cir. 2002), *cert. granted*, 123 S.Ct. 2075 (U.S. May 19, 2003) (No. 02-1315).