

## WHY THE DECISION IN ZELMAN MAKES SO MUCH SENSE\*

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The Supreme Court's decision in *Zelman v. Simmons-Harris*<sup>1</sup> came to the relief of two age-old victims of political discrimination in America, Catholics and Blacks. One class of victims, the Catholics, had been forced in the nineteenth century to found their own religious schools because they would not send their children to public schools where Protestantism served as the unofficial but actual state-sponsored religion.<sup>2</sup> For long before the Supreme Court had found school prayer to be unconstitutional,<sup>3</sup> Catholic parents and their leaders had refused to submit their children to education in schools that demeaned their beliefs by making them worship in ways that were heretical.<sup>4</sup>

The discrimination by political leaders in places like Boston, New York and Philadelphia during the period of immigration of the Catholic Irish and Catholic Germans was the primary cause of

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1. 536 U.S. 639, 122 S. Ct. 2460 (2002) (holding that school voucher program did not violate Establishment Clause even though many students used the vouchers to attend religiously affiliated schools).

2. ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* 24 (1993).

3. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (invalidating state law requiring Bible readings and recitations of the Lord's Prayer in public schools); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that state officials may not compose an official state prayer and require its recitation in the public schools).

4. See BRYK, *supra* note 2, at 24; PHILIP HAMBURGER, *THE SEPARATION OF CHURCH AND STATE* 220 (2002).

the creation of a Catholic parochial system in the United States.<sup>5</sup> But the hate mongers who set convents, churches and schools afire<sup>6</sup> were not content just to drive Catholics from the public schools. They also unleashed at the state and federal levels an era of nativism which sought to deny any aid, direct or indirect, to the religious schools that were set up in response to the Protestant-run public schools.<sup>7</sup> The fear of foreign influence, or popery as it was called, put into place laws and practices that were blatantly anti-Catholic.<sup>8</sup> The nativists tried to make permanent their political advantage by enacting a constitutional amendment barring direct or indirect aid to religious schools, an effort that barely failed.<sup>9</sup> They were more successful with constitutional provisions at the state level as many states, including New York, adopted these so-called "Blaine Amendments."<sup>10</sup> These efforts were effective in preventing the admission of territories into the Union if they did not enact these provisions.<sup>11</sup> As a result, there are significant numbers of states that enacted these amendments, the tenor of which is to inhibit the rights of citizens to the full exercise of their religious freedoms.<sup>12</sup>

These assaults on political freedoms were, of course, not limited to Catholics. Blacks, women, alien immigrants, workers, Native Americans, foreign language speakers, the disabled, and many others each had their political rights compromised by the acts of intolerance that marked politics in the latter part of the nineteenth century.<sup>13</sup> In many cases these acts of discrimination have been

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5. See BRYK, *supra* note 2, at 24.

6. See LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925*, at 29 (1987); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Law*, 21 *HARV. J. L. & PUB. POL'Y* 657, 667, 669 (1998) [hereinafter Viteritti, *Blaine's Wake*].

7. JORGENSEN, *supra* note 6, at 28-30; Viteritti, *Blaine's Wake*, *supra* note 6, at 669-76.

8. Viteritti, *Blaine's Wake*, *supra* note 6, at 659; Joseph P. Viteritti, *School Choice and American Constitutionalism*, in *CHARTERS, VOUCHERS, AND PUBLIC EDUCATION* 114, 124-26 (Paul E. Peterson & David E. Campbell eds., 2001) [hereinafter Viteritti, *School Choice*].

9. Viteritti, *Blaine's Wake*, *supra* note 6, at 672 ("Blaine's amendment received strong support in both houses of Congress, but fell four votes short of the required two-thirds majority in the Senate to pass").

10. JORGENSEN, *supra* note 6, at 114.

11. Viteritti, *Blaine's Wake*, *supra* note 6, at 673.

12. *Id.*

13. See JILL NORGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND THE LAW* 3, 17-22, 54-55, 197-202, 225-27 (2d ed. 1996), for a detailed analysis of the historical, cultural and legal treatment of various minority groups. See also JORGENSEN, *supra* note 6; WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION AND THE CONSTITUTION 1917-1927* (1994) (detailing the history of World

remedied by judicial action and by the progress toward greater tolerance that has marked much of our recent political history.

