ZELMAN v. SIMMONS-HARRIS: A PUBLIC POLICY ANALYSIS

By

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PRESENTED TO THE GRADUATE SCHOOL
OF THE UNIVERSITY OF FLORIDA IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA

2007

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ACKNOWLEDGMENTS

I thank all the people who have contributed suggestions, constructive criticism, and encouragement in the development of this dissertation. First, I also thank my advisor, Dr. R. Craig Wood for all his guidance, encouragement, support, and patience. His sincere interest in public school law has been a great inspiration to me. Also, I would like to thank my committee members Dr. James L. Doud, Dr. David S. Honeyman, and Dr. Lynn Leverty for their very helpful insights, comments and suggestions. It has been a great pleasure working with the faculty, staff, and students at the University of Florida during my tenure as a doctoral student.

Additionally, I owe a debt of gratitude to my family: particularly to my understanding and patient husband, Tom, who has supported me through these many years of research, and our children, Sean, Gina, Ryan, Kyle, and Rose. Their unwavering love, support, and encouragement sustained me through this long academic journey. I must also thank my loving parents for inspiring my love of learning.

Finally, a special thank-you goes to my circle of friends, Karen Morehouse, Merrille Koffler, Judy Johnson, Jackie Sullivan, and Michelle Clopton, who provided invaluable support and suggestions throughout this process. Your friendship has been a constant source of support for me and I cannot imagine that this dissertation would have been completed without your encouragement.

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GLOSSARY OF LEGAL TERMS

Accommodationist	Not a legal term, but a descriptor in legal literature referring generally to those interpreting the Establishment Clause as allowing some interactions between government and religion, or even non-preferential government aid to religion. In Establishment Clause jurisprudence, it is the opposite of the *separationist* position.
Affirm	To declare a judgment or decree of a lower court to be valid and correct.
Amicus curiae	Latin meaning "friend of the court." A third party, not directly is a involved in a suit, who files a brief with the court which provides information and arguments relevant to a particular case.
Appeal	The method of review of inferior court proceedings by a superior court requested by the losing party in the inferior court.
Appellate court	A court possessing the authority to review, and sustain or Reverse decisions of a lower court. The U. S. Supreme Court is an appellate court.
Associate justice	The title given to judges of an appellate court excluding the chief justice.
Brief	A written statement setting out the legal contentions of a party in litigation, esp. on appeal; a document prepared by counsel as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support of them.
Case law	The law as handed down in written judicial opinions.
Certiorari	An order from a superior to an inferior court to send the entire record of a case to the superior court for review. A Writ of Certiorari is issued by the U. S. Supreme Court when four of the nine justices agree to hear a case.
Chief Justice	The title given to the judge who is the chief administrative officer of an appellate court.
Child benefit doctrine	U. S. Supreme Court put forward the doctrine in *Cochran v. Louisiana State Board of Education*.[1] The Court reasoned that

[1] 281 U.S. 270 (1930).

	assistance provided to individuals, rather than to the church-related institutions which those individuals happen to attend, is not 'aid' to religion and is not forbidden by the Establishment Clause. In *Cochran* the aid was specifically the provision of secular textbooks to students attending parochial schools. This doctrine was important in the *Everson v. Board of Education*[2] and all later textbook cases beginning with *Board of Education v. Allen*.[3]
Compelling interest	A tool of constitutional interpretation that requires the state to demonstrate that depriving individuals or groups of fundamental rights (i.e., to freely exercise their religion) is necessary for the public good.
Concur	To agree; act together; consent. To agree with the result reached by another, but not necessarily with the reasoning or logic used in reaching such a result. In the practice of appellate courts, a "concurring opinion" is one filed by one of the judges or justices, in which he/she agrees with the conclusions or the result of another opinion filed in the case (which may be either the opinion of the court or a dissenting opinion) though he/she states separately his/her views of the case or his/her reasons for so concurring.
Constitutional	Consistent with, authorized by or not conflicting with any provision of a constitution.
Decision	A popular rather than a technical or legal word referring to the judgment or conclusion of a court with respect to an issue.
Dictum	Individual views or opinions of a judge which may be in addition or unnecessary to the determination of the court; opposite of Holding.
Doctrine	A rule, principle, theory or tenet of the law.
Due process clause	Two such Clauses are found in the U. S. Constitution; one in the Fifth Amendment, pertaining to the federal government, and the other in the Fourteenth Amendment which protects persons from state actions. It was through the Due Process Clause of the Fourteenth Amendment that both the Establishment and Free Exercise Clauses were held to apply to the states, as well as to acts of Congress.

[2] 330 U.S. 1 (1947).

[3] 392 U.S. 236 (1968).

En banc	French for "by the full court," "in the bench," or "full bench." When all the members of an appellate court hear an argument, they are sitting en banc. Refers to court sessions with the entire membership of a court participating rather than the usual quorum. U. S. courts of appeals usually sit in panels of three judges, but may expand to a larger number in certain cases.
Endorsement test	A revision of the *Lemon* test for deciding Establishment Clause cases proposed by Justice Sandra Day O'Connor in *Lynch v. Donnelly*,[4] asks whether a particular government action amounts to an endorsement of religion, thus violating the Establishment Clause. According to the test, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion.
Establishment Clause	Found in the First Amendment of the U. S. Constitution, it states: "Congress shall make no law respecting the establishment of religion."[5] It was made applicable to the states by incorporation through the Fourteenth Amendment by the Supreme Court in the case of *Everson v. Board of Education.*[6]
Federal courts	Refers to the courts of the United States (as distinguished from state, county, or city courts) as authorized by Art. III of the U.S. Constitution.
Federal question jurisdiction	Cases involving the interpretation and application of the Constitution, laws, or treaties of the United States.
First Amendment	Amendment to the U. S. Constitution guaranteeing basic freedoms of religion, speech, press, and assembly ant the right to petition the government for redress of grievances.
Free Exercise Clause	Found in the First Amendment of the U. S. Constitution, it states: "Congress shall make no law . . . prohibiting the free exercise of [religion]." It was made applicable to the states by incorporation through the Fourteenth Amendment by the Supreme Court in the case *Cochran v. Louisiana*.[7]

[4] 465 U.S. 668 (1984).

[5] U. S. Const. Amend. I

[6] 330 U.S. 1 (1947).

[7] 281 U.S. 270 (1930).

Holding	The legal principle or principles which may be derived from the opinion (decision) of the court; opposite of dictum.
Injunction	A court order that either prohibits (restrains) or compels (enjoins) a party from continuing a particular activity.
Judgment	A formal decision made by a court following a lawsuit.
Judicial review	The power of a court to examine legislative enactments and acts of executive officials for constitutionality or for the violation of basic principles of justice.
Legislative intent	Refers to the intentions of legislators when enacting a law. Usually involves a reading and interpreting by a court of the legislative history of a statute.
Lemon test	The three-prong test established by the Supreme Court in *Lemon v. Kurtzman* [8] for determining what are permissible and impermissible governmental actions under the Establishment Clause of the First Amendment. For an action not to violate the Establishment Clause it must have a secular purpose, a neutral effect (i.e., neither advance or inhibit religion), and it must not create an excessive entanglement between church and state.
Non-preferentialist test	An alternative to the *Lemon* test for deciding Establishment Clause cases endorsed by Chief Justice Rehnquist. The non-preferentialist position is that the Establishment Clause only prohibits the government from establishing a state church, or showing preference between religions.
Opinion	A written statement by a judge or court announcing a decision in a case and usually details the court's reasoning. A *majority* opinion establishes new legal precedent, or supersedes or reverses existing precedent. It is typically written by one judge and represents the principles of law which a majority of the judges on the court deem operative in a given decision. A *dissenting* opinion is an opinion of one or more judges in an appellate court expressing disagreement with the majority opinion. By definition, a dissent is the minority of the court. A *concurring* opinion is a separate opinion delivered by one or more judges who agree with the decision of the majority of the court but offering own reasons for reaching that decision. A *plurality* opinion is one in which no single opinion received the support of a majority of the court, but received more support than any other opinion.

[8] 403 U.S. 602 (1971).

Original intent	The attempt to determine what the Framers of the Constitution meant when they wrote the Constitution, and to remain true to those principles when interpreting the basic document.
Parochiaid	Not a legal term, but a descriptor found in legal and popular literature referring to government aid to religion, specifically government aid to religious schools.
Pervasively sectarian doctrine	Developed by the Court as a guideline in applying the second prong of the *Lemon* test to parochiaid cases. A school is considered "pervasively sectarian" if its religious and secular educational functions are inseparable.
Petition	A title of an initial pleading requesting judicial action on a certain matter to be heard before a court.
Plaintiff	A person who initiates a lawsuit (also known as an action) before the court and seeks remedial relief for an injury to rights.
Precedent	A decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases. Prior cases which are close in facts or legal principles to the case under consideration are called precedents. A rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases. *See also* Stare decisis.
Public laws	Acts of Congress are designated in the form: Public Law X-Y where X is the number of the ordinal Congress and Y is the number of the chronological order of the Act in that Congress. For example, the Civil Rights Act of 1964, Pub. L. 88-352, was the 352nd Act of Congress passed in the 88th Congress.
Remand	Latin meaning to send back. An appellate court sending a case back to the same court from which it came for the purpose of having the lower court take some further action.
Reverse	The action of an appellate court voiding, annulling or repealing the decision of a lower court.
Ruling	A judicial or administrative interpretation of a provision of a constitution, statute, order, regulation or ordinance.

Separationist	Not a legal term, but a descriptor used in legal literature referring generally to those who interpret the Establishment Clause as allowing little or no interaction between government and religion. This position is reflected in Thomas Jefferson's metaphor, ". . . a wall of separation between Church and State,"[9] and is the opposite of the *accomodationist* position.
Stare decisis	Latin meaning "to stand by things decided." A tradition that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. It is the policy of courts to stand by precedent and not to disturb settled point.
Statute	A formal written enactment of a legislative body, whether federal, state, city, or county. An act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.
Strict scrutiny	The highest standard of judicial review used by courts to weigh an asserted government interest against a constitutional right or policy that conflicts with the manner in which the interest is being pursued. To pass strict scrutiny, the law or policy must satisfy three prongs: compelling government interest, the law or policy must be narrowly tailored, and must be the least restrictive means for achieving governmental interest.
Supreme Court	An appellate court existing in most of the states. In the federal court system, and in most states, it is the highest appellate court or court of last resort whose rulings cannot be challenged.
Tax credit	An amount by which an individual's tax liability is reduced. A tax credit reduces the tax owed dollar-for-dollar.
Tax deduction	An amount which reduces an individual's tax liability only in proportion to his/her tax bracket (the amount is deducted prior to determining taxable income). It has the affect of reducing the amount of taxes that would otherwise be owed.

[9] *See* Thomas Jefferson's letter to the Danbury Baptists "…thus building a wall of separation between Church & State." Available at http://www.loc.gov.loc/lcib/9806/danpre.html

United States Code	A compilation and codification of the general and permanent federal law of the United States.
Voucher	A certificate which is worth a certain monetary value and which may only be spent for specific reasons or on specific goods. A school voucher is a payment the government makes to a parent, or an institution on a parent's behalf, to be used for a child's education expenses.

Abstract of Dissertation Presented to the Graduate School
of the University of Florida in Partial Fulfillment of the
Requirements for the Degree of Doctor of Philosophy

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August 2007

Chair: R. Craig Wood
Major: Educational Leadership

State and federal court decisions have been divided over the constitutionality of school voucher programs that include religious schools. In the absence of a uniform national standard, these court decisions provided mixed messages to policymakers concerning what constitutes permissible public aid to religious schools. In *Zelman v. Simmons-Harris*, the U. S. Supreme Court held that the Ohio Pilot Project Scholarship Program, as implemented in the Cleveland Voucher Program, does not violate the Establishment Clause of the U. S. Constitution by providing state funds to religious schools. The Court held that the program was neutral with respect to religion, and "provide[d] assistance directly to a broad class of citizens who, in turn, direct[ed] government aid to religious schools wholly as a result of their own genuine and independent private choice."

The purpose of the study was to trace the school voucher movement in the United States, specifically examining the Ohio Pilot Project Scholarship Program and subsequent legal challenges that culminated in the U. S. Supreme Court's *Zelman v. Simmons-Harris* decision. The study highlighted policy trends the Court found persuasive in *Zelman*. The research summarized the U. S. Supreme Court Establishment Clause standards with regard to direct public aid for religious schools, traced the shift in U. S. Supreme Court Establishment Clause

doctrine, summarized indirect public aid for religious schools, and described pertinent judicial decisions the Court found applicable in *Zelman*. A review of litigation was presented pertaining to the Cleveland Voucher Program which led directly to the U. S. Supreme Court decision in *Zelman v. Simmons-Harris*. The study reviewed school voucher legislation since the *Zelman* decision. To discover central issues, traditional legal research methods were used to examine and analyze the permissible use of publicly funded vouchers in support of religious schools.

