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SCHOOL CHOICE LITIGATION AFTER *ZELMAN* AND *LOCKE*

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In the past 2 years, the United States Supreme Court has decided two important cases that will bear directly on legislation and litigation involving school choice programs that provide financial aid to parents of children attending religious schools. Those cases are Zelman v. Simmons-Harris *(2002) and* Locke v. Davey *(2004). The reasoning in* Zelman*, along with the litigation in the lower courts leading up to that decision, provide useful insights that should prove helpful in drafting school choice legislation and successfully defending it in court when challenged. The decision in* Locke *may have implications for litigation involving challenges to state laws and constitutional provisions limiting aid to religious institutions and to students attending religious schools. Both cases are discussed below.*

BACKGROUND

In 1995, in response to the crisis in Cleveland's public schools a federal district court placed the entire Cleveland public school district under state control. The State of Ohio reacted, in part, by establishing the Pilot Project Scholarship Program, hereinafter referred to as "the voucher program," as part of a biennial operating appropriations bill. The voucher program provides two basic kinds of financial aid to parents of children in the Cleveland school district. The first is tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating private or public school of their parents' choosing. Any private school, religious or nonreligious, located in the Cleveland school district that meets the statutory requirements can register to participate in the voucher program. Any public school located in a public school district adjacent to the Cleveland school district can also participate in the voucher program, although none elected to do so during the course of the litigation. Families with income below 200% of the poverty line are given

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priority and are eligible to receive 90% of the private school tuition, up to a maximum of $2,250. Other families can receive 75% of tuition, up to a maximum of $1,875 (*Zelman v. Simmons-Harris*, 2002).

The second kind of aid is tutorial assistance provided through grants to any student in the Cleveland school district who chooses to remain in public school. Students from low-income families receive 90% of the amount charged for such assistance up to $360. Other students receive 75% of that amount. The number of tutorial assistance grants offered to students must equal the number of tuition aid scholarships provided to students at participating private or adjacent public schools. The number of available scholarships is determined annually by the Ohio Superintendent for Public Instruction (*Zelman v. Simmons-Harris*, 2002).

The Cleveland voucher program was initially challenged in state court by individual taxpayers and the Ohio Federation of Teachers in two separate lawsuits that were consolidated. The trial court held that the program did not violate the Federal Establishment Clause, nor did it violate any of the several state constitutional provisions cited by the challengers (*Gatton v. Goff*, 1996). An intermediate appellate court reversed the decision, holding, in part, that the voucher program violated the Federal Establishment Clause, as well as the State Constitution's Establishment Clauses and its Uniformity Clause (*Simmons-Harris v. Goff*, 1997). Both sides appealed to the Ohio Supreme Court.

The Ohio Supreme Court ruled that the voucher program did not violate the Federal Establishment Clause, except for a selection criterion that gave priority to students whose parents belonged to a religious group that supported the religious school. The Court held that the unconstitutional selection criterion was severable from the remainder of the statutory scheme. Likewise, it found that the voucher program did not violate the State's Establishment Clauses. The Ohio Supreme Court, however, ultimately struck down the voucher program as violating the State Constitution's one subject requirement because it was a substantive program included in a general appropriations bill (*Simmons-Harris v. Goff*, 1999). The Ohio Legislature immediately cured this defect, which led to new litigation in federal court brought by some of the same plaintiffs who had initiated the state litigation.

SIMMONS-HARRIS V. ZELMAN – FEDERAL DISTRICT COURT

After the Ohio Supreme Court's ruling on May 27, 1999, invalidating the voucher program, the Ohio Legislature moved quickly to remedy the one subject requirement problem. On June 29, 1999, the Legislature again

enacted the voucher program, this time as part of the Education Budget Bills. Moving just as quickly, within a month of its enactment on July 29, 1999, opponents of the voucher program brought two lawsuits in federal district court challenging the program's constitutionality on Federal Establishment Clause grounds (*Simmons-Harris v. Zelman*, 1999).

In its opinion, after describing the 1999 program in all pertinent respects to be the same as the 1995 program, the court observed that over 82% of the participating schools were church-affiliated and that over 96% of students receiving tuition assistance were enrolled in religious schools. The court then went on in two full pages to describe how religious the participating schools were, quoting extensively from handbooks and mission statements of three Catholic and two Lutheran schools. In this commentator's experience, it does not bode well for the constitutionality of an aid program when a court begins its opinion by demonstrating just how religious the participating religious schools are. That religious schools are actually religious in some respects should not come as a surprise to anyone. Another indicator that the voucher program was in trouble in the district court was its lengthy and approving description of the church-state views of James Madison and Thomas Jefferson, including quotes from Madison's *Memorial and Remonstrance*. Again, not a good harbinger for the constitutionality of the voucher program (*Simmons-Harris v. Zelman*, 1999).