This has not generally been true in the case of Catholics and their schools. After states and localities prevented Catholics from attending public schools without being forced to worship in alien ways, the United States Constitution was used to deny them any forms of state aid. This was done by a blatant misreading of the First Amendment's Establishment Clause, where at its extreme the Supreme Court fashioned a "wall of separation" between church and state.<sup>14</sup> Beyond misstating the framers' intent and corrupting the language of the Constitution itself, the characterization of "a wall" strongly suggested that religion had no place in the public square. Left unnoticed were years in our early history where public funding for the support of religious institutions was a common practice.<sup>15</sup> The erection of a wall reflected judicial hostility toward religion rather than the tolerance and encouragement that characterized the early American republic's movement toward freedom for religious exercise.<sup>16</sup> The fear of a state religion had been replaced by hostility toward all religious aid.

It is only in modern times that the Supreme Court has begun the task of reexamining the relationship of state and church and taken a much more tolerant attitude toward the freedom of religion guarantees that seemed to be underappreciated for so long. Even now, the constitutional standard established for aid that flows to Catholic schools requires an intent to benefit individuals or groups with only indirect benefit flowing to religious schools.<sup>17</sup>

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War I legislation seeking to prevent the teaching of foreign languages and the Supreme Court's invalidation of these "language laws"; DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954*, at 154-57 (1987) (discussing the use of public schools to enforce assimilation and the teaching of majority moral values).

14. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" (citation omitted); see also ROBERT C. HARTNETT, *EQUAL RIGHTS FOR CHILDREN: PUBLIC WELFARE BENEFITS FOR ALL AMERICAN CHILDREN* 25-26 (1948).

15. J.A. BURNS, *THE GROWTH AND DEVELOPMENT OF THE CATHOLIC SCHOOL SYSTEM IN THE UNITED STATES* 248-50 (1912).

16. HARTNETT, *supra* note 14, at 22, 24-26.

17. *Zelman v. Simmons-Harris*, 536 U.S. 639, 647-54, 662-63 (2002). See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-10 (1993) (upholding provision of sign language interpreter to student at sectarian school because aid was directed at the student and the benefit to the school was attenuated); *Witters v. Washington Dep't of Services for Blind*, 474 U.S. 481, 487-89 (1986) (upholding extension of state aid to finance training at Christian college because aid paid

This position, incidentally, puts the United States at odds with most other democracies in the modern world.<sup>18</sup> In those countries, religious and secular schools receive state support.

Further, in an age where greater tolerance has marked much of the twentieth century, the United States Supreme Court, bitterly divided on the question of direct aid to religious schools, has taken only very modest steps toward setting aside restrictions on supporting students who attend these schools.<sup>19</sup> The support for free exercise of religion is very much circumscribed by judicial hostility toward the religious schools that parents would like their children to attend. Although the presently constituted Supreme Court would probably refuse to go much further than it did in *Zelman*, its narrow view of such aid to students stands in the face of an unmistakable trend toward greater expansion of religious rights. The recognition of a right is fundamentally valueless if the means to exercise that right are denied by economic circumstances that prevent its enjoyment.

The failure to recognize the need for direct funding comes when the need for such support has never been greater. For most of their history, Catholic schools were basically free schools.<sup>20</sup> They were underwritten by the contributed services of the many priests, sisters and religious brothers who largely staffed the schools, and who worked for virtually no compensation.<sup>21</sup> Catholic parochial schools were affordable alternatives, because the costs of the education in a parochial school were borne by most Catholics in the local parishes to which the schools were attached.<sup>22</sup> They educated first

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directly to the student); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (upholding tax deductions for certain elementary and secondary school expenses, even for parents who send their children to parochial schools, because the aid goes directly to the parents); see also Viteritti, *School Choice*, supra note 8, at 130□1.