CHAPTER 1
INTRODUCTION

Educational reform, particularly in low-income urban areas, has been a priority public policy issue since the 1960s.[1] Urban elementary and secondary public schools face an array of challenges (i.e., governance issues, desperate financial circumstances, unsatisfactory student achievement, poorly maintained or dangerous facilities, inexperienced teachers, high student mobility, and a lack of consensus regarding educational reform strategies).[2] Traditionally, public school student assignments are based on resident locations that result in schools that are economically and racially homogeneous.[3] This has been the case for urban public schools that are highly segregated, both racially and economically.[4]

This residential geography affects the type of public school education children receive and what they learn about life in American society.[5] For the most part, suburban families have the ability to make class-related choices by their financial ability to buy or rent homes in expensive areas with good schools while families of poor, mostly minority children have little real choice

[1] Title IV of the *Civil Rights Act* of 1964, 42 U.S.C. 2000c, Pub. L. 88-352, July 2, 1964, 78 Stat. 241, authorized grants and loans for school districts and higher education institutions in transitioning into desegregation; *Economic Opportunity Act* of 1964, 42 U.S.C. § 2701 *et seq*., Pub. L. 88-452, Aug. 20, 1964, 78 Stat. 508, created compensatory education programs (i.e., Head Start); Title I of the *Elementary and Secondary Education Act of 1965*, 20 U.S.C. 6301 *et seq*., Pub. L. No. 89-10, title I, § 1001, created grants for educational programs at the state and local levels to financially assist schools with high concentrations of poor children; and the *Bilingual Education Act of 1968*, 20 U.S.C. § 7401, Pub. L. 90-247, mandated public schools to provide bilingual education programs through Title VII of the *Elementary and Secondary Education Act of 1965*, 20 U.S.C. 7424.

[2] Jonathan Kozol. *Savage Inequalities: Children in America's Schools*. New York: Crown Publishers, 1991.

[3] *See* James S. Coleman. "Schools and the Communities They Serve." *Phi Delta Kappan*, April 1985: 527-532.

[4] Gary Orfield. *Schools More Separate: Consequences of a Decade of Resegregation*. Cambridge, MA: The Civil Rights Project, Harvard University, 2001. Available at http:civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (last visited Feb. 2, 2007).

[5] Charles Glenn. "Parent Choice and American Values in Public Schools by Choice: Expanding Opportunities for Parents, Students, and Teachers." In *Public Schools by Choice*, Joe Nathan, ed. St. Paul, MN: The Institute for Learning and Teaching, 1989, 47; Jonathon Kozol, *Savage Inequalities: Children in America's Schools*. New York: Crown Publishers, 1991.

where they will live. Too often attending the neighborhood school places poor children into schools populated entirely of other poor children.

Various educational reforms have been proposed,[6] some reforms have even been shown to have a positive effect,[7] but in general, the piecemeal approach to educational reform has not resulted in enduring and comprehensive improvement in urban public schools.[8] One controversial solution to the desperate needs of urban public schools is to change the way school systems are governed through school choice.[9] In theory, school choice reforms, which include charter schools and school vouchers, are dedicated to improving the quality of education. Increased educational options are made available to parents of children enrolled in public schools and thereby make public schools more directly accountable to parents for educational outcomes.

Educational policy in the United States is a complex system of decision-making that focuses on the critical question of how public education should be governed, and by whom. In order to understand the role of public participation in education and educational policy, it is first necessary to note the respective roles of the federal, state, and local government in public education. Currently, legislatures at both the federal and state level are active in creating educational policy.[10]

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[6] *See* i.e., Back-to-Basics curricula, teacher professional development, class-size reduction, raised graduation requirements, comprehensive school reform, high-stakes testing, abolition of social promotion, site-based management, and innumerable reading and math programs.

[7] *See* Geoffrey D. Borman, Robert E. Slavin, Alan Cheung, Anne Chamberlain, Nancy Madden, and Bette Chambers. "The National Randomized Field Trial of Success for All: Second-Year Outcomes." *American Educational Research Journal* 42 (4), 673-696. (April, 2005). Available at http://www.successforall.org/_images/pdfs/SFA_RE_Year2_Outcomes.doc (last visited Feb. 2, 2007).

[8] Frederick Hess. *Spinning Wheels: the Politics of Urban School Reform*. Washington, D.C.: Brookings Institution Press, 1999.

[9] Carl Krueger and Todd Ziebarth, "No Child Left Behind Policy Brief: School Choice." Education Commission of the States, April 2002. Available at http://www.ecs.org/clearinghouse/35/21/3521.pdf (last visited Feb. 26, 2007).

[10] Frances C. Fowler. *Policy Studies for Educational Leaders*. New York: Prentice-Hall Inc., 2000.

Although there is no mention of education in the U. S. Constitution, the federal government's role dates back to 1787 at which time it initiated financing education within the territories.[11] In 1819, the U. S. Supreme Court confirmed the authority of the Federal government[12] to support educational programs by allowing funds to be spent for "the general welfare."[13] The number of programs and funding appropriated for education greatly increased in the 1960s.[14] Since then federal courts routinely support congressional acts that establish conditions under which states can obtain funding for educational purposes.[15]

Upon challenge of legislation, the courts have played a major role in defining important educational policy issues.[16] As early as the 1860s, "the law was used to justify public education, to compel attendance,[17] and to establish a structure for its financing and governance."[18] The impetus for increased governmental influence on educational policy was illustrated in the U. S.

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[11] Northwest Ordinance, July 13, 1787, 1 Stat. 51; (National Archives Microfilm Publication M332, roll 9); Miscellaneous Papers of the Continental Congress, 1774-1789; Records of the Continental and Confederation Congresses and the Constitutional Convention, 1774-1789, Record Group 360; National Archives. Available at http://ourdocuments.gov/doc.php?flash=false&doc=8# (last visited Feb. 2, 2007). The sixteenth section in each township was reserved for the maintenance of public schools also revenue created by selling a portion of each township in the new states would go to fund public education; *See also* Morrill Act, 7 U.S.C. 301 *et seq*., July 2, 1862, ch. 130, 12 Stat. 503. The Morrill Act provided federal funds to establish land-grant colleges and state universities.

[12] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[13] U. S. Const. art. I, § 8, cl. 1. "The Congress shall have Powers to lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the Common Defense and General Welfare of the United States."

[14] *See* Title I of the *Elementary and Secondary Education Act of 1965*, 20 U.S.C. 6301 *et seq*., Pub. L. No. 89-10, title I, § 1001, which created grants for educational programs at the state and local levels.

[15] *See* Family Education Rights to Privacy Act, 20 U.S.C. 1232; Individuals with Disabilities Education Act 20 U.S.C. 1400 *et seq.*; and Title IX, Education Amendments of 1972, 20 U.S.C. 1681.

[16] Joel Spring. *The American School: 1642-1996, 4th ed*. New York: McGraw-Hill, 1997; David B. Tyack, Thomas James, and Aaron Benavot. *Law and the Shaping of American Public Education: 1785-1954*. Madison, WI: University of Wisconsin Press, 1987.

[17] Massachusetts adopted the first compulsory school attendance laws in 1852 and by 1918 all states had enacted compulsory school attendance laws.

[18] Mark G.Yudof, Betsy Levin, and David L. Kirp. *Educational Policy and the Law*, 4th ed. Belmont, CA: Wadsworth Group/Thomson Learning, 2002, xi.

Supreme Court landmark decision *Brown v. Board of Education*.[19] Congress followed this decision with legislative efforts to ensure equal educational opportunities for minorities,[20] women,[21] and students with special needs.[22]

In the 1960s and early 1970s, Congress created a number of federal initiatives to achieve equal educational opportunity and equity in the states.[23] As a result, state legislatures and local boards of education struggled to pay for federally required programs. State and local officials were pressured to implement policies which altered their management responsibilities.

New federalism, which involved the federal government providing block grants to the states for education, became popular in the 1980s and 1990s. This national policy once again shifted responsibility back to state and local legislators, administrators, and judges who re-emerged as the primary sources of school reform initiatives. Another appealing feature of the block grant approach to federal assistance was the prospect of simplifying federal programs. For an example, during the Reagan Administration the federal government created Chapter 2 of the Education Consolidation and Improvement Act of 1981,[24] which was a block grant that combined more than forty smaller education programs.

In 1983, the influential education report of the Reagan administration, *A Nation at Risk*,[25] created the perception of a failing public school system and thus changed the goals of public

[19] 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

[20] Title IV of the *Civil Rights Act* of 1964, 42 U.S.C. 2000c, d.

[21] Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

[22] Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*.

[23] *See* Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c, d; Education for All Handicapped Children Act of 1975, 20 U.S.C. 1400 *et seq*., Pub. L. 94-192, Nov. 29, 1975, 89 Stat. 773.

[24] 20 U.S.C. Sec. 3801 *et seq*., Pub. L. 97-35, title V, subtitle D (§5551 *et seq*.), Aug. 13, 1981, 95 Stat. 463.

[25] U. S. Department of Education. *A Nation at Risk: The Imperative for Educational Reform*, a report of the National Commission on Excellence in Education. Washington, DC: U. S. Government Printing Office, 1983. The

education. Concerns regarding student achievement replaced equity concerns in policy agendas[26] and sparked the present period of intense school reform, which calls for higher academic standards and privatization. Inconsistent results from these reforms (i.e., standards-based reforms, governance reforms) have made it clear that educational change is a slow process [27]and that its ultimate success or failure is still unclear.[28]

In 1994, Congress passed the *Goals 2000: Educate America Act*,[29] with the intent that "all students can learn and achieve to high standards and must realize their potential if the United States is to prosper."[30] As a result of the first education summit involving the President and the National Governors' Association in 1989,[31] this legislation aimed to establish common goals for the improvement of public schools throughout the nation. A new focus on achievement grew from the bipartisan opinion that too many students were not achieving (by either perceived or actual deficits) at levels necessary for success in the global economy.[32] Immediately, efforts to

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commission warned the "educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and as a people."

[26] Mark G. Yudof et al., *Educational Policy and the Law*, 4th ed. Belmont, CA: Wadsworth Group, 2002, 773.

[27] Richard F. Elmore and Milbrey W. McLaughlin. *Steady Work: Policy, Practice, and the Reform of American Education.* Santa Monica, CA: RAND Corporation, 1988; David Tyack and Larry Cuban. *Tinkering Toward Utopia: A Century of Public School Reform.* Cambridge, MA: Harvard University Press, 1995.

[28] Helen F. Ladd and Janet S. Hansen, eds. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999, 18.

[29] *Goals 2000: Educate America Act*. 20 U.S.C. § 5801 *et seq*., Pub. L. 103-227, Mar. 31, 1994, 108 Stat. 125-191, 200-211, 265-280.

[30] *Id*. at § 301(1).

[31] Helen F. Ladd and Janet S. Hansen, eds. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999, 15.

[32] *See* Milton Friedman, *Capitalism and Freedom*. Chicago, IL: University of Chicago Press, 1962; John E. Coons and Stephen D. Sugarman, *Education by Choice: The Case for Family Control*. Berkeley, CA: University of California Press, 1978; John E. Chubb and Terry M. Moe, *Politics, Markets, and America's Schools*. Washington, DC: Brookings Institution, 1990; John E. Coons and Stephen D. Sugarman, *Scholarships for Children*. Berkeley, CA: Institute of Governmental Studies Press, 1992; Myron Lieberman, *Public Education: An Autopsy*. Cambridge, MA: Harvard University Press, 1993; Amy Stuart Wells, *Time to Choose: America at the Crossroads of School Choice Policy*. New York, NY: Hill & Wang, 1993; Peter W. Cookson Jr., *School Choice: The Struggle for the Soul*

improve public schools were attempted by most states.[33] School choice in the form of charter schools and vouchers were considered an alternative to promote change and achieve desired national goals. Many reforms were proposed, and adopted, but few stirred as much controversy as publicly funded vouchers for use at private schools.

During the presidencies of Lyndon Johnson,[34] Richard Nixon,[35] Ronald Reagan,[36] George H. W. Bush,[37] and William J. Clinton,[38] school choice as a policy concept was a topic of interest.[39] This trend has continued during the presidency of George W. Bush with the passage of the No Child Left Behind Act of 2001(NCLB) which established public school choice into

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of American Education. New Haven, CT: Yale University Press, 1994; David Berliner and B.J. Biddle, *The Manufactured Crisis: Myths, Fraud, and the Attack on America's Public Schools*. Reading, MA: Addison-Wesley, 1995; Kevin B. Smith and Kenneth J. Meier, *The Case against School Choice: Politics, Markets, and Fools*. Armonk, NY: M. E. Sharpe, 1995; Bruce Fuller and Richard F. Elmore, eds., *Who Chooses? Who Loses? Culture, Institutions, and the Unequal Effects of School Choice*. New York, NY: Teachers College Press, 1996; and Andrew J. Coulson, *Market Education: The Unknown History*. New Brunswick, NJ: Transaction Publishers, 1999.

[33] *See* Matthew D. Fridy, "What Wall? Government Neutrality and the Cleveland Voucher Program," 31 *Cumb. L. Rev.* 709, 2001. Fridy quoted Senator Ted Kennedy of Massachusetts: "…Secretary Riley pointed out that today, just 8 months after the 'Goals 2000 Educate America Act' was signed into law, 44 States are designing, from the bottom up, a better education system for the next century." 141 Cong. Rec. S1877-01 (1995).

