

**1**  
**—****The  
Equality  
Principle****KENNETH W. STARR**

**Z***elman v. Simmons-Harris* has certainly changed the school choice landscape. But to see exactly just what has transpired, we should first look at the meaning of *Zelman* itself. I want to make two basic points, one that focuses on facts and contexts, the other that is more analytical or theoretical.

It was Justice Lewis Brandeis who said quite famously: “facts, facts, facts. Give me facts, don’t give me theory.” Without embracing a Brandeisian contextualism, I think it is helpful in understanding *Zelman*, and then school choice as a public policy issue more broadly, to look at the specific factual context that gave rise to the *Zelman* case. In doing so, I draw upon the Supreme Court’s majority opinion, which provides key facts about Cleveland and its public school system.

The Court observes that the Cleveland public school system was placed into receivership by a federal district court judge who had been asked to oversee the desegregation of the Cleveland schools. The judge appointed the state superintendent as essentially the superintendent of schools of Cleveland. Was this just an instance of runaway judicial power or was the

school system truly deficient? Maybe a little bit of both, but consider these disheartening facts: (1) the district had failed to make any of eighteen state standards for minimal acceptable performance; (2) only one-in-ten ninth graders could pass a basic proficiency examination; (3) students at all levels performed, in the Court's words, at a "dismal rate compared with students in other Ohio public schools"; (4) more than two-thirds of high school students either dropped out or failed before graduation. There are many more facts such as these. Now this contextual background suggests that this one pilot project that made it all the way to the Supreme Court of the United States was a bipartisan response by the political apparatus of Ohio—both by the state legislature and by two governors (Voinovich and Taft)—to a judicially mandated takeover of the Cleveland school system.

It is useful in this context to compare Cleveland's situation with the school choice program in Milwaukee, which began in 1990 and expanded in 1995 to include religiously affiliated schools. This, too, was a pilot choice program but it was not initiated in response to a judicial mandate or injunction. Instead, Milwaukee's voucher program grew out of a grassroots political reaction guided by a reform-minded Republican governor and a progressive Democratic mayor. It was thoroughly bipartisan. It had deep support within the community, including business leaders from more than one religious faith.

As a final contextual point, consider private philanthropy in the school choice arena, which developed concurrently with the Milwaukee program. Across the country, men and women of goodwill, of all political persuasions, or of no political persuasion at all, found the state of education so abysmal with respect to inner-city students that they offered to give these students a choice. Some were quite opposed to the idea of publicly financed choice but they were willing to put liter-

ally millions of dollars of their own money into providing privately financed scholarships because of the hopelessness of those children in the schools of America's inner cities. These developments form the context for the *Zelman* case.

Let me now turn to a more theoretical or analytical point. The Chief Justice's reasoning in *Zelman* is straightforward, quite predictable for those who are student's of Rehnquist's legal jurisprudence. Intriguingly, the Chief Justice draws from case law not involving inner-city social and educational collapse, but from a series of opinions involving what can fairly and accurately be described as middle class entitlement cases. Most important, there were the big three: *Mueller v. Allen* (1983), *Witters v. Washington Department of Services for the Blind* (1986), and *Zobrest v. Catalina Foothills School District* (1993). Let's consider them in turn.

*Mueller*, from Minnesota, involved a tax deduction program—not a particularly lively area of debate in the inner city. This was a middle class entitlement program, even though 96 percent of its benefits went to the parents of children in religiously affiliated schools. The Supreme Court nonetheless upheld the program, saying statistical percentages were not what counted in constitutional matters.

*Witters*, from the state of Washington, involved a young man aspiring to enter the ministry. He was suffering from a disability and applied to the Washington Educational Rehabilitation Authorities for a scholarship so that he could become a pastor. The Supreme Court of Washington State ruled against the aspiring pastor, arguing that the Establishment Clause—the separation of church and state—would not permit the use of public funds to attend religious schools. The Supreme Court of the United States reversed by a margin of 9–0, with not a single justice in dissent. The Court ruled that Mr. Witters could choose to use his scholarship at a religious institution.

The third case is *Zobrest*, from Arizona. Larry Zobrest was deaf. His parents could afford tuition at a Catholic high school, but they wanted their son to be able to bring with him an already extant state-provided and federally funded sign-language interpreter. The Supreme Court of the United States upheld the program. The decision was not unanimous, but the principle was clear: because the interpreter was present in the religious school as a result of private choice—as opposed to government direction—there was no constitutional problem.