18. I CHARLES GLENN & JAN DE GROOF, *FINDING THE RIGHT BALANCE: FREEDOM, AUTONOMY, AND ACCOUNTABILITY IN EDUCATION* 577□80, (2002) (reviewing the educational policies of Australia, Austria, Belgium, Bulgaria, Canada, Denmark, England and Wales, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, the Russian Federation, Scotland, South Africa, Spain, Sweden, Switzerland and the United States). Of those, only the United States, Austria, Bulgaria, Greece, Ireland, Italy, the Russian Federation, Scotland and Spain do not make public funding available to schools without regard to whether they are religiously affiliated. *Id.* app. at 595 tbl.2 (Provisional Charts, Rating the National Systems: Equal Treatment).

19. See supra note 17.

20. See BURNS, supra note 15, at 274□84.

21. BRYK, supra note 2, at 33□4; BURNS, supra note 15, at 274□84.

22. Joseph Claude Harris, *The Funding Dilemma Facing Catholic Elementary and Secondary Schools*, in *CATHOLIC SCHOOLS AT THE CROSSROADS: SURVIVAL AND TRANS-*

generation and poor working class Americans even when urban public schools were □ from the standpoint of educational quality □ a suitable alternative. Urban children had affordable options; options that offered them quality education, and a way out of poor cities and working class neighborhoods. Today, youngsters in inner-cities are generally left with two unattractive alternatives. The parochial schools, while not as costly as traditional private schools, charge tuition of several thousand dollars per year.<sup>23</sup> The public school systems in every American large city have a significant number of failing schools, most of them in the poorest neighborhoods.<sup>24</sup> Both the cost of religious education and the poor quality of many public schools present huge barriers to an effective education for inner-city youth.

But all is not well in Catholic education. A crisis in Catholic education is directly linked to the shortage of teachers in religious orders.<sup>25</sup> Where once lay teachers were the exception, today they are the rule.<sup>26</sup> The salaries of these lay teachers, while generally less than those salaries of public school teachers, add significantly to the cost of providing an education in Catholic schools.<sup>27</sup> This shortage of religious personnel is coupled with other escalating costs, driven in part by enhanced state standards and requirements that place additional burdens on these schools and hence make them increasingly unaffordable, even to the middle class.<sup>28</sup> The neutrality of the government in the face of this fact has the effect of reducing access to these schools and denying a choice that was once

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FORMATION 55, 56 (James Youniss & John J. Convey eds., 2000). See BURNS, *supra* note 15, at 274 □ 5.

23. Harris, *supra* note 22, at 66 (□ Parochial secondary school] tuition for a single student was \$3,241 in 1994. □. In 1994, tuition for students enrolled in parochial elementary school was \$1,591. *Id.* at 63.

24. Only 40% of fourth and eighth graders in city schools met national standards in reading, math and science as compared to nearly 67% of suburban and rural students. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION AND CIVIL SOCIETY 7 (1999). Thirty-five percent of poor students and 43% of minority students attend urban schools. *Id.*

25. Maryellen Schaub, A Faculty at the Crossroads: A Profile of American Catholic School Teachers, in CATHOLIC SCHOOLS AT THE CROSSROADS, *supra* note 22, at 72, 73 □ 4.

26. Lay faculty comprise approximately 94% of the staff at Catholic schools. DALE McDONALD, NAT'L CATHOLIC EDUC. ASS'N, ANNUAL REPORT ON CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS: UNITED STATES CATHOLIC ELEMENTARY AND SECONDARY SCHOOL STATISTICS 2001 □ 2002 (2002), available at <http://www.ncea.org/newinfo/catholicschooldata/annualreport.asp> (last visited June 7, 2003) [hereinafter NCEA REPORT].

27. See Schaub, *supra* note 25, at 75 □ 7.

28. Harris, *supra* note 22, at 59, 63, 68 □ 69.

available. It provides a legal right to a religious education in the face of costs that are hard to meet. It is a right that can be exercised only selectively.