[34] President Johnson's Economic Opportunity Act of 1964 established the Office of Economic Opportunity which proposed a school voucher experiment (Alum Rock). Available at http://www.pfaw.org/pfaw/dfiles/file_228.pdf (last visited Feb. 26, 2007).

[35] *Id*. President Nixon formed the Presidential Commission on School Finance which proposed "parochiaid."

[36] *See* Public Papers of the Presidents of the United States: Ronald Reagan. Washington, DC: Office of the Federal Register, 1987,128, 153. The Reagan administration attempted to convert Chapter One funds for disadvantaged students into individual vouchers.

[37] President Bush endorsed three proposals: the "Educational Excellence Act of 1989," which allotted $230 million to fund choice scholarships and experiments in 1989. *See* Stedman, James B. and Wayne Clifton Riddle. *The "Educational Excellence Act of 1989"*: The Administration's Education Proposal, CRS Report for Congress. Washington, D.C.: Congressional Research Service; America 2000, a similar program in 1991 and the Federal Grants for State and Local "GI Bills" for Children, a $500 million program of $1,000 scholarships for middle and low-income students to attend the public, private, or religious school of their choice. *See* John T. Woolley and Gerhard Peters. *The American Presidency Project.*Santa Barbara, CA: University of California, 1992. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=21259. (last visited June 26, 2007).

[38] President Clinton's endorsement was limited to public school choice. *See* "Address Before a Joint Session of the Congress on the State of the Union, 1997." *The American Presidency Project*. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=53358. (last visited June 26, 2007).

[39] *See* Michael Mintrom. *Policy Entrepreneurs and School Choice.* Washington, D.C.: Georgetown University Press, 2000, 182 ; Alex Molnar. "Educational Issues Series : School Choice. " Teaching and Learning, 1996. Available at http://www.weac.org/resource/nov96/vouchers.htm (last visited Feb. 26, 2007).

federal law.[40] This legislation reauthorized and expanded the Elementary and Secondary Education Act, first enacted in 1965.[41] NCLB mandates that if a school failed to make adequate annual progress for three consecutive years, disadvantaged students would become eligible to use Title I funds (approximately $1,500 per child) to enroll in a higher-performing public or private school, or to receive supplemental educational services from a provider of choice.[42] Parents with a child enrolled in a school identified as under-performing have the option to transfer their child to a better-performing public school or public charter school in the same district. Most controversial in this proposed plan was the voucher program. As the bill proceeded through Congress, the voucher provision for private schooling was defeated and removed from the bill.[43]

School Vouchers Defined

The contemporary idea of school vouchers was introduced by economist Milton Friedman as an educational reform in the 1950s.[44] In his book, *Free to Choose: A Personal Statement*,[45] he advocated:

> One way to achieve a major improvement, to bring learning back into the classroom, especially for the currently most disadvantaged, is to give all parents greater control over

[40] No Child Left Behind Act of 2001, 20 U.S.C. 6301 et seq. (Pub. L. No. 107-110, Jan. 8, 2002, 115 Stat. 1425). Available at www.ed.gov/policy/elsec/leg/esea02/index.html (last visited Feb. 26, 2007).

[41] *Elementary and Secondary Education Act* of 1965 (ESEA) created grants for educational programs at the state and local levels (i.e., Title I of the Elementary and Secondary Education, 20 U.S.C. 2701 *et seq*.).

[42] 20 U.S.C. § 6316(b)(1)(E).

[43] *See* Lizette Alvarez. "House Democrats Block Voucher Provision," *New York Times*, May 3, 2001. Available at http://www.nytimes.com/2001/05/03/politics/03EDUC.html (last visited Feb. 26, 2002); Helan Dewar. "Senate Passes Major Revamp of Education," *Washington Post*, June 15, 2001. Available at http://washingtonpost.com/ac2/wp-dyn/A3404-2001Jun14?language (last visited Feb. 26, 2002); Lizette Alvarez. "Senate Approves Legislation to Penalize Failing Schools," *New York Times*, June 15, 2001. Available at http://www.nytimes.com/2001/06/15/politics/15EDUC.html (last visited Feb. 26, 2002).

[44] Milton Friedman. "The Role of Government in Education." In *Economics and the Public Interest*, Robert A. Solow, ed. Piscataway, NJ: Rutgers University Press, 1955.

[45] Milton and Rose Friedman. *Free to Choose: A Personal Statement*. Orlando, FL:Harcourt, Inc, 1980.

> their children's schooling, similar to that which those of us in the upper-income classes now have. Parents generally have both greater interest in their children's schooling and more intimate knowledge of their capacities and needs than anyone else….One simple and effective way to assure parents greater freedom to choose, while at the same time retaining present sources of finance, is a voucher plan.[46]

Tax-funded school vouchers are "a particular way of distributing government assistance."[47] They are a tuition grant or scholarship issued by a public entity (federal, state, or local school district) that entitles eligible recipients to a specified type and level of educational service.[48] "Voucher programs can be established either through an act of a state legislature or the U. S. Congress or by a public referendum."[49] Vouchers are "always a means to an end, not an end in itself."[50]

In a school voucher system, funding is allocated to families who choose to spend the dollars at private schools. The dollar value of a voucher is usually equal to, but may be less than, the state average per pupil expenditure, and may cover either the partial or full cost of private school tuition.[51] The funding may flow either directly to the family or to the eligible school.

Examples of the wide range of school choice alternatives are private schools, home schools, magnet schools, inter-district and intra-district open enrollment programs, dual/concurrent enrollment programs, charter schools, tuition tax credits and deductions, and

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[46] *Id*. at 160.

[47] Urban Institute. "Vouchers: Looking Across the Board." Available at http://www.urban.org/pubs/vouchers/intro.html.

[48] David H. Monk. *Educational Finance: An Economic Approach*. New York: McGraw-Hill Publishing Company, 1990, 72.

[49] Marcus Egan. *Keep Public Education Public: Why Vouchers Are a Bad Idea*. Alexandria, VA: National School Boards Association, 2003, 3. Available at http://www.nsba.org/site/docs/32500/32418.pdf (last visited Feb. 4, 2007).

[50] *See* C. Eugene Steuerle. "Common Issues for Voucher Programs." In *Vouchers and the Provision of Public Services*. Washington, D.C.: The Brookings Institution Press, 2000. C. Eugene Steuerle, Van Ddorn Ooms, George Peterson, Robert D. Reischauer, eds.

[51] Education Finance Task Force White Paper, American Institutes of Research Draft Handbook Update Project, 12/19/00. Available at http://nces.ed.gov/forum/pdf/finance_voucher.pdf

private voucher programs.[52] Though different operationally, these options share one critical feature: the student and family select the school and type of education.[53]

School vouchers represent a great divergence in practice from the traditional governmental managed public education system funded by local and state taxes. Public schools are funded based on enrollment and other special factors, such as poverty level of students and number of students with special needs. The intent of school vouchers is to reform the fundamental organization of the school system. Three essential characteristics distinguish vouchers from conventional schools.[54]

First, there is the element of admission by choice.[55] Parents have control in deciding where their children attend school rather than school districts using centralized student assignments by zoning patterns.[56] Whether the participating school has a choice in admitting students depends on the details of the law authorizing the voucher program.

Second, market accountability distinguishes vouchers from conventional schools.[57] Market accountability allows parents to choose the best schooling option for their child. Private schools only receive public funding if parents enroll their children. Therefore, the market mechanism of

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[52] Üllik Rouk, Joyce Pollard, and Julia Guzman. "Vouchers: Yea or Nay." *Insights on Education Policy, Practice, and Research*, Number 12, 1-13. September 2000. Available at http://www.sedl.org/policy/insights/n12/

[53] Mary Anne Raywid. "The Mounting Case for Schools of Choice." In *Public Schools by Choice: Expanding Opportunities for Parents, Students, and Teachers*. Joe Nathan, ed. St. Paul, MN: The Institute for Learning and Teaching, 1988, 13-40.

[54] Brian P. Gill, P. Michael Timpane, Karen E. Ross, and Dominic J. Brewer, *Rhetoric Versus Reality: What We Know and What We Need to Know About Vouchers and Charter Schools.* Santa Monica, CA: RAND, 2001. Available at http://rand.org/publications/MR/MR1118/MR1118.ch1.pdf (last visited Mar. 24, 2007).

[55] *Id*. at 9.

[56] Jennifer Lutzy. "School Vouchers: Necessary Choice or Downfall of Public Education Ideals." *CYD Journal: Community Youth Development*. Volume 2, No. 3. Summer 2001. Available at http://www.cydjournal.org/2001Summer/lutzy_0613.html (last visited Mar. 24, 2007).

[57] Brian P. Gill, et al. at 9.

parental choice is the primary accountability factor for private schools while conventional public schools are accountable to the school district's direct governance.

Third, the most distinctive difference between privately operated voucher schools and conventional public schools is autonomy. Voucher schools are publicly funded but operate outside the direct control of a governmental agency.[58] Although voucher programs may include conventional public schools or secular private schools, the majority of those participating are religious private schools. Privately operated voucher schools possess broader control over curriculum, instruction, staffing, budget, and internal organization than conventional public schools. The intent of voucher schools is to create opportunities for parents, teachers, nonprofit organizations, and private businesses to operate publicly funded schools outside the direct control of the local school district.

School vouchers are a funding mechanism and not an instructional reform. According to Andrew J. Rotherham, director of education policy at the Progressive Policy Institute, "vouchers have no direct connection with teaching, curriculum, or other in-school factors that influence student learning."[59] There is no accountability in place for documenting increased student achievement.[60] These are important issues to explore, but are beyond the scope of this research.

Federal Constitutional Provisions

The religion clauses of the First Amendment to the U. S. Constitution state "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[61]

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[58] *Id.* at 10.

[59] Andrew J. Rotherham. "Putting Vouchers in Perspective: Thinking About School Choice after Zelman v. Simmons-Harris." July 2, 2002. Available at http://www.ppionline.org/documents/Ed_vouchers_702.pdf (last visited June 25, 2007).

[60] *See* Joe Nathan. *Charter Schools: Creating hope and opportunity for American education.* San Francisco: Jossey-Bass Publishers, 1996.

[61] U.S. Const., amend I.

The religion clauses tolerate neither governmentally established religion nor governmental interferences with religion. The First Amendment is binding on the states through the 14th Amendment,[62] which requires that people within a state receive equal protection of the laws.

Initially, courts assumed that the religion clauses in the U. S. Constitution required state and federal government to remain strictly neutral in matters of religious theory, doctrine, and practice. In the 1980s and 1990s, the U. S. Supreme Court acknowledged that government accommodation of religion is a more appropriate position than strict neutrality.[64] In accommodating religion, or not accommodating it, government recognizes that there are necessary interrelationships between itself and religion. For example, churches receive community police and fire protection;[65] churches are exempt from state and federal property taxes;[66] and government may not include religious prayer or instruction in public schools.[67] To decide whether government accommodation of religion is required, permitted, or prohibited, government and courts must reconcile the inevitable tension between the Establishment Clause and the Free Exercise Clause, and between separation of church and state and neutrality toward religion.

When voucher legislation and enactment has been challenged, the central federal question has been whether school voucher plans permitting participation of religious schools violate the

[62] U. S. Const., amend. XIV.

[64] *Mueller v. Allen*, 463 U.S. 388 (1983). The Court upheld the constitutionality of a Minnesota program allowing tax deductions for educational expenses to all parents, whether their children attend public school or private; *Witters v. Wash. Dept. of Servs. For the Blind*, 474 U.S. 481 (1986). The Court upheld a vocational rehabilitation program that paid the tuition for a student who was blind at a religious school because he freely chose to attend a religious school; *Zobrest v. Catalina Foothills Sch. Dist*., 509 U.S. 1 (1993). The Court held that the presence of a sign language interpreter in a religious school did not violate the Establishment Clause.

[65] *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).

[66] *Walz v. Tax Commision of the City of New York*, 397 U.S. 664 (1970).

[67] *Engel v. Vitale*, 370 U.S. 421 (1962).

Establishment Clause, which prohibits government action "respecting an establishment of religion."[68] The U. S. Supreme Court is the final arbiter of whether a law or action is in conflict with the U. S. Constitution and its Amendments.[69]

State Constitutional Provisions

State supreme courts may interpret state constitutions as providing different or greater constraints upon government action than those founded in the U. S. Constitution. Therefore, state constitutional provisions that are analogs to the Establishment Clause are relevant to this research. However, state constitutional challenges to voucher programs are not limited to the issue of religious establishment. Some state constitutions have specific provisions that address educational funding, public money, and uniformity. Several states have enacted school voucher programs, allowing vouchers to be used at religious schools. All of these existing voucher programs were legislatively adopted as opposed to state ballot initiatives.[70]

Milwaukee Parental Choice Program

In 1990, Wisconsin enacted the Milwaukee Parental Choice Program (MPCP),[71] the country's first school voucher plan. The program, implemented as part of the state's omnibus budget, was not passed as a stand alone policy by the Wisconsin Legislature. The purpose of MPCP was to "determine if it is possible to improve, through parental choice, the quality of

[68] U. S. Const., amend I ("Congress shall make no law respecting an establishment of religion,,,.").