The district court relied primarily on *Committee for Pub. Educ. & Religious Liberty v. Nyquist* (1973) in holding the voucher program unconstitutional under the Establishment Clause. It spent five full pages discussing, in its view, the similarities between the program struck down in *Nyquist* and the voucher program, as well as the religious nature of the schools involved in the *Nyquist* program. The court ultimately concluded that the fact that the Cleveland voucher program overwhelmingly benefited religious schools and that the tuition assistance provided was not restricted to supporting only secular functions made it indistinguishable for Establishment Clause purposes from the tuition reimbursement program struck down in *Nyquist*. The court concluded its discussion of *Nyquist* by noting that it has not been overruled (*Simmons-Harris v. Zelman*, 1999).

The district court's opinion is remarkable in several respects. First, as noted above, it places emphasis on the religious nature of the majority of private schools participating in the voucher programs. Second, it has an almost singular reliance on *Nyquist* and an insistence that the Cleveland voucher program did not fit the type of case contemplated in footnote 38 of *Nyquist*, wherein funds are made available generally without regard to the religious-nonreligious or public-nonpublic nature of the institution benefited (*Simmons-Harris v. Zelman*, 1999). Third, it makes a determined effort to distinguish the post-*Nyquist* decisions in *Mueller v. Allen* (1983), *Witters*

v. Washington Dep't of Servs. for the Blind (1986), and *Zobrest v. Catalina Foothills Sch. Dist.* (1993). Fourth, the court treats the voucher program as a direct aid program. And finally, the district court's tunnel vision of the options available to parents in Cleveland focuses almost exclusively on the tuition assistance aspect of the voucher program. It is clear from the Supreme Court's subsequent decision that the district court's approach to the case in each of these respects was fundamentally flawed.

SIMMONS-HARRIS V. ZELMAN – SIXTH CIRCUIT COURT OF APPEALS

The state defendants and interveners appealed the district court's decision to the U.S. Court of Appeals for the Sixth Circuit, which, in a 2-1 decision, affirmed the district court's ruling that the voucher program violated the Establishment Clause of the First Amendment (*Simmons-Harris v. Zelman*, 2000).

Like the district court before it, the majority's description of the operation of the voucher program emphasized (i) the high percentage (96%) of children receiving tuition assistance who were enrolled in religious schools in the 1999-2000 school year, (ii) the high percentage (82%) of participating schools that were church-affiliated, and (iii) the religious nature of the church-affiliated schools, with quotes from school handbooks. In addition, the majority opinion pays scant attention to the tutorial grant part of the program (*Simmons-Harris v. Zelman*, 2000).

The majority's legal analysis was structured in much the same way as the district court's analysis. It too found the *Nyquist* decision to be the most persuasive of the Supreme Court cases following *Lemon v. Kurtzman* (1971), in that it was on point with the voucher program at hand. It found similarities between the Cleveland voucher program and the tuition reimbursement program struck down in *Nyquist*: (1) the high percentage (85%) of religious schools in the *Nyquist* program, (2) the religious nature of those schools and (3) the absence of any means to insure that the public funds would be restricted to secular uses (*Simmons-Harris v. Zelman*, 2000). As to the latter point, the court did not effectively distinguish three cases, *Mueller v. Allen* (1983), *Witters v. Washington Dep't of Servs. for the Blind* (1986), and *Zobrest v. Catalina Foothills Sch. Dist.* (1993), where the challenged aid had no secular use restrictions.

In holding the voucher program unconstitutional, the majority opinion disregarded the facial neutrality of the statutory scheme, finding instead that there was no evidence that the tuition vouchers served as a neutral form of state assistance which would excuse the direct funding of religious institutions and that the alleged choice afforded parents was illusory

because the program's design did not result in the participation of adjacent public schools from outside Cleveland. The majority also found that the availability of other options to Cleveland parents, such as community schools, was at best irrelevant (*Simmons-Harris v. Zelman*, 2000), a finding that is remarkable given the Supreme Court's reliance on the availability of other options in its decision in *Zelman v. Simmons-Harris* (2002). The fundamental flaw in the majority's analysis, as was the case with the district court, was its treatment of the voucher program as a direct aid case rather than an indirect, true private choice case which would have been governed by post-*Nyquist* cases such as *Mueller*, *Witters*, and *Zobrest*.