There are many reasons, beyond the service to the children who attend them, that can justify direct public support to these schools. They do, after all, save taxpayers more money than they cost, given the considerable per student cost disparity that exists between parochial and public schools.<sup>29</sup> Additionally, they provide a quality education which compares favorably with public schools, particularly in the inner-cities.<sup>30</sup> In addition, these parochial schools admit students who are not Catholic and thus in many respects are public schools.<sup>31</sup>

There is a further benefit, not generally mentioned, when considering the public benefit Catholic schools confer. Today, many suburban public school systems, with seats available, do not make their schools available to students from adjacent communities. As in the *Zelman* case, where every suburban district was invited to participate in Cleveland's program and refused to do so, good public schools are not really universally available.<sup>32</sup> Entitlements to these schools are closely guarded, and segregation in public education is

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29. According to the National Center for Education Statistics, the estimated average per capita public school expenditure for students in elementary and secondary schools during the 2000-2001 school year was \$7,079. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 2001, Table 167 (2002), available at <http://nces.ed.gov/pubs2002/digest2001/tables/dt167.asp> (last visited June 7, 2003). During the comparable time frame, the average per-pupil expenditure in Catholic elementary schools was \$3,505 and for Catholic secondary schools was \$5,571. NCEA REPORT, *supra* note 26.

30. See, e.g., Paul E. Peterson & David E. Campbell, Introduction to CHARTERS, VOUCHERS, AND PUBLIC EDUCATION, *supra* note 8, at 7-8. The most compelling evidence involves high school graduation rates. See Jeffrey Grogger & Derek Neal, Further Evidence on the Effects of Schooling, in BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 151, 162 (William G. Gale & Janet Rothenberg Pack eds., 2000) (On average, expected graduation rates are 7 percentage points higher for Catholic-school students than for their similar counterparts in public schools.); William N. Evans & Robert M. Schwab, Finishing High School and Starting College: Do Catholic Schools Make a Difference?, 110 Q.J. ECON., 941, 944 (1995) (Attending a Catholic high school raises the probability of finishing high school or entering a four-year college by thirteen percentage points.). Moreover, private schools do at least as well as, if not better than, public schools in educating students in civics and democratic citizenship. David E. Campbell, Making Democratic Education Work, in CHARTERS, VOUCHERS, AND PUBLIC EDUCATION, *supra* note 8, at 241, 244-45.

31. Cornelius Riordan, Trends in Student Demography in Catholic Secondary Schools, 1972-1992, in CATHOLIC SCHOOLS AT THE CROSSROADS, *supra* note 22, at 33, 37.

32. *Zelman v. Simmons-Harris*, 536 U.S. 639, 644-48 (2002).

a way of life in America almost as extensive as it was before *Brown v. Board of Education*.<sup>33</sup> Thus *Zelman* provided an opportunity for the Court not only to examine the limited rights of Catholic schools, it also gave the Court the chance to consider the effects of inadequate public schooling on the largely minority students taking advantage of the opportunity to opt out of those poorly performing public schools.

It is now understood that the decision in *Brown v. Board of Education* did not deliver quality education to Black Americans.<sup>34</sup> In fact, it is clear today that it did not provide integrated education for most Black students in the twentieth century. In virtually every state, school district boundaries are tolerated that have the effect of furthering *de facto* segregation.<sup>35</sup> In law of the courts and of the legislatures, school district boundaries are the real *Wall of Separation* that defenders of civil rights should be seeking to tear down. In the face of enormous deficiencies in public schooling, suburban districts largely remain indifferent to the plight of the cities' students. The concurring opinion of Justice Thomas in *Zelman* says it eloquently:

Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown v. Board of Education* that, *It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,* urban children have been forced into a system that continually fails them.<sup>36</sup>

And as *Zelman* demonstrates, public school districts invited to do something about this wretched situation enrolled not one single student, notwithstanding that the schools were eligible to receive a tuition grant greater than that available to non-public schools plus the full amount of per-pupil state funding attributable to each additional student.<sup>37</sup> Thus, public schools established by the state were

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33. 347 U.S. 483 (1954). See Lisa M. Fairfax, *The Silent Resurrection of Plessy: The Supreme Court's Acquiescence in the Resegregation of America's Schools*, 9 *TEMP. POL. & CIV. RTS. L. REV.* 1, 57 (1999).

34. Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 *U. ILL. L. REV.* 1043, 1045, 1048-54 (1992).

35. See Fairfax, *supra* note 33, at 14-20; see also DAVID ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 165-210 (1995) (discussing *white flight* as a factor in *de facto* segregated schools); Richard C. Kroger, *The Failure of Brown v. Board of Education: A Texas-Sized Problem of Resegregated Districts and Achieving Unitary Status*, 51 *BAYLOR L. REV.* 373, 387 (1999).

36. 536 U.S. at 676 (Thomas, J., concurring) (citation omitted).

37. *Id.* at 647.

shutting out poor students, while nearly 3,700 children were welcomed by religious schools in inner-city Cleveland.<sup>38</sup> It is incredible that in the face of such legally sanctioned hostility by the other school districts toward the children of Cleveland, a remedial plan offering voluntary placement in religious schools would not be celebrated by all citizens concerned with the rights of children to an effective education.

The situation in Cleveland is not isolated. Residents in most American inner-cities have been subject to many conditions in the public schools that put their children at a tremendous disadvantage.<sup>39</sup> Many advocates have attacked funding formulas for cities, arguing quite unconvincingly that more money solves the problem of poorly performing schools.<sup>40</sup> But can systems, many of which have a history of discrimination against so many children, from disabled to foreign speakers, be trusted to overcome such flawed institutional practice by the infusion of new money? Beyond being costly, such hope appears too speculative it seems to me and certainly less worthy than using already existing effective alternatives as were tried in Cleveland's Pilot Program. Other remedies in Cleveland such as vouchers and charter schools have also been suggested and they too are worth trying.<sup>41</sup> In the desire to adapt alternative strategies, parental choice—particularly to select schools in their own neighborhoods where good education has been provided for many years—should be the most encouraged practice. Even more urgently, with Federal law mandating alternatives to failing schools,<sup>42</sup> vouchers for religious schools make a great deal of practical sense and are cost-effective.

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38. *Id.*

39. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *YALE L.J.* 2043, 2103–04 (2002); see also Brian P. Marron, *Promoting Racial Equality through Equal Educational Opportunity: The Case for Progressive Self-Choice*, 2002 *BYU EDUC. & L. J.* 53, 64 (2002).

40. For an analysis of various attacks on school funding formulas, see Marron, *supra* note 39, at 63–70.

41. Ryan & Heise, *supra* note 39, at 2047.

42. No Child Left Behind Act of 2001, 20 U.S.C. §6301 (2002) (The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments. This purpose can be accomplished by . . . holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education . . .).



Justice Thomas, who looked closely at how successful Cleveland's Catholic schools were, captured the basic logic of why these choices should be made available: they worked.<sup>43</sup> He says,

Although one of the purposes of public schools was to promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity. At the time of Reconstruction, blacks considered public education a matter of personal liberation and a necessary function of a free society. Today, however, the promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts. Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities. Opponents of the program raise formalistic concerns about the Establishment Clause but ignore the core purposes of the Fourteenth Amendment.

While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. As Thomas Sowell noted 30 years ago: "Most black people have faced too many grim, concrete problems to be romantics. They want and need certain tangible results, which can be achieved only by developing certain specific abilities." The same is true today.<sup>44</sup>

It seems tragic that the Bill of Rights, which guarantees basic freedoms for our citizens, has been used to stifle the basic freedoms that are so vital to the education of our citizens. Zelman gets us along the road, but most of the Court still does not see how severe the problem is, and how imperative it is for all of America not to suffer another generation of poorly educated children.

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43. See Zelman, 536 U.S. at 681-83 (Thomas, J., concurring).

44. Id. at 681-82 (Thomas, J., concurring) (citations and footnotes omitted).