[69] U. S. Const., art. III. "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

[70] *See* California Proposition 38 (2000), 71 percent of voters voted no to the school voucher initiative; Michigan Proposal 00-1 School Choice (2000), 69 percent of voters voted no to school voucher initiative; Washington (1996) 64 percent of voters voted no to the school voucher initiative; California (1993) 70 percent of voters voted no to the school voucher initiative; Colorado (1992) 67 percent of voters voted no to school voucher initiative; Michigan Proposal of 1978 was defeated at the polls by a margin of 74.3 percent to 25.7 percent. Available at http://www.crcmich.org/PUBLICAT/2000s/2000/rpt331.pdf); and Maryland (1972) 55 percent of voters voted no to school voucher initiative.

[71] Wis. Stat. § 119.23 (1995-96).

education in Wisconsin for children of low-income families."[72] Initially, eligible low-income families were allowed to use public funds to send their children (kindergarten-12th grade) enrolled in Milwaukee public schools to secular private schools. Participating private schools were required to comply with state anti-discrimination and health and safety laws, provide minimum hours of instruction in specified curriculum areas, and undergo state academic performance reviews.

In 1995, the Wisconsin Legislature, as part of the state's budget process, expanded the program to include religious schools.[73] An opt-out provision in the law allowed families to request that their children be excluded from a school's religious activities.[74] The expanded program limited eligibility to Milwaukee families with incomes at or below 175 percent of the federal poverty level pursuant to guidelines of the federal Office of Management and Budget.[75] The number of participants was not to exceed 15 percent of students enrolled in the Milwaukee public schools. In order to avoid sending public funds directly to religious schools, the state-issued tuition check was made payable to parents of participating students, and was mailed to the schools for parents to endorse. The school voucher equals the tuition cost at a private school up to the amount of per pupil state aid. Participating private schools use a lottery to assign students if student applications exceed available spaces.

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[72] *Davis v. Grover*, 480 N.W.2d 460, 462 (Wis. 1992).

[73] Wis. Stat. Ann. § 119.23 (2001).

[74] *Id*. § 119.23(7) (c) (2001). The intent is to prohibit any religious school from proselytizing students.

[75] *Id*. § 119.23(2)(a)(1) (2001). For further example of how this looks operationally *see* Russ Kava. "Milwaukee Parental Choice Program: Informational Paper 29." Madison, WI: Wisconsin Legislative Fiscal Bureau, 2005. Available at http://www.legis.state.wi.us/lfb/Informationalpapers/29.pdf. For 2004-05, 175 percent of the federal poverty level is $21, 698 for a family of two; $27,319 for a family of three; and $5,621 for each additional family member above three.

The Milwaukee program was immediately challenged under the Wisconsin and U. S. Constitutions. In *Davis v. Grover,*[76] the first legal challenge was based on Wisconsin's constitutional prohibition against private or local bills, the establishment of uniform school districts, and the public purpose doctrine, which requires that public funds be spent only for public purposes. At this time, only secular private schools were eligible to participate in the Milwaukee program so religion was not an issue in this case. The Wisconsin Supreme Court held that the Milwaukee voucher program did not violate on any of the three issues under review.[77]

In *Miller v. Benson,*[78] parents of low-income students participating in the MPCP filed suit against the Wisconsin Superintendent of Public Instruction. The parents claimed that the exclusion of religious private schools from MPCP violated the Free Exercise Clause of the First Amendment, applied to the states by the Fourteenth Amendment.[79] The district court held that using a voucher to pay tuition at nonreligious and religious schools violated the Establishment Clause of the First Amendment.[80] The parents appealed and while the appeal was pending the state enacted a new version of the MPCP minus the word "nonsectarian" in the description of tuition at religious schools.[81] The Attorney General of Wisconsin filed a motion arguing that the case was moot because the amendment gave plaintiffs exactly what they sought - equal treatment

[76] 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

[77] *See id*. at 501; *Id*. at 462; *Id*.

[78] 878 F. Supp. 1209 (E.D. Wis. 1995).

[79] *See id*. at 1212.

[80] *See id*. at 1216.

[81] *See* Wis. Stat. Ann. § 119.23 (2001).

of secular and sectarian private schools under the state's funding program. The court dismissed the litigation as moot.[82]

The amended MPCP was challenged as a violation of the Establishment Clause and the Equal Protection Clauses of the U. S. Constitution and several provisions of the Wisconsin Constitution in circuit court. In 1996, the Wisconsin Supreme Court considered the case, split three-three over the constitutionality of the amended MPCP, and the case was remanded to the Dane County Circuit Court for further proceedings.[83] In January 1997, the circuit court held that the amended MPCP violated the religious benefits and compelled support clauses of the Wisconsin Constitution,[84] the public or local bill prohibitions of the Wisconsin Constitution,[85] and the public purpose doctrine as the program applied to sectarian schools. The circuit court also found that the amended MPCP did not violate the uniformity clause of the Wisconsin Constitution[86] or the public purpose doctrine as it applied to the nonsectarian private schools. Since the circuit court invalidated the amended MPCP on state constitutional grounds, the court did not address the question whether the program violated the Establishment Clause. The Wisconsin Court of Appeals affirmed the lower court ruling, and the state appealed to the Wisconsin Supreme Court.

In *Jackson v. Benson,*[87] the Wisconsin Supreme Court reversed the lower court rulings and upheld the constitutionality of the voucher program under the U. S. and Wisconsin Constitutions.

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[82] *Miller v. Benson*, 878 F. Supp. 1209, 1216 (E.D. Wis. 1995), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995).

[83] *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (1996) (per curiam).

[84] Wis. Const. art. I, § 18

[85] Wis. Const. art. IV, § 18

[86] Wis. Const. art. X, § 3

[87] 218 Wis.2d 835, 578 N.W.2d 602, *cert. den.*, 525 U.S. 480 (1998).

The court ruled that the amended Milwaukee Parental Choice Program (MPCP) does not violate the federal Establishment Clause or state provisions of the Wisconsin Constitution.[88] Justice Donald W. Steinmetz, writing for the majority, found "the amended MPCP does not violate the Establishment Clause because it has a secular purpose, it will not have the primary effect of advancing religion, and it will not lead to excessive entanglement between the state and participating sectarian private schools."[89] The Wisconsin Supreme Court relied on *Agostini v. Felton*[90] (a U. S. Supreme Court ruling permitting Title I aid to disadvantaged parochial-school students at religious schools) to uphold the program's inclusion of religious schools.[91] When considering the state establishment clause, the Wisconsin Supreme Court found the amended MPCP does not violate the "benefits clause"[92] or the "compelled support clause"[93] of the Wisconsin Constitution. The decision was appealed to the U. S. Supreme Court but the Court declined to review *Jackson v. Benson*.[94] The result of the decision is that participation of religious schools in MPCP was constitutional and remains the law in Wisconsin.

[88] Wis. Const. art. I § 18.

[89] *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[90] 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997).

[91] In 1995, as part of the biennial budget bill, the Wisconsin legislature amended the original MPCP (Wis. Act 27, §§ 4002-4009). The legislature removed from Wis. Stat. § 119.23(2)(a) the limitation that participating private schools be "nonsectarian" (Wis. Act 27, § 4002).

[92] Wis. Const. art. I, § 18 (Wisconsin's equivalent of the Establishment Clause of the First Amendment) provides: "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

[93] Wis. Const. art. I, § 18 provides "nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent…"

[94] *Jackson v. Benson*, 119 S.Ct. 466, 142 L.Ed.2d 419 (1998), noting that Justice Breyer would have granted certiorari.

Florida Opportunity Scholarship Program

In 1999, Florida enacted the Opportunity Scholarship Program (OSP),[95] the country's first statewide voucher program as part of Governor Bush's "A+ Education Plan. The purpose was "to provide enhanced opportunity for students to gain the knowledge and skills necessary for postsecondary education, a career education, or the world of work."[96] As the first program to tie private school choice with public school accountability, the voucher program was designed for students in failing public schools statewide and was not limited to low-income families. Annually, all Florida public schools receive a letter grade based on student academic performance.[97] A failing public school is defined by the state as one that receives two "F" grades in any four-year period.[98]

Children who attended a failing public school were eligible to use the voucher to attend a private or higher performing public school. A student who attended a higher performing public school could use the voucher through the twelfth grade. A student who attended a private school could use the voucher until the student returned to public school, completed a K-8 private school program, or began high school and the school to which the student was assigned received at least a "C" grade.

Participating private schools were required to accept the voucher amount as full payment of a student's tuition and fees regardless of the school's actual tuition rate. A lottery was used to select students if student applications exceed available spaces. Voucher schools were obligated

[95] Fla. Stat., Title XVI, Chapter 229.0537 (2001); Fla. Stat., Title XLVIII, Chapter 1002.38 (2005).

[96] Fla. Stat. § 229.0537(1) (1999).

[97] Fla. Stat., Title XLVIII, Chapter 1008.34 (2005).

[98] *Id*. at Chapter 1008.33 (2005).

to adopt control and accountability measures to ensure that the state's obligation to educate is satisfied.

In the 1999-2000 school year, 143 students out of approximately 900 eligible students chose vouchers.[99] Fifty-eight enrolled in participating private schools and eighty-five enrolled in other higher-performing public schools. Of the five participating private schools in the 1999-2000 school year, four were religious and one was secular.[100]

In 1999, shortly after legislation was enacted school voucher opponents claimed the OSP violated the Establishment Clause of the First Amendment to the U. S. Constitution, as well as three provisions of the Florida Constitution.[101] While the litigation was preceding opponents withdrew the First Amendment claim.[102] The first count, also referred to as the "No-Aid Provision," declared that the OSP violated Article 1, Section 3 of the Florida Constitution that states that"…no revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." The second count, also referred to as the "Uniformity Clause," asserted that the OSP violated Article IX, Section 1 of the Florida Constitution which requires Florida to adequately provide for "a uniform, efficient, safe, secure and high quality system of free public schools that allows students to obtain a high quality

[99] Diana M. Pietrowiak and Daniel C. Jacobsen. "School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee." Washington, D.C.: United States General Accounting Office, 2001. Available at http://www.gao.gov/new.items/d01914.pdf (last visited July 9, 2007).

[100] *Id*.

[101] The following groups filed suit: People For the American Way Foundation, National Education Association (NEA), American Jewish Congress, and other organizations.

[102] This claim was dismissed after the U. S. Supreme Court ruled in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) that a similar voucher program (Cleveland Scholarship and Tutoring Program) did not violate the U. S. Constitution.

education…"[103] The third count involved Article IX, Section 6, which required the State School Fund be used only to support public schools.[104]

In March 2000, the Leon County Circuit Court[105] held that the scholarship program violated the Florida Constitution's guarantee of an adequate system of free public schools.[106] The state appealed an action that, under Florida law, automatically stayed the court's ruling. The students currently in the voucher program were permitted to finish out that school year in their voucher schools. The First District Court of Appeals for the State of Florida heard oral arguments on August 16, 2000, and reversed the trial court on October 3, 2000.[107] The court held that Florida's school voucher program did not violate Article IX, Section 1 of the Florida Constitution. The court reasoned "nothing in Article IX, Section I clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary."[108] The court added that "Article IX, Section I does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system."[109] The First District declined to address the other constitutional issues raised and remanded the case back to the trial court level for further proceedings.[110]

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[103] The Leon County Circuit Court (trial court) held that the OSP did violate Article IX, Section 1. The First District Court of Appeal subsequently reversed the ruling.

[104] This claim was of little significance since the OSP was funded from other state sources.

[105] *Bush v. Holmes*, 767 So.2d 668, 672 (Fla. Dist. Ct. App. 2000).

[106] Fla. Const. art. IX, § 1.

[107] *Bush v. Holmes*, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000).

[108] *Id*. at 675.

[109] *Id*.

[110] *Id*. at 677.

In 2001, school voucher opponents appealed the appellate court's rejection of the "uniformity" argument to the Florida Supreme Court.[111] The court declined to review sending the case back to the trial court for resolution of the other federal and state constitutional issues. In August 2002, the Leon County Circuit Court judge ruled Florida's voucher program unconstitutional, citing Florida's constitutional prohibition against direct or indirect public funding of a religious institution, referred to as the no-aid provision.[112] The state appealed the ruling to the First District Court of Appeals. The decision was stayed and the program was allowed to continue during appeal.

In August 2004, the First District Court of Appeals upheld the circuit court's ruling that the Opportunity Scholarship Program violated the 'no-aid' provision in a 2-1 decision.[113] The state moved for a rehearing of the case by the full fifteen member appellate court.

In November 2004, the full First District Court of Appeals, in an 8-5-1 decision, held that the Opportunity Scholarships Program violated the no-aid provision of the Florida Constitution.[114] The court concluded that the Florida Constitution is more restrictive than the Establishment Clause in the U. S. Constitution.[115] Therefore, even if the Florida voucher program were constitutional under the Establishment Clause as interpreted in *Zelman*, it conflicts with Florida Constitution's ban against using public money to aid religious institution.[116] The

[111] *Holmes v. Bush*, 790 So. 2d 1104 (2001) (unpublished table decision).

[112] *Holmes v. Bush*, No. CV99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002).

[113] *Bush v. Holmes*, 29 Fla. L. Weekly D1877 (Fla. 1st Dist. Ct. App., Aug. 16, 2004).