Circuit Judge Ryan wrote an unusually stinging dissent to the majority's ruling that the voucher program violated the Establishment Clause. In his view the majority refused to conduct any meaningful analysis of post-*Nyquist* Supreme Court decisions and its

> insistence that the plainly distinguishable *Nyquist* case is directly on point, and the factually unsupported antireligious-schools arguments in the opinion strongly suggest that the majority has simply signed onto the familiar anti-voucher mantra that voucher programs are no more than a scheme to funnel public funds into religious schools. (*Simmons-Harris v. Zelman*, 2000, p. 963)

The majority responded, "not for the purpose of dignifying [the dissent's] hyperbole, but to quash any putatively substantive argument which may have found its way through the gratuitous insults" (*Simmons-Harris v. Zelman*, 2000, p. 962). So much for judicial collegiality.

Judge Ryan distinguished the New York program in *Nyquist* in three ways: (1) its stated purpose was to provide financial help to New York's financially troubled private schools, (2) it involved direct financial grants to private schools, and (3) it permitted government aid to schools that discriminate against children on the basis of religion. In addition, Ryan noted that the Establishment Clause law upon which *Nyquist* was decided had changed (*Simmons-Harris v. Zelman*, 2000). Ryan then went on to argue persuasively that, under the post-*Nyquist* decisions in *Mueller* (1983), *Witters* (1986), *Zobrest* (1993), *Agostini v. Felton* (1997) and *Mitchell v. Helms* (2000), the Cleveland voucher program was constitutional under the Establishment Clause, emphasizing, inter alia, the range of options available to Cleveland parents (*Simmons-Harris v. Zelman*, 2000).

ZELMAN V. SIMMONS-HARRIS – UNITED STATES SUPREME COURT

When the Cleveland voucher program reached the Supreme Court, in a 5-

4 decision it reversed the decision of the Sixth Circuit and found the program to be constitutional under the Establishment Clause. Chief Justice Rehnquist produced a concise, well-written majority opinion which was joined by Justices O'Connor, Thomas, Scalia, and Kennedy. Justices O'Connor and Thomas wrote separate concurring opinions. Justices Stevens, Souter, Ginsburg, and Breyer dissented (*Zelman v. Simmons-Harris*, 2002).

The legal analysis in the majority opinion begins by noting that the Establishment Clause prevents states from enacting laws that have the purpose or effect of advancing or inhibiting religion, citing *Agostini v. Felton* (1997). There being no dispute that the voucher program was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, the Court focused its attention on whether the voucher program had the forbidden effect of advancing or inhibiting religion (*Zelman v. Simmons-Harris*, 2002). To answer that question the Court recognized that its decisions have drawn a consistent distinction between 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. The Court went on to note that its jurisprudence with respect to the constitutionality of direct aid programs has changed significantly over the past 2 decades and that its jurisprudence with respect to true private choice programs, referring to the aid programs challenged in *Mueller*, *Witters*, and *Zobrest*, has remained consistent and unbroken. Interestingly, the phrase "true private choice programs" was first used by Justice O'Connor in a concurring opinion in *Mitchell v. Helms* (2000), to distinguish the per capita aid upheld in that case. Chief Justice Rehnquist repeats the phrase "true private choice" six times in the course of the majority opinion.

In the key paragraph in the majority opinion, the Court states that:

> *Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. (*Zelman v. Simmons-Harris*, 2002, p. 652)

To support its conclusion that the Cleveland voucher program was a true private choice program, and thus constitutional, the Court noted several aspects about the program, such as it (1) was neutral in all respects towards religion, (2) was part of a general and multifaceted undertaking by the State to provide educational opportunities, (3) conferred assistance to a broad class of individuals defined without reference to religion, and (4) permitted the participation of all religious and nonreligious private schools in Cleveland, as well as adjacent public schools (*Zelman v. Simmons-Harris*, 2002). Any objective observer familiar with the full history and context of the Cleveland program would, in the Court's view, reasonably see it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general (*Zelman v. Simmons-Harris*, 2002).

Critical to the Court's decision were the genuine opportunities for Cleveland parents to choose secular educational options for their children. The Court listed six available options for Cleveland school children, (1) remain in public school, (2) remain in public school with publicly funded tutoring aid, (3) obtain a scholarship and choose a religious school, (4) obtain a scholarship and choose a nonreligious private school, (5) enroll in a community school, and (6) enroll in a magnet school. The Court emphasized that the Establishment Clause question must be answered by evaluating all options provided Cleveland school children, only one of which involved choosing a religious school (*Zelman v. Simmons-Harris*, 2002). Recall that the Sixth Circuit considered these other options "at best irrelevant" (*Simmons-Harris v. Zelman*, 2000, p. 958).