In light of that jurisprudential background spanning fifteen years, the Court did not struggle in reaching a decision in the *Zelman* case. There was no hand-wringing, no sense that this case required an exception to a general rule. The opinion does set forth the abysmal facts of educational failure in the Cleveland schools, but there is not a hint in the opinion that this was decisive to the judicial analysis. The Court simply looked at its own precedents and found a ready answer.

As everyone who follows the Court knows, this is a Court that takes its precedents very seriously. Whatever one may think about a particular jurisprudential strain, this is the Court that thought *Roe v. Wade* was wrongly decided but re-embraced it. It thought *Miranda* was wrongly decided but re-embraced it. But the *Zelman* decision was about more than grudgingly following precedent. Rather, it affirmed with enthusiasm a clear *principle* drawn from those cases that were identified as controlling.

The *Zelman* decision arose from a deeply unifying principle developed in the cases of neutrality and private choice. But those are technical words. The word at the heart of this decision is *equality*. Neutrality, after all, is just an expression of equality. The power of the equality principle for this Court is quite noteworthy. It is shown by reference to the Court's work in the free speech area, which set the stage. In still another

*The Equality Principle*

29

landmark case, *Widmar v. Vincent*, a small Christian group at the University of Missouri, Kansas City, wanted to meet on campus. But the university said *no*, invoking the separation principle and the Establishment Clause. The case went to the Supreme Court of the United States. The ruling, an 8–1 decision, was that the university cannot discriminate. The University must treat all groups equally. It cannot single out a group and exclude them from the public square because of the particular viewpoint that they are articulating and embracing.

*Widmar* was really the fountainhead for the equality principle, though it was not widely recognized at the time the decision was handed down. This decision, made twenty-one years ago, set forth the equality principle—the principle essentially of nondiscrimination—and it crowned the equality principle the winner over the separation principle. I give you this provocative thought: separationism died in *Widmar* twenty-one years ago as a unifying principle of the Court’s work, but people were very slow to discover its death. What the Court did in *Widmar* was not a sort of balancing act. There was to the Court a *right answer* and only one answer, and it was the *equality answer*. In other words, there is a principle—equality—and when we apply it we get an answer as if we were in the world of mathematics. It is very simple: Do not exclude. Stop the discrimination. This is obviously a principle of enormous power. When we focus on that principle, we see that, in terms of what is ahead, the Supreme Court has given school choice a very bright green light.

The equality principle lifts up high values of great moral appeal—inclusiveness and community. The equality principle, not surprisingly, was embraced very shortly after *Widmar* at a political level by the Congress of the United States, by overwhelming bipartisan majorities, in the Equal Access Act.

The Equal Access Act stopped the discrimination at high schools against Bible study clubs. If a school allows the chess club or the French club to meet, it must also allow Bible study clubs, prayer groups and the like.

The constitutionality of the Equal Access Act was tested in the Supreme Court a few years later in the *Bridget Mergens* case. The Board of Education of Westside, outside Omaha, Nebraska, would not allow a Bible study club to meet in the school. Ms. Mergens hired a lawyer and the lawyer invoked the Equal Access Act. The *Mergens* decision was 8–1: the Bible study club could meet at the school. Equality triumphed over separationism. Only Justice Stevens was in dissent. Interestingly enough, in that dissent he did not rest his view on separationism principles. He grounded his dissent entirely on federalism principles, arguing that Congress did not intend to intrude so deeply into the administration of local school districts. But Stevens was a small minority; for the Court as a whole, separationism was over.

Despite this, four justices dissented from *Zelman*. In the main dissenting opinion, Justice Souter tried mightily to steer himself around these various tributes to the equality principle. He searched in a very lawyer-like way, very diligently and earnestly, and he found an answer: the separationist principle embodied in the Supreme Court's opinion in the 1950s called *Everson v. The Board of Education of the Township of Ewing, New Jersey*. But there was a problem, and Justice Souter—able lawyer and justice that he is—recognized it. *Everson* seemed to embrace separationism, but, concretely, the decision itself did a very different thing. *Everson* came down against aid to religious schools but then proceeded to allow aid to religious schools in the context of bus transportation. So Justice Souter turned to the notion of *substantiality*. Public funding may be used for bus transportation and various aid programs, but the

aid cannot be *too substantial*. Justice Souter recognized that *no aid* does not really mean *no aid*. He realized that *Muller*, *Witters*, and *Zobrest* must stand for something. But, according to Justice Souter, these cases do not permit substantial aid for religious institutions. Souter's effort at explaining the cases went on for more than thirty pages. (The word "lugubrious" springs to mind.) But there was an enormous roadblock standing in Justice Souter's way, set up in 1986 by that judicial moderate, Louis F. Powell Jr., in his opinion in *Witters*, which clarified issues left unresolved in *Widmar*.