[114] *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st Dist. Ct. App. 2004) (Holmes II).

[115] *Id.*, at 346-47 and footnotes 7 and 8 at 67-68 (discussing the history of "Blaine Amendments" in state constitutions, which provide greater restrictions than the Establishment Clause; "The primary purpose of these amendments to the various state constitutions was to bar the use of public funds to support religious schools" also noting that Florida's "no-aid" provision is more restrictive than most states' Blaine Amendments).

[116] *Id.*

court reviewed the legislative history of Florida's constitution and stated that the legislative intent was to impose greater restrictions than the Establishment Clause.[117]

Relying on the no-aid provision, the court rejected successful arguments made on behalf of voucher programs in other states.[118] The court rejected voucher proponents argument that the OSP did not aid religious schools because it "gives parents and guardians a choice as to which school to apply a tuition voucher."[119] The court held that "[b]ecause of the broad language of the no-aid provision, prohibiting the use of state revenues 'directly or indirectly' in aid of secular institutions, such an indirect path for the aid does not remove the OSP from the restrictions of the no-aid provision."[120]

Additionally, the court rejected the argument that the OSP does not benefit religious schools or only provides incidental benefits.[121] The majority held that Opportunity Scholarships were unconstitutional aid to religious schools, rather than aid to students who chose where to use their scholarships. The court deemed that the "entire education mission of these schools, including the religious component, is advanced and enhanced by the additional, financial support

[117] *Id.*, at 349-10.

[118] *See Jackson v. Benson,* 578 N. W.2d at 876-884. The Wisconsin Supreme Court held that paying aid directly to parents rather than the sectarian school satisfied the no-aid (i.e. the "benefits clause") provisions of the state constitution.; *Bush v. Holmes*, 886 So. 2d at 359-360. The court noted that "[t]he Florida no-aid provision…is drafted to be substantially more restrictive than the 'benefits clause' in the Wisconsin Constitution. First, the Wisconsin provision lacks a prohibition on both direct and indirect benefits. Second, the prohibition in the Wisconsin Constitution does not expressly bar benefit to all 'sectarian institutions,' as does Florida's no-aid provision."

[119] *Bush,* at 350-351.

[120] *Id.*

[121] *See Jackson* at 879. The Wisconsin Supreme Court noted that "[t]he crucial question, under [Wisconsin's Establishment Clause], as under the [federal] Establishment Clause, is 'not whether some benefit accrues to a religious program, but whether its principal or primary effect advances religion." The court concluded that Wisconsin's voucher program does not have the primary effect of advancing religion.

received through operation of the OSP."[122] Therefore, the OSP was unconstitutional because religious schools received state aid.

In conclusion, Judge William Van Nortwick, writing for the majority, stated, "If Floridians wish to remove or lessen the restrictions of the no-aid provision, they can do so by constitutional amendment."[123] As required by law, the court certified the constitutional question for further review by the Florida Supreme Court as one involving a question of "great public importance."[124]

On June 7, 2005, the Florida Supreme Court heard oral arguments on the constitutionality. The justices' questions concentrated on issues relating to the No-Aid Provision[125] and the education provision.[126] On January 5, 2006, the Florida Supreme Court held the Opportunity Scholarship Program (OSP) violated the language under Article IX of the Florida Constitution.[127] Chief Justice Barbara Pariente, writing for the majority, stated the OSP violated Florida's Constitution's "uniformity" clause:

> It diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children. This diversion not only reduces money available to the free schools, but also funds private schools that are not "uniform" when compared with each other or the public system. Many standards imposed by law on the public schools are inapplicable to the private schools receiving public monies. In sum, through the OSP the state is fostering plural, nonuniform systems of education in direct violation of the constitutional mandate for a uniform system of free public schools.[128]

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[122] *Bush v. Holmes* at 351.

[123] *Id.*

[124] *Bush v. Holmes*, 886 So. 2d at 344.

[125] Fla. Const. art. I, § 3.

[126] Fla. Const. art. IX, § 1.

[127] *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

[128] *Id.* at 398-408.

The court found it unnecessary to rule regarding the separation of church and state in the Florida Constitution question after finding OSP violates the public education provision. The Florida Supreme Court ruling is final and cannot be appealed to the U. S. Supreme Court since no federal issues were involved. At this time, it is unclear whether the OSP ruling offers a legal basis for challenging Florida's other voucher program.

The John M. McKay Scholarship for Students with Disabilities Program[129] is a separate scholarship program and distinct from the Opportunity Scholarship Program. Parents of a public school student with a disability who are dissatisfied with their child's progress may request and receive from the state a scholarship for their child to enroll in another Florida public school or an eligible private school. Students with special needs include those who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospitalized or homebound, or autistic.

McKay Scholarship recipients must have spent the prior school year in attendance at a Florida public school. The parents must also obtain admission of their child to an eligible private school and notify in writing the school district of the request for a scholarship at least sixty days prior to the date of the first scholarship payment. Parents may choose, as an alternative, to enroll their child with special needs in and transport their child to a public school in an adjacent school district which has available space and has a program with the services agreed to in the student's individual education plan (IEP).

The maximum scholarship granted for an eligible student with disabilities is the calculated amount equivalent to the base student allocation in the Florida Education Finance Program

[129] Fla. Stat., Title XVI, Chapter 229.05371(2001).

(FEFP) multiplied by the appropriate cost factor for the educational program that would have been provided for the student in the district school to which he or she was assigned, multiplied by the district cost differential. In addition, a share of the guaranteed allocation for exceptional students is added to the calculated amount. The scholarship amount is the lesser of either the calculated amount or the amount of the private school's tuition and fees. Any assessment fee required by the participating private school may be paid from the total amount of the scholarship.

In 1999, the initial pilot program capped participation at 5 percent of eligible enrollment. In 2000, the program was expanded statewide and the cap was removed. Senate Bill 1180, passed and signed in 2001, significantly expanded the program. In 2004-2005, 15,910 students received scholarships averaging $6,117 per student to attend participating nonpublic schools. In 2004-2005, 703 nonpublic schools participated in the program. At this time, the McKay Scholarship has not been challenged in the courts.

Town Tuitioning Voucher Programs

For over 100 years informal voucher plans have existed in rural Vermont[130] and Maine.[131] Town tuitioning allows families living in districts that do not own and operate elementary or secondary schools to send their children to public or non-sectarian private schools in other areas of the state, or even outside the state, using funds provided by the child's home district. The

[130] Vt. Title 16, Part 2, Chapter 21, § 822 which permits public school students residing in a school district without a public high school to attend private high schools, with the student's resident district paying the student's high school "tuition."

[131] Me. Free High School Act of 1873, which allowed public school students residing in a town without a public high school to attend private high schools at state and district expense; Sinclair Act of 1957, which undertook a systematic program of school consolidation aimed at reducing the number of smaller school districts throughout the state.

primary intent of these voucher programs is to comply with the state's duty to provide a free public education.[132]

Since 1869, Vermont statutes have authorized school districts to provide high school education to its students by paying tuition for nonpublic schools selected by their parents.[133] In 1961, the Vermont Supreme Court held that the inclusion of religious schools in voucher program violated the First Amendment but not the state constitution.[134] In 1994, the Vermont Supreme Court overruled the prior decision and concluded that the Establishment Clause of the U. S. Constitution was not a constitutional barrier to public funds, in the form of tuition, being paid to religious schools.[135] In 1999, the Vermont tuition program was challenged on both state and federal grounds in *Chittenden Town School District. v. Department of Education*.[136] In June 1999, the Vermont Supreme Court held that providing tuition assistance for religious schools would violate the Vermont Constitution.[137] The court based its decision on the Compelled Support Clause of the Vermont Constitution which pertained to state support of religious worship.[138] The crucial factor in the Vermont decision was the wording of the state constitution: "[N]o person ought to, or of right can be, compelled to attend any religious worship, or erect or support any place of worship. . . "[139] Employing that clause, the Court held that the tuition

[132] Me. Rev. Stat. tit. 20-A, § 1001.

[133] *See* 16 Vt. Stat. Ann. §§ 822 and 824.

[134] *Swart v. South Burlington Sch. Dist.*, 122 Vt. 177, 167 A.2d 514 (1961).

[135] *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 641 A.2d 352 (1994).

[136] *Chittenden Town School District v. Vermont Department of Education* (97-275); 169 Vt. 310; 738 A.2d 539 (1999).

[137] *Id.* at 546.

[138] Vt. Const. Ch. I., art. 3.

[139] *Id*.

program must be limited to nonreligious schools. But the Court stated, "we conclude that the Chittenden School District tuition-payment system, with no restrictions in funding religious education, violates (the Vermont Constitution). The major deficiency in the . . . system is that there are no restrictions that prevent the use of public money to fund religious education . . . We decide only that the current statutory system, with no restrictions on the purpose or use of the tuition funds violates Article 3."[140] In December 1999, the U. S. Supreme Court, without comment, declined to hear an appeal from families of students seeking to attend religious schools.[141]

In Maine, families who reside in districts without a public school may send their children to a public school in a neighboring school district or receive reimbursement from the town for the cost of tuition to send their children to approved nonreligious private schools within or outside of the state.[142] The town is partially or fully reimbursed for the expense by the state. The maximum allowable reimbursement is $6,305.[143] If a private school enrolls 60 percent or more publicly funded students, the school must participate in the statewide assessment program, which includes administration of the Maine Educational Assessment.

Religious school tuition was funded by local and state government until the law was changed in 1983. Public funds may still be used to pay for busing, textbooks, and special educational services at religious schools. The legislation excluding religious schools was challenged in two separate cases, one suit in state courts of Maine and one in federal court.[144] In

[140] *Chittenden*, at 562-563.

[141] *Andrews v. Vermont Department of Education*, 120 S.Ct. 626 (1999).

[142] Me. Rev. Stat. Ann. Tit. 20-A 117 § 2951.

[143] Me. Rev. Stat. Ann. Tit. 20-A 219 § 5804 (tuition allowed for elementary school students) and Me. Rev. Stat. Ann. Tit. 20-A 219 § 5806 (tuition allowed for secondary school students).

[144] *Bagley v. Raymond Sch. Dept*., 728 A.2d 127 (Me. 1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999).

both suits students' families challenged the exclusion of religious schools as a violation of the Free Exercise Clause of the Establishment Clause and the Equal Protection Clause under the Fourteenth Amendment. In both decisions the respective courts determined that the program's exclusion of religious schools does not violate the Free Exercise Clause or the Equal Protection Clause of the U. S. or Maine Constitution. In October 1999, the U. S. Supreme Court, declined to review the ruling, allowing the lower court's decisions to stand.[145]

Ohio Pilot Project Scholarship Program

In 1995, the Ohio legislature enacted the Ohio Pilot Project Scholarship Program to help failing school districts.[146] The program provided up to $2,250 in tuition and up to $360 in tutorial aid to low-income families. The recipient families must reside in a school district that is under a federal court order giving the state superintendent of public instruction administrative control of that district.[147]

The program allows private schools including religious schools in the affected district and public schools in adjacent districts to participate.[148] Participating private schools can charge lowest-income families a maximum $250 tuition co-payment.[149] The program allows other families to receive 75 percent of private school tuition up to a maximum of $1,875, without any co-payment limit, and tutoring aid if the scholarship fund is not exhausted.[150]

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[145] *Bagley v. Raymond Sch. Dept*., 120 S. Ct. 364, 145 L. Ed .2d 285 (1999); *Strout v. Albanese*, 120 S.Ct. 329, 145 L.Ed.2d 256 (1999). *Bagley v. Raymond Sch. Dept*., 728 A.2d 127 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999).

[146] Ohio Rev. Code Ann. §§ 3313.974 – 3313.979 (Baldwin Supp. 2001).

[147] *Id*. at 3313.975 (A).

[148] *Zelman v. Simmons-Harris*, 536 U.S. at 645.

[149] *Id.* at 647.

[150] *Id.*

At the time of enactment, the Cleveland Municipal School District was the lone district under a federal court order giving district control to the state superintendent. The court issued the order in response to an acutely high student failure and dropout rate discovered as a result of a district performance audit. In the 1999-2000 school year, 3,700 of Cleveland's 75,000 students participated in the voucher program, 82 percent of participating schools were religiously affiliated, 96 percent of participating students attended private religious schools, and 60 percent of participating students came from families living below poverty level.[151]

The fifty-six participating private, mostly religiously affiliated schools are prohibited from discriminating based on religion and must agree not to teach hatred of any individual or group based on religion. The state superintendent, who is appointed by the state board of education composed of both elected and appointed members, is authorized to establish admission rules and procedures for participating schools. The voucher program is part of a broader Cleveland school district initiative to improve school choice that includes community and magnet schools which receive two and three times the amount of funding available to private schools participating in the voucher program.

The Cleveland voucher program permitted religious schools to participate from its inception and as a result the program's constitutionality was immediately challenged. During the state court phase of litigation, the Ohio Supreme Court upheld the constitutionality of the Cleveland program under the "Compelled Support" Clause of the Ohio Constitution, as well as under the Establishment Clause.[152] Before being appealed to the U. S. Supreme Court, the Sixth Circuit Court of Appeals struck down the Cleveland voucher program as a violation of the

[151] *Id.*

[152] *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

federal Establishment Clause.[153] In 2001, the State of Ohio requested that the U. S. Supreme Court review the case. The Bush administration via the Attorney General filed an amicus brief supporting the request.

On September 25, 2001 the U. S. Supreme Court agreed to hear the *Zelman v. Simmons-Harris* case.[154] The Court accepted three petitions for review but consolidated them into a single case.[155] The Cleveland voucher program, which enrolls approximately 3,700 students from kindergarten through eighth grade, continued to operate pending the appeal process. On June 27, 2002, the U. S. Supreme Court held that the Ohio Pilot Project Scholarship Program does not violate the Establishment Clause.

Tuition Tax Credits/Deductions

Education tax credits/deduction are policy instruments that use the tax system to support school choice. In general, tax credit programs either allow families to receive a direct tax deduction for private school tuition or allow individuals and/or corporations to receive a tax deduction for contributions to private scholarship organizations that in turn subsidize all or part of a student's private school tuition.

Educational tax credits are a direct reduction in tax liability for educational expenditures. The amount of the credit and which educational expenses qualify is determined by the state legislature. Tax deductions allow for certain educational expenses to be deducted from taxable income prior to the calculation of tax liability.

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[153] *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

[154] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[155] *Id*.

The following seven states: Arizona,[156] Florida,[157] Illinois,[158] Iowa,[159] Minnesota,[160] Pennsylvania,[161] and Rhode Island,[162] offer tax credits for private school tuition or tax deductions for education expenses or contributions to scholarship programs. These tax credit or deduction programs for private school tuition have been adopted through legislative acts and not through ballot initiatives. Many school choice proponents view these options as more able to withstand legal challenges. Arizona's tuition tax credit program was upheld by the state Supreme Court and in federal courts despite a strict Blaine amendment to the state Constitution.[163]

The Arizona Tuition Tax Credit Law was signed into law in 1997.[164] Residents of Arizona who donate to charitable organizations that provide scholarships to private or religious schools receive a nonrefundable tax credit of up to $500 for individuals and $625 for married couples. Additionally, residents of Arizona who pay fees for, or donate to, public school extracurricular activities or character education programs, receive a nonrefundable tax credit of up to $200 for individuals and up to $250 for married couples.[165] The amount of credit is equal to the amount paid or donated and may be carried forward for no more than five consecutive years. This

[156] A.R.S. § 43-1089.

[157] Fla. Stat. § 220.187.

[158] 35 ILCS 5/201 (m).

[159] I.C.A. § 422.12(2).

[160] Minn. Stat. § 290.0674.

[161] 24 P.S. §§ 20-20005-B, 20-2006-B, & 20-2007B.

[162] R.I. Gen. Laws § 44-62-1.

[163] *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (Ariz. 1999), *cert. denied* 528 U.S. 810 (1999).

[164] A § 43-1089.

[165] A § 43-1089.01.

contribution cannot directly benefit the taxpayer's own child, and tuition organizations cannot designate the money to benefit students of only one private or parochial school.

The Florida Corporate Tax Credit Scholarship Program was enacted in 2001.[166] The purpose of the statute was to encourage private, voluntary corporate contributions to nonprofit scholarship-funding organizations that help low-income families provide educational choice for their children. A business may not contribute more than $5 million to any single organization and the credit may not exceed 75 percent of the tax due for the taxable year. The initial $50 million cap on the total credit granted throughout the state was raised to an $88 million cap in the 2003 legislative session. At least 5 percent of the total statewide amount authorized for the tax credit is reserved for small business contributions. Students who are eligible for free or reduced lunches are qualified to receive a scholarship of as much as $3,500. At least 75 percent of scholarship funding given for use in a nonpublic school must be used for tuition. The remainder may be used for textbooks or transportation. Scholarships of as much as $500 may be given for use in a public school for transportation expenses to a school outside of the district in which the student resides. In 2004-2005, 10,473 students received scholarships to attend any of the 973 participating nonpublic schools through the corporate tax credit donations.

The Illinois Education Expense Credit was signed into law in 1999.[167] It permits a parent, adoptive parent, foster parent, or legal guardian to claim a tax credit of up to 25 percent of education-related expenses, such as tuition, books, and lab fees that exceed $250. The maximum amount of credit is $500, for educational expenses in any public, private secular or religious school, or home school that satisfies the Illinois School Code and is in compliance with Title VI

[166] Fla. Stat. § 220.187 (2001).

[167] 35 Ill. Comp. Stat. 5/201 (m).

of the Civil Rights Act of 1964. A bill was introduced in January 2005 to increase the existing education expense tax credit from $500 to $1000 per year but, it failed to pass.

In June 2006, Iowa Governor Tom Vilsack signed into law the School Tuition Organization Tax Credit Act.[168] The Iowa legislature approved Senate File 2409 which established an income tax credit equal to 65 percent of cash contributions made to the nonprofit School Tuition Organization (STO).[169] The donor cannot designate the contribution to be used for the direct benefit of any dependent or any other student. If the tax credits received by the donor exceed their tax liability for the year, the credit may be carried forward for up to five years. School tuition organizations must be exempt from federal taxation, prepare annual reviewed financial statements, and must allocate at least 90 percent of the annual revenue in tuition grants. These organizations must only provide tuition grants to eligible students who are Iowa residents and must not limit tuition grant availability to only students of one school.

For students to be eligible for the tuition grants, household income cannot exceed more than three times the federal poverty level. A qualified school must meet the state accreditation standards and follow the provisions of the federal Civil Rights Act of 1964 and Iowa's civil rights laws. The tax credits are limited to a $2.5 million impact on the general fund for tax year 2006 and $5million for tax year 2007 and each year thereafter. In 2004, Governor Vilsack vetoed a similar tax credit bill that contained no restrictions on the impact of the credit to the state general fund. According to guidelines set by the legislature, the Department of Revenue determines the amount of the tax credit certificates that school tuition organizations are able to provide its donors.

[168] I.C.A. § 422.12(2).

[169] Senate File 2409. Available at http://coolice.legis.state.ia.us/Legislation/Enrolled/SF2409.html

The Minnesota Education Credit was enacted in 1997 and it was expanded in 1999 to increase the maximum income level for eligibility.[170] Currently, families with an income no greater than $33,500 may receive a tax credit for 75 percent of educational expenses, excluding tuition, as much as $1,000 per student with a $2,000 family maximum. There is a reduced maximum credit for families with income falling between $33,500 and $37,500. The credit may be claimed by families that do not pay income tax. Qualifying expenses include: tutoring by a qualified instructor, transportation fees, academic books and materials for nonreligious school classes, musical instrument rental fees, music lessons by a qualified instructor, computer hardware and educational software as much as $200, after school enrichment programs, and summer camp tuition focused on academics or the fine arts. The education deduction may be used for expenses exceeding the credit.

In 2001, the Pennsylvania General Assembly passed House Bill 996 which amended Public School Code of 1949 (P.L. 30, No.14) and established the Educational Improvement Tax Credit (EITC).171 This legislation permitted corporations to receive a tax credit of 75 cents for every dollar invested up to $200,000 or 90 percent of the donation if the corporation donation was a two year commitment.172 Under this legislation, the total tax credits distributed by the state in any year could not exceed $30 million ($20 million to nonprofit scholarship organizations to fund public or private school scholarships and the remaining $10 million for innovative educational programs in public schools). In 2003, Governor Rendell signed Act 48 (Senate Bill 180) which included the creation of a preschool scholarship program173 and House

[170] Minn. Stat. 290.0674 (2005).

[171] Act 4 (H.B. 996, P.N. 1878, Session 2001).

[172] 24 P.S. § 20-2005-B(a-b).

[173] 24 P.S. § 20-2003 (B) (C) (1-3).

Bill 564 that included additional money for the EITC.174 In 2005, House Bill 628 established a statewide cap of $44 million in tax credits permitted in a fiscal year ($29.3 million for donations to school tuition organizations to fund nonpublic schools and $14.7 million for educational improvement organizations and programs for public schools).175

In June 2006, the newest tax credit law was passed by the Rhode Island General Assembly and signed into law by Governor Donald Carcieri.[176] The Tax Credits for Contributions to Scholarship Organizations takes effect as of January 1, 2007. Rhode Island businesses may make donations to scholarship organizations that provide low-income students tuition assistance grants to attend qualified nonpublic schools. The business tax credit is not to exceed $100,000 in any tax year. The total amount of credits the state allows is capped at $1 million.[177] Each scholarship organization must be a nonprofit and must allocate at least 90 percent of its annual revenue to scholarships. The business donor may not designate the scholarship to a specific student or school. The bill does not prescribe the amount of the scholarship but does require the scholarship organization to report to the state the number of scholarships distributed per school, the dollar range of scholarships, and a description of all criteria used by the organization in determining to whom scholarships were awarded.[178]

[174] 24 P.S. § 20-2001 (A).

[175] 24 P.S. § 20-2003 (A) (1).

[176] H7120A Article 24 Sub A as amended (§ 44-62-1). Available at http://www.rilin.state.ri.us/BillText/BillText06/HouseText06/Article-024-SUB-A-as-amended.pdf

[177] *Id*.

[178] *Id*.

Statement of the Problem

The introduction of school voucher legislation has resulted in constitutional challenges in many states.[179] State and lower federal courts have reached conflicting decisions on the constitutionality of school voucher programs that include religious schools. At the federal district court level, vouchers were found to violate the Establishment Clause.[180] But three state supreme courts upheld school vouchers, or similar programs, in the face of Establishment Clause challenges.[181] In the absence of a uniform national standard, these court decisions provided mixed signals to policymakers concerning what constitutes permissible public aid to religious schools. The dividing line between permissible and impermissible aid was not clearly defined.

Prior to accepting the *Zelman v. Simmons-Harris*[182] case, the U. S. Supreme Court Justices declined to hear appeals arising from litigation concerning other school choice program appeals.[183] Considerable attention was focused on *Zelman* because the Court's rationale would have significant implications for other states considering any type of state aid to religious schools. If, in reaching the *Zelman* decision, the U. S. Supreme Court had concluded that the Ohio plan unconstitutionally advances religion, the national school voucher movement might

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[179] *See Strout v. Albanes*, 178 F.3d 57 (1st Cir. 1999); *Bush v. Holmes*, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000); *Bagley v. Raymond Sch. Dist.,* 728 A.2d 127 (Me. 1999); *Jackson v. Benson*, 578 N. W.2d 602 (Wis. 1998).

[180] See *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 730, 741-42 (N.D. Ohio 1999), *stay granted*, 528 U.S. 983 (1999); *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 864-65 (N.D. 1999), *aff'd*, 234 F.3d 945, 961 (6th Cir. 2000), *reh'g and reh'g en banc denied*, Nos. 00-3055, -3060, -3063, 2001 U.S. App. LEXIS 3344, at *1 (6th Cir. Feb. 28, 2001); *Miller v. Benson*, 878 F. Supp. 1209, 1216 (E.D. Wis. 1995), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995); *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999), *cert denied*, 528 U.S. 931 (1999).

[181] See *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211, 214 (Ohio 1999); *Kotterman v. Killian*, 972 P.2d 606, 616 (Ariz. 1999), *cert. denied*, 528 U.S. 810 (1999), and *cert. denied*, 528 U.S. 921 (1999).

[182] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[183] *See Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998); *Bagley v. Raymond Sch. Dept*., 728 A.2d 127 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999); & *Andrews v. Vermont Department of Education*, 120 S.Ct. 626 (1999).

have been severely stalled. Alternatively, if the Court upheld the Ohio voucher plan as it has, this could encourage other states to experiment with various types of voucher systems.[184]

The U. S. Supreme Court held that the Cleveland Scholarship and Tutoring Program (CSTP) did not violate the Establishment Clause of the U. S. Constitution because the program was enacted for a valid secular purpose, is neutral with respect to religion, permits participation of various types of schools, and provides assistance directly to a broad class of citizens who direct aid to religious schools as a result of their independent and private choice. As a result of the *Zelman* decision the federal constitutional roadblock for legislatures that want to pass voucher legislation was removed, but this does not rule out challenges under state constitutions. Approximately three dozen states have establishment clauses that are more restrictive than the federal guarantee, with some constitutional clauses specifically banning states from giving money to religious schools. State constitutions also contain language guaranteeing uniform public education, and vouchers could be challenged on that ground. In the future, the constitutionality of school vouchers will be litigated state by state.

Purpose of the Study

The purpose of this study was to trace the school voucher movement in the United States, specifically examining the Ohio Pilot Project Scholarship Program and subsequent legal challenges that culminated in the U. S. Supreme Court's *Zelman v. Simmons-Harris* decision. First, policy trends supporting the school voucher movement were examined to determine which policy arguments the U. S. Supreme Court found persuasive in *Zelman*. Secondly, this research summarized U. S. Supreme Court Establishment Clause standards with regard to public aid for religious schools, traced the shift in U. S. Supreme Court Establishment Clause doctrine, and

[184] *See* Barbara Miner. "Supreme Court Debates Vouchers." In Rethinking Schools Online. 2002. Available at http://www.rethinkingschools.org/special_reports/voucher_report/vdeba.shtml

described all pertinent judicial decisions the Court found applicable in *Zelman*. Next, a review of litigation was presented pertaining to the Cleveland Voucher Program. Finally, this study reviewed recent state school voucher legislation involving the constitutionality of state restrictions of voucher programs, and decisions on voucher and voucher-related programs that were handed down since the *Zelman v. Simmons-Harris* decision.

Significance of the Study

Legislative actions at the federal and state levels have proposed a variety of voucher plans that have resulted in legal challenges. The legal battles center on the constitutionality of the use of public funds to support religious schools. The *Zelman v. Simmons-Harris* case provides educational policymakers with a current understanding of the federal dividing line between permissible and impermissible public aid to religious schools. This analysis enables educational leaders to interpret, anticipate, and effectively plan for changes in urban public schools resulting from school vouchers that permit public aid to religious schools.

Method of the Study

In order to determine the constitutional principals the U. S. Supreme Court applied in *Zelman v. Simmons-Harris*, traditional legal research methods were utilized to examine and analyze the permissible use of publicly funded vouchers to support religious schools. Legal research can be characterized as a "systematic inquiry into the law that can be described as a form of historical-legal research that is neither qualitative nor quantitative."[185]

Legal research involves a systematic investigation of legislation and court cases in order to interpret those laws and cases and arrive at understanding.[186] This study relies heavily upon legal

[185] Charles J. Russo. "Legal Research: The 'Traditional' Method." In David Schimmel, ed., *Research That Makes a Difference: Complimentary Methods For Examining Legal Issues in Education*. Topeka, KS: National Organization on Legal Problems of Education, 1996, 33.

[186] *Id*. at 33-34.

authorities. The main types of legal authorities are primary and secondary. Primary authorities are further divided into two categories: mandatory and persuasive.

Primary mandatory authority for the decisions of the U. S. Supreme Court is the U. S. Constitution, and for the purposes of this study, specifically the Establishment Clause of the First Amendment. Persuasive authorities for the U. S. Supreme Court are all of its prior decisions in cases interpreting the Establishment Clause. These decisions form the precedent for later decisions.[187]

Primary authority states the law and is issued by a branch of the government or a governmental body.[188] Sources of primary authority can be statutes, executive decrees, administrative regulations, or judicial opinions. Statute comes from the Latin term *statutum* that means, "it is decided." Enacted at the state or federal level, statutes create law and represent the legislators' belief of the current will of the people. They are subject to review by the judiciary to determine the constitutionality of each statute, if challenged.[189]

Next, the research identified federal and state court cases involving the Ohio school voucher legislation between 1995 and 2002. Case law is judge-made or enunciated by the courts and differs from laws that originated in the legislature.[190] In legal research, mandatory primary sources of authority are those that a court must follow, while persuasive authorities are those that a court may follow. For example, U. S. Supreme Court decisions are mandatory authority for

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[187] *See* Henry Campbell Black. *Black's Law Dictionary*, St. Paul, MN.: West Publishing Company, 2004. Stare decisis is defined as adherence to precedent. When the court has made a declaration of legal principle, it is the law until changed by a competent authority.

[188] C. L. Kunz, D. Schmedemann, M. Downs, and A. Bateson. *The Process of Legal Research: Successful Strategies* 4th ed. Aspen Publishers, 1996.

[189] Kern Alexander and M. David Alexander, *American Public School Law* 2 5th ed. St. Paul, MN.: West Publishing Company, 2000.

[190] *Id*.

lower federal and all state courts in the United States, while decisions in one of the Federal Circuit Court of Appeals decisions would only be persuasive in other circuit courts.

Secondary authority is anything other than primary authority that a court could use as a basis for decision. Law reviews, educational articles, legal encyclopedias, and relevant citations from judicial decisions were consulted for commentaries and interpretation of the law. Relevant cases were identified through recognized legal research sources such as court reporters and *LexisNexis* computer searches.

Data Analysis

To determine the significance for such research, a search was made of school voucher legal issues. Once pertinent U. S. Supreme Court, federal, and state cases were identified, inductive analysis was used to analyze the precedence represented in case law. The legal issues were then subjected to comparative analysis. Such analysis compared similarities and differences in constitutionally permissible aid to religious schools to previous U. S. Supreme Court cases. The purpose was to determine "a consistent trend, a series of unique situations, or the beginning of a new direction."[191]

The Limitations

The scope of this study focused on the constitutionality of the Ohio Pilot Project Scholarship Program in the U. S. Supreme Court case of *Zelman v. Simmons-Harris.* This study analyzed only relevant cases in state court, federal courts, and U. S. Supreme Court decisions on constitutional issues affecting public aid to religious schools and vouchers.

This study was also limited to examining the legislation enacted, the litigation that led to and resulted from this legislation, and the implications for educational leaders. It was beyond the

[191] J. H. McMillan and S. Schumacher. *Research in Education: A Conceptual Introduction*. New York, NY: HarperCollins, 1989.

scope of this dissertation to explore the effectiveness of school voucher programs or their implications in terms of school finance.

The Delimitations

The delimitation of the study was that in researching existing publicly funded school voucher legislation, no attempt was made to examine pending publicly funded school voucher legislation. Additionally, no attempt was made to examine privately funded voucher programs because they function outside the public policy arena and do not use tax dollars or require direct involvement of federal, state, and local policymakers.

Organization of the Study

The opening chapter introduced school vouchers as an educational policy and presented an overview of existing public school voucher plans in the United States. It presented the organization and research methods used in this legal study. Chapter Two examined the policy trends behind the school voucher movement and presented leading policy arguments on both sides of the school voucher controversy in regards to the constitutionality of voucher programs that provide public aid to religious schools. Chapter Three provided a history of the U. S. Supreme Court's Establishment Clause jurisprudence, from *Everson v. Board of Education of Ewing Township*[192] to the *Mitchell v. Helms*[193] decision. Chapter Four described the Ohio Pilot Project Scholarship Program, traced the *Zelman v. Simmons-Harris* lawsuit through the federal and state courts to the U. S. Supreme Court, and summarized the U. S. Supreme Court opinion in *Zelman*. Chapter Five, the concluding chapter, briefly reviewed school voucher legislation at the federal and state level since the *Zelman* decision. The final chapter identified that school

[192] 330 U.S. 1 (1947).

[193] 530 U.S. 793 (2000).

vouchers as educational policy is the responsibility of the state legislature and state supreme courts. Recommendations for further study based on the research were also made.

CHAPTER 2
SCHOOL VOUCHERS AS PUBLIC POLICY

Introduction

Public elementary and secondary schools are never isolated from the rest of society. Trends in school reform generally occur in response to a particular societal need. This pressing need is typically expressed in a well-defined social movement that results in legislation or judicial decisions. Whether the social challenge is population change, technological advancement, national security, political shift, race relations, poverty, or social transformation, public schools are viewed as part of both the problem and the solution. Interaction with many other social institutions, such as the family, state, and economy, forces this to occur.

Historically, schools have been sites of struggle over national, state, and local politics, culture, and values. Frequently, federal legislation to ameliorate educational needs have preceded or have been accompanied by lawsuits challenging the adequacy of the education being provided to and, in some cases, denied to minority children,[1] children for whom English was a second language,[2] and children with disabilities.[3] School vouchers are controversial because this policy tool separates the functions of public primary and secondary education into the provision of schooling and financing schooling.[4] This chapter reviews the societal backdrops of educational trends that relate to the politics of school vouchers.

[1] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[2] *Lau v. Nichols*, 414 U.S. 563 (1974).

[3] *See Pennsylvania Association for Retarded Children v. Commonwealth*, 334 F.Supp. 1257 (E.D.Pa. 1971); *Mills v. Board of Education of the District of Columbia*, 348 F.Supp. 866 (D.D.C.1972).

[4] Harry Brighouse. *School Choice and Social Justice*. New York: Oxford University Press, 2000, 25.

This chapter examined literature linking school vouchers with the continuing struggle to improve education for all students, especially children in urban public schools.[5] It provides an historical perspective of the federal government's efforts to promote various school policies and ideologies that have led, in part, to the increased interest in school vouchers as a public policy tool. Additionally, this chapter reviewed the political rhetoric related to school vouchers and identifies the positions of various stakeholders.

Throughout history, the federal government has emphasized various national goals (i.e., educational equal opportunity, equity, excellence, or accountability) as national events and moods changed. In the decades since economist Milton Friedman first proposed school vouchers in the 1950s,[6] the pro-voucher movement has become a diverse group: Christian conservatives who support church-affiliated schools, free market proponents who believe competition will force public schools to improvement, and inner-city minority parents frustrated with the public schools in their neighborhoods. The stakeholders opposed to school vouchers have consistently been groups of public school advocates:[7] the American Civil Liberties Union,[8] the National Association for the Advancement of Colored People,[9] and the League of Women Voters.[10]

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[5] Circumstances in small rural school districts have not been conducive for school choice movement.

[6] Milton Friedman. "The Role of Government in Education." In *Economics and the Public Interest.* Robert A. Solow, ed. New Brunswick, N.J.: Rutgers University Press, 1955, 123-144.

[7] *See* National Education Association (NEA) arguments against school vouchers available at http://www.nea.org/vouchers/index.html; American Federation of Teachers (AFT) position on school vouchers available at http://www.aft.org/topics/vouchers/index.htm; Parent Teacher Association (PTA) opposes school vouchers available at http://www.pta.org/ia_pta_positions_1118872244156.html

[8] *See* American Civil Liberties Union arguments against school vouchers available at http://www.aclu.org/ReligiousLiberty/ReligiousLiberty.cfm?ID=7272&c=140

[9] *See* National Association for the Advancement of Colored People (NAACP) arguments against school vouchers available at http://www.naacp.org/inc/docs/education/education_resolutions.pdf

[10] *See* League of Women Voter arguments against school vouchers available at http://www.lwv.org/AM/Template.cfm?Section=Home&template=/CM/HTMLDisplay.cfm&ContentID=1798

Historical Perspective

Thomas Jefferson, a proponent of free public schools, believed education was crucial to a democracy. He stated, "Above all things I hope the education of the common people will be attended to, convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty."[11]

At America's founding, public schools were practically nonexistent. Some towns in New England had primary schools but most education was provided by privately paid tutors or in a handful of church-run schools.[12] Providing education for children was the responsibility of the parents, local churches, local officials, and philanthropic agencies.[13] Education, therefore, became a privilege for children of the wealthy with the curriculum being universally religious in nature.[14] Upon the adoption of the U. S. Constitution, in 1789, no mention of public education existed.

In colonial New England, communities established and maintained a decentralized system composed of "common" schools through the 1850s. School attendance was a parental decision and not compulsory. A combination of local taxes, tuition payments by parents, and donations funded the existing common schools, and curriculum reflected the values and religious sect (i.e., Quakers, Puritans) of the local community. Additionally, a wide array of private education, such as church schools, college preparatory academies, seminaries, dame schools, charity schools, and

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[11] Thomas Jefferson quote to James Madison, 1787 available at http://etext.lib.virginia.edu/jefferson/quotations/jeff1350.htm

[12] *See* Massachusetts School Law of 1647, which required a community of 50 or more families to hire a schoolteacher.

[13] Matthew J. Brouillette. *The Case for Choice in Schooling: Restoring Parental Control of Education*. Midland, MI.: Mackinac Center for Public Policy, 2001, 5.

[14] *See* Frederick Rudolph, ed. *Essays on Education in the Early Republic*. Cambridge, MA: Harvard Press, 1965, xvi-xvii; *see also* Ellwood P. Cubberely, ed. *Reading in Public Education in the United States*. Boston: Houghton Mifflin Co., 1934, 75-140.

private tutors existed. All schools were viewed as serving the public interest with no real differentiation between public and private schools.[15] All schools were eligible for local public funding. During colonial times "education emphasized parental responsibility and a limited government role."[16]

The Emergence of Government Schools

In the mid to late 1800s, America was inundated with large numbers of southern and eastern European immigrants. Simultaneously, the nation was transitioning from an agrarian to an industrial economy. An immediate need existed to educate and train immigrants to work in newly built factories. Public schools became the popular solution to these societal needs. Schools initiated "Americanization" programs in which the language and customs were taught.[17] Common school reformers (i.e., Horace Mann of Massachusetts, Henry Barnard of Connecticut, and Samuel Lewis of Ohio) emphasized the need for schools to teach republican virtues. Hard work, morality, and education for democratic citizenship were implemented through a non-denominational Protestant curriculum. Reformers in many states argued for increased state aid to local schools, establishment of a statewide professional education bureaucracy, licensing examinations, increased teacher pay, increased school terms, and the establishment of property taxation for school support.[18]

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[15] Rockne McCarthy, Donald Oppewal, Walfred Peterson, and Gordon Spykam. *Society, State and Schools: A Case for Structural Pluralism*. Grand Rapids, MI.: William B. Eerdmans Publishing Co., 1981, 80.

[16] Carl F. Kaestle. "The American Religious Experience: Public Education." In *Encyclopedia of American Social History, Volume 3*. Mary Kupiec Cayton, Elliott J. Gorn, and Peter W. Williams, eds. New York, New York: Scribner, 1993. Available at http://are.as.wvu.edu/scopedu.htm

[17] Joel Spring. *American Education*, Ninth Edition. New York: McGraw Hill, 2000.