In the course of its opinion, the Court flatly rejected arguments that the program provided financial incentives to attend religious schools, noting that families that choose a community school, magnet school, or traditional public school pay nothing. That a high percentage (82%) of participating schools were religious was not of constitutional significance to the Court. Nor was the fact that 96% of tuition recipients had enrolled in religious schools, citing *Mueller*. The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school (*Zelman v. Simmons-Harris*, 2002).

The Court easily rejected the argument, accepted by the Sixth Circuit, that *Nyquist* should govern the outcome. It distinguished *Nyquist* in two ways. First, the program in *Nyquist* gave a package of benefits exclusively to private schools and the parents of private school enrollees and the function of the program was to provide financial support for nonpublic, religious schools. Second, the Court pointed to footnote 38 in *Nyquist* (1973),

where it had expressly reserved judgment with respect to a case involving some form of aid made available generally without regard to the religious-nonreligious or public-nonpublic nature of the institutions benefited. Finally, the Court explicitly held that "*Nyquist* does not govern neutral educational assistance programs, like the program here, that offer aid directly to a broad class of individual recipients defined without regard to religion" (*Zelman v. Simmons-Harris*, 2002, p. 662).

LOCKE V. DAVEY – UNITED STATES SUPREME COURT

Reversing a 2-1 decision of the U.S. Court of Appeals for the Ninth Circuit, the U.S. Supreme Court, in a 7-2 opinion written by Chief Justice Rehnquist, held that the Free Exercise Clause did not prevent the State of Washington from disqualifying only students pursuing theology degrees from state financial aid programs. Justices Scalia and Thomas dissented. The particular program at issue, the Promise Scholarship Program, provided financial aid to assist academically gifted students with college expenses. To be eligible a student had to meet certain academic and income standards and enroll in an accredited postsecondary institution in the State of Washington. Students may spend their funds on any education-related expense, including room and board. Qualifying students can pursue any degree they desire except degrees in theology, which, as interpreted by the State of Washington, are degrees that are devotional in nature or designed to induce religious faith (*Locke v. Davey*, 2004).

Joshua Davey was awarded a Promise Scholarship and chose to enroll in Northwest College, a Christian college affiliated with the Assemblies of God denomination, to pursue a double major in pastoral ministries and business management/administration. There was no dispute that the pastoral ministries degree is devotional and, therefore, excluded from the scholarship program. Davey refused to certify to his college that he was not pursuing a devotional theology degree and, as a result, did not receive any scholarship funds.

Chief Justice Rehnquist began his legal analysis by noting the Establishment and Free Exercise Clauses are frequently in tension, with room for "play in the joints" between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause. The Court said that this case involves that play in the joints. The State of Washington could permit Promise Scholars to pursue degrees in devotional theology, but it was not required to do so by the Free Exercise Clause (*Locke v. Davey*, 2004).

In reaching this conclusion, the Court rejected Davey's argument that

the program is presumptively unconstitutional because it is not facially neutral with respect to religion. In the Court's view, this was not a case like *Church of Lukumi Babalu Aye v. Hialeah* (1993) which involved a law that sought, through criminal sanctions, to suppress ritualistic animal sacrifices of the Santeria religion. In this case, according to the Court, the State's disfavor of religion is of a far milder kind. There are no civil or criminal sanctions on any type of religious practice. The State has merely chosen not to fund a distinct category of instruction (*Locke v. Davey*, 2004).

Significantly, throughout the majority opinion Chief Justice Rehnquist repeatedly characterizes the case as one involving the training or education of ministers. That a state would deal differently with religious education for the ministry than with education for other professions is more a product of the special treatment that religion has historically received in federal and state constitutions than it is of evidence of hostility toward religion. To support this conclusion, the Chief Justice specifically identifies eight states that, around the time of the founding of the country, placed formal prohibitions in their constitutions against using tax funds to support the ministry. Further indicators of no hostility to religion, according to the Court, include that Promise Scholars can attend pervasively religious schools and even take devotional theology courses (*Locke v. Davey*, 2004).

The Court concludes its opinion by finding, neither in the history or in the text of the particular provision in the Washington Constitution on which the State relied, nor in the operation of the scholarship program, anything that suggests animus towards religion. The State's interest in not funding the pursuit of devotional degrees in theology is substantial and the exclusion of such funding places a relatively minor burden on scholarship recipients (*Locke v. Davey*, 2004).