In *Widmar*, where the opinion was written by Justice Thurgood Marshall, the Court concluded that a public scholarship to attend a religious school is similar to taking a paycheck from the government and turning it over to a religious organization: perfectly acceptable. There is no suggestion that *substantial* aid in Washington is going to support people studying for the ministry. So Justice Marshall concluded that there is no need to worry: *de minimis non curat lex*. He rests his opinion more on the minimum effect doctrine than on the free choices of the individuals involved. However, if there had been substantial aid going to seminaries, it is not so clear how the case might have been decided.

But, in *Witters*, Justice Powell provided a more convincing rationale for voucher-like arrangements. According to Powell, it does not matter how many citizens choose to use public aid at a religious institution. This is not a direct grant to a religious institution—it is indirect through the medium of private choice. That was really a watershed that takes us beyond *Widmar*. Justice Powell, in *Witters*, garnered five votes not just for the decision, but, even more important, to go beyond Justice Marshall's *de minimis* stance to one focused on private choice.

Among those who agreed with Justice Powell was Justice Sandra Day O'Connor. She did not join his opinion but she

expressed in a separate opinion her view that Justice Powell was right. Justice Sandra Day O'Connor is the bellwether of the Rehnquist Court—as she goes, so goes the Court. Justice O'Connor is ardently committed to the equality principle in a variety of settings. She responded in *Zelman* quite elaborately to Justice Souter and his colleagues and said, in effect, that the interconnections between faith communities and the government are so legion and of such considerable vintage that it makes no sense to have the pretense of permitting no public aid. Justice O'Connor has a remarkable ability, and has had over time, to find a position that seems to resonate quite strongly with the common sense of the American people. She is pragmatically attached to what works and avoids rigid doctrines, whether of the ideological left or of the right. She has spoken against grand unified theories because they may turn out to be not so grand and not so unified. Yet, on school choice, she is solidly in the equality camp—for solid pragmatic as well as theoretical reasons.

So what does this mean for litigation that is under way in Florida and Maine? What about those Blaine amendments to some state constitutions, whose origins date back to a period of virulent anti-Catholicism? People should be ashamed to be wrapping themselves in the cloak of Senator James G. Blaine, the nineteenth-century opponent of schools built by Catholic immigrants. Self-proclaimed liberals need to pick another hero. He cared much more for the exclusion of immigrants than he did for equality of opportunity. So today, whenever judges rely on these state Blaine amendments as a way of denying school choice, as a Florida trial court has recently done, these judges find themselves in real tension with the equality principle.

Think about the way in which the equality principle works in higher education. Are we going to tell the G.I. returning from

*The Equality Principle*

33

Kandahar and Tora Bora, “Sorry, you can’t go to Notre Dame, it’s too religious”? The idea that you can’t use government funds to go to an institution of your choice seems quite silly now. Wisely, the separationists tend to look the other way when it comes to the G.I. Bill.

Instead, they seek more vulnerable targets: vouchers for inner-city children, for instance. Yet there really is something morally unattractive about telling an otherwise qualified needy family that they cannot use available funds to send their child to a school that fosters values of their faith community. There is, in short, a difference between (1) parents’ being unable to choose a religiously affiliated school because they do not have the means, and (2) the state’s giving the parents the means but then limiting the choices available. The former involves choices naturally influenced and shaped by economics; the latter involves choices being shaped, if not directed, by government.

I close by returning briefly to *Everson*. *Everson* talked the talk of separationism, but then it fell back and embraced a principle that it called neutrality, a form of equality. The Court explained that it would be wrong to tell the citizens of *Everson* Township that if they chose to provide bus transportation to public school children they could not provide it to Catholic school children or other religiously affiliated children. While policing the Establishment Clause, the Court must be “sure”—the words of Hugo Black—“that we do not inadvertently prohibit New Jersey from extending its general State law benefits to *all its citizens* without regard to their religious belief [my italics].” And there it is. It was in *Everson* all along. The word “all”—of inclusiveness, of full membership in the community, of nondiscrimination.

It should now be clear that, quite apart from moral considerations, it is at least problematic constitutionally for the state

to exclude religious persons, groups, or institutions from otherwise neutral programs. With *Zelman* building on the big three of *Mueller*, *Witters*, and *Zobrest*, has the bell tolled for programs that, in response to state separationist principles, say “we hereby exclude?” *Zelman* tells us now that it is over. You cannot discriminate. The well-designed choice program is the inclusive choice program.