[18] Carl F. Kaestle, *supra* note15.

The Common School Movement

Horace Mann, "the father of the American common school,"[19] was elected the first Secretary of the Massachusetts Board of Education in 1837. While Secretary for twelve years, Mann started a biweekly "Common School Journal" for teachers, wrote annual reports to the state legislature, and published articles and essays about education in newspapers and journals. He was a skilled public speaker and writer who developed arguments that appealed to the particular interests of different constituencies. When addressing industrials, Mann emphasized the importance of public schools in the development of an educated and moral work force and argued that supporting public education was an investment in the state's economy. In his *Eleventh Annual Report* of 1847, Mann proposed that education would make the nation prosperous and "redeem the state from social vices and crimes."[20]

When his audience was working people, Mann stressed the democratic purpose of public schools in the furtherance of social and economic equality. In his *Twelfth Annual Report* of 1848, Mann described public education as "the great equalizer of the conditions of men--the balance wheel of the social machinery."[21] He envisioned public schools educating students from all social classes together. Universal schooling would be the vehicle for social and economic mobility for students from lower socioeconomic classes. Students, by attending school, could gain the necessary skills and knowledge to better their social and economic status.

Mann and other educational reformers maintained that society had an obligation to educate other people's children by providing a centralized system of public schools supported by state

[19] *See* Lawrence A. Cremin, ed. *The Republic and the School: Horace Mann on the Education of Free Men*. New York: Teachers College Press, 1957; Jonathan Messerli. *Horace Mann: A Biography*. New York: Knopf, 1972.

[20] Lawrence A. Cremin, ed. *The Republic and the School: Horace Mann on the Education of Free Men*. New York: Teachers College, 1957, 79-80, 84-97. Available at http://usinfo.state.gov/usa/infousa/facts/democrac/16.htm

[21] *Id.*

and local funds. Mann contended that society's responsibility to transmit commonly held values to the next generation could be accomplished by providing a common educational experience that would shape children into respectable citizens. Common school supporters asserted that the virtues of good citizenship rested on a shared moral and religious foundation that was fulfilled by reading the King James Version of the Bible without commentary in public schools.[22]

Catholics and some Protestant denominations, Lutherans for example, argued that the reading of the King James Bible in public school was unacceptable.[23] At the time, the political majority favored the reading of the King James Bible in public schools. This left those families opposed to that practice to choose to remain or attend private parochial schools. When public funding was sought, Mann and others proposed that public funds be restricted to schools run and administered by the state, where a nonsectarian form of religion would be taught. During this period, the struggle for public funds for religious schools began and continues to this day.

Mann was a supporter of strong governmental control of education: what was taught in public school, how it was taught, and what resources could be used to teach, and who was allowed to teach. During this period of rapid urbanization and bureaucratization, public school systems became larger and more structured. Public schools were reflective of America's industrial nature by being structured top-down in industrial-era-management style. Two administrative roles that emerged were the superintendent and principal. In the late nineteenth century, as urban schools grew larger, principals became increasingly more full-time administrators. Professional superintendents were hired to oversee the whole system of public education.

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[22] Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 45 (1992).

[23] Lloyd P. Jorgenson. "The Birth of a Tradition," *Phi Delta Kappan*, June 1963,411.

Mann argued that common school attendance would prevent class division and produce a social value. Students of all socio-economic classes would be schooled together and that this would create mutual respect. Students would also be socialized in common political values, therefore guarding against political chaos. He stated that schools would disseminate basic principles of republican government necessary for citizens to remain free. These issues created a mission for public education and gave a significant role to government. The common school ideology maintained that "the public good could best be served by public, not private, education, because the moral and civic training of the young was the concern of all citizens, not just parents. For that reason, choices about education should be collective."[24]

The common school was the standard model for American public education by the 1890s, in part due to compulsory attendance laws.[25] Compulsory attendance legally requires children to attend public or private school and continues to provide the foundation for the American democratic process by producing educated citizens prepared to participate in self-government.[26] The compulsory education requirement "is premised on a number of asserted state interests including preparing the individual for citizenship and economic independence, inculcating values, and preserving the security of the state."[27] The majority of students attend public schools which are regulated by state and local policymakers; whereas, private schools and home schooling are characterized by significantly fewer regulations.

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[24] David Tyack. "Choice options: School choice, yes-but what kind?" *The American Prospect.* vol. 10 no.42, January 1, 1999-February 1, 1999. Available at http://www.prospect.org/print-friendly/print/V10/42/tyack-d.html

[25] *See* list of State Compulsory School Attendance Laws available at http://www.infoplease.com/ipa/A0112617.html

[26] *See* Amy Gutman. *Democratic Education*. Princeton: Princeton University Press, 1987; Jeffrey R. Henig. *Rethinking School Choice: Limits of the Market Metaphor*. Princeton: Princeton University Press, 1994; Michael Mintrom. *Policy Entrepreneurs and School Choice.* Washington, D.C.: Georgetown University Press, 2000.

[27] Mark G. Yudof et al., *Educational Policy and the Law*, 4th ed. Belmont, CA: Wadsworth Group, 2002, 121.

The Federal Role in Education

The federal government's role in education began with the passage of the Northwest Ordinance.[28] It was the first instance of federal aid for education. The trend continued with the subsequent passages of the Morrill Acts,[29] which were a result of growing demand for agricultural and technical education in the United States following the Civil War. The Office of Education was established by The Department of Education Act of 1867 and was transferred to the Department of the Interior as the Bureau of Education in 1869. Its primary function was to collect statistics and information about the condition of education in the country. The office had no power to enforce compliance in any educational matter. In 1939 the Bureau, by executive order, was transferred to the Federal Security Agency, which in 1953 was renamed the Department of Health, Education, and Welfare.[30] Modern school reform began with the creation of the Cabinet-level Department of Health, Education, and Welfare (HEW) in 1953.[31] The Bureau of Education of HEW was the first successful attempt of the federal government to directly influence public schools. Up until 1953, public schools had been considered the responsibility of state and local governments. In 1979, President Carter signed the Department of Education Organization Act, which created the Department of Education as a cabinet level department.[32]

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[28] *See* Northwest Land Ordinance of 1787. The sixteenth section in each township was reserved for the maintenance of public schools.

[29] Morrill Acts of 1862 and 1890 provided federal funds to establish land-grant colleges and state universities.

[30] Title 20 Chapter 48 Subchapter I§ 3401

[31] "Special Message to the Congress Transmitting Reorganization Plan 1 of 1953 Creating the Department of Health, Education, and Welfare, March 12, 1953," *Public Papers of the Presidents* (PPP) 1953 (Washington, D.C.: Government Printing Office, 1958-61), 28.

[32] Department of Education Organization Act of 1979, 20 U.S.C. 3401 *et seq*., Pub. L. 96-88, Oct. 17, 1979, 93 Stat. 668.

Typically, the federal government's role has been to identify educational issues of national importance and to provide federal financial assistance for categorical services to states. In addition, the federal government's attention focuses the nation on a particular educational concern, which then spurs state and local policymakers to address the same issue.[33]

Educational Trends in the 1950s

In the 1950s, the federal government became actively involved in setting national educational policy. The formation and growth of the school voucher movement, within that policy, was related to three specific events. First, the U. S. Supreme Court's landmark decision, *Brown v. Board of Education*[34] focused national attention on equal educational opportunity and equity. The *Brown* decision held that the Equal Protection Clause of the Fourteenth Amendment prohibits states from maintaining segregated public schools. The U. S. Supreme Court validated education as "the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."[35]

The *Brown* decision initiated social reforms that were a catalyst for the Civil Rights Movement in the 1960s and shifted education policy in an entirely new direction. Educational historians stated, "With that shift came a redefinition of education as a private good, protected by constitutional entitlement. National interest was defined as the aggregation of private interests."[36] Many viewed school vouchers as an alterative funding tool to obtain a private good (education).

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[33] Jack Jennings. "Title I: Its Legislative History and Its Promise." *Phi Delta Kappan*. Vol.81, No.7 (March 2000), 516-522.

[34] 347 U.S. 483, 74 S. Ct. 686 (1954).

[35] *Id*. at 492-493.

[36] Thomas Timar and David Tyack. *The Invisible Hand of Ideology: Perspectives from the History of School Governance*. Denver, Colo.: Education Commission of the States, 1999, 6.

Therefore, school vouchers could be utilized exclusively for personal gain or used to achieve equality of educational opportunity and equity.[37] It is, however, important to recognize that the *Brown* decision, while not only initiating ultraistic educational reforms, encouraged some families to take advantage of school vouchers as a way to support segregation in certain areas of the country. School vouchers were used primarily in southern states to avoid having children attend integrated public schools. "White flight" academies flourished when parents supported freedom of choice programs.[38] Parents withdrew their children from the public schools to enroll them in private schools, which were funded by publicly funded vouchers.[39]

In 1955, the second educational event was initiated by economist Milton Friedman. He proposed a free market approach to education that would implement publicly funded school vouchers.[40] Friedman questioned the role of government in education and whether there ought to be government schools. He believed public schools are "an indiscriminate extension of governmental responsibility."[41] In Friedman's proposed plan:

> Governments would require a minimum level of education which they could finance by giving parents vouchers redeemable for a specified maximum sum per child per year... Parents would then be free to spend this sum and any additional sum on purchasing

[37] *See* F. J. Capell and L. Dosher. *A Study of Alternatives in American Education: Vol. VI, Student Outcomes at Alum Rock 1974-76*. Santa Monica, CA: RAND, 1981.

[38] Peter W. Cookson, Jr. and Sonali M. Shroff. "School Choice and Urban School Reform." Columbia University, Teachers College, ERIC Clearinghouse on Urban Education Institute for Urban and Minority Education, Urban Diversity Series No. 110, December 1997, 7.

[39] *See Green v. County School Board of New Kent County, VA et al*, 391 U.S. 430 (1968) and *Griffin v.County School Board of Prince Edward County*, 377 U.S. 218, 222 (1964). In 1959 the General Assembly abandoned "massive resistance" to desegregation and concentrated on a "freedom of choice" program (Acts, 1959 Ex. Sess., c.53.) and repealed Virginia's compulsory attendance laws (Va. Code §§ 22-251 to 22-275.). The Board of Supervisors for Prince Edward County refused to appropriate any funds for the County School Board, effectively closing the public schools rather than integrate them. Prince Edward County schools remained closed for five years from 1959-1964.

[40] Milton Friedman. "The Role of Government in Education." In *Economics and the Public Interest.* Robert A. Solow, ed. New Brunswick, N.J.: Rutgers University Press, 1955, 123-144.

[41] *Id*.

> educational services from an 'approved' institution of their own choice. The educational services could be rendered by private enterprises operated for profit, or by non-profit institutions of various kinds. The role of government would be limited to assuring that schools met certain minimum standards such as the inclusion of a minimum common content in their programs, much as it now inspects restaurants to assure that they maintain minimum sanitary standards.[42]

In the 1950s Friedman's free market ideas for education attracted little public policy interest, but in the 1960s and 1970s liberal reformers would advocate regulated school vouchers to meet the educational needs of low-income students. [43] In the 1980s and 1990s, conservatives had a renewed interest in free market goals that emphasized competition as the key to school improvement:

> This voucher plan would give all parents the opportunity to choose schooling for their children that the more affluent among us now have . . . It would promote a rapid improvement in the quality and diversity of education as competition worked its magic in schooling, as it has in every other area.[44]

The third and final major educational event focused on federal funding for education as a result of the Soviet Union's successful launch of Sputnik I.[45] Prior to 1957, education proposals for general aid for school districts failed in Congress. Following Sputnik, the public became alarmed that American children seemed to be academically inferior to Russian children, and, thus public school reform efforts intensified. Congress responded by passing the National Defense Education Act (NDEA) of 1958,[46] which specified funds (categorical) for math, science,

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[42] *Id*.

[43] *See* Theodore Sizer, "The Case for a Free Market," *Saturday Review*, January 11, 1969; Christopher Jencks, "Giving Parents Money to Pay for Schooling: Education Vouchers," *New Republic*, July 4, 1970; John E. Coons and Stephen D. Sugarman, "Family Choice in Education: A Model State System for Vouchers." *California Law Review* 59:321-438, 1971.

[44] Milton Friedman. *Bright Promises, Dismal Performance: An Economist's Protest*. William R. Allen, Ed. New York: Harvest/Harcourt Brace Jovanovich, 1983, 171.

[45] *See* Constance McLaughlin Green and Milton Lomask. *Vanguard: A History*. Washington, DC: Smithsonian Institution Press, 1971. Available at http://www.hq.nasa.gov/office/pao/History/sputnik/toc.html.

[46] National Defense Act of 1958, 20 U.S.C. 401 *et seq*., Pub. L. 85-864, Sept. 2, 1958, 72 Stat. 1580.

and language initiatives for public and private schools.[47] Since that event the federal government has taken a continuous role in the never-ending era of school reform.

High Expectations of the 1960s and the 1970s

Constitutional issues raised in Brown v. Board of Education[48] and social welfare concerns were the foundation on which all federal efforts to help educate disadvantaged children was built in the 1960s and the 1970s. Policymakers had confidence