Two particular aspects of the majority's opinion are significant. With virtually no discussion and analysis the Court, in footnote 3, dismissed Davey's free speech and equal protection claims (*Locke v. Davey*, 2004). And in several places, the majority opinion creates the perception that this case was about the use of funds to pay for devotional theology degrees. This is somewhat misleading in that Davey could have used the funds solely on nonacademic expenses, such as room and board, and even could have used the funds to defray the costs of devotional theology courses as long as he did not pursue a theology degree devotional in nature.

While the result in *Locke* is disappointing, the opinion is not without some redeeming aspects. The Chief Justice appears to go out of his way to write a very narrow opinion focusing on the "only interest at issue [as being] the State's interest in not funding the religious training of clergy" (*Locke v. Davey*, 2004, *5). The Court supported this approach by relying on the historic context around the founding of the country in which many

of the early states had provisions in their constitutions prohibiting the use of tax funds to support the ministry (*Locke v. Davey*, 2004). The Court also made clear that the religious bigotry of so-called Blaine Amendments was not before it because to support its position the State relied, not on its Blaine Amendment, but on another provision in its Constitution, Article I § 11, which prohibits the use of public money for religious worship, exercise, or instruction (*Locke v. Davey*, 2004). Finally, the Court reiterated the principle established in earlier cases, (i.e., the link between government funds and religious training is broken by the independent and private choices of recipients). "As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology" (*Locke v. Davey*, 2004, *4). Significantly, the four dissenters in *Zelman*, Justices Stevens, Souter, Ginsburg, and Breyer, signed onto this language.

SCHOOL CHOICE AFTER *ZELMAN* AND *LOCKE*

The Supreme Court's decisions in *Zelman* and *Locke* have potential implications for school choice litigation. Litigation is pending in at least four states: Maine, Vermont, Florida, and Colorado. The purpose of this article is not to review the status of pending litigation, but rather to offer some general comments on the potential impact of *Zelman* and *Locke* on future litigation.

By upholding the constitutionality of the Cleveland voucher program, the Court has basically taken the Federal Establishment Clause issue out of the public debate over school choice and, hopefully, out of school choice litigation. *Zelman* is not a complicated case. Any legislative body should be able to design programs that embody the principles set out in the Court's majority opinion, (i.e., a program neutral with respect to religion that provides assistance directly to a broad class of citizens who, through independent private decisions direct the assistance to the schools of their choice, religious or nonreligious). As a litigation strategy, it is imperative that evidence of all the choices available for children, including remaining in public school, be clearly demonstrated in the record.

Even before *Zelman* effectively rendered the Federal Establishment Clause issue moot, opponents of school choice had already adopted the strategy of attacking school choice programs on state, as well as federal, constitutional grounds. This is what happened in the Cleveland litigation and it also occurred earlier in the litigation involving the Milwaukee choice program. After *Zelman*, opponents' reliance on state constitutional provisions can only intensify.

Locke's potential impact on litigation is more speculative. Proponents

of school choice programs who challenge state Blaine Amendments or other restrictive state constitutional provisions will almost certainly encounter arguments by school choice opponents that *Locke* effectively forecloses any federally required affirmative obligation on a state to include children attending religious schools in school choice programs. This is a gross oversimplification. In such a scenario, *Locke* can be distinguished in three significant respects.

First, in footnote 5, the Court specifically states that "the only interest at issue here is the State's interest in not funding the religious training of clergy" (*Locke v. Davey*, 2004, *5). Thus, arguably *Locke's* reach can be limited to litigation involving attempts to require, as opposed to permit, a state to fund clergy training. The Court specifically acknowledged that the State of Washington could have awarded a Promise Scholarship to Davey had it wanted to do so. Second, the Court relied heavily on the historical context around the founding of the country in which a number of states included prohibitions on funding of ministers in their constitutions. The history of funding education below the college level is entirely different. It is widely recognized that, around the founding of the country, most education was provided by religious organizations. Finally, the Court made clear that the case is not about Blaine Amendments. Opponents of such amendments can still argue that they are hostile to religion because of their anti-Catholic lineage, which a plurality of the Court recognized in *Mitchell*.

CONCLUSION

The debate over school choice programs will continue into the foreseeable future. The Supreme Court's decision in *Zelman* has effectively taken the Federal Establishment Clause argument away from opponents of school choice. The focus of future legal arguments will shift to state constitutional provisions. Proponents of school choice challenging restrictive state constitutional provisions will need to limit and distinguish *Locke* if they are to be successful.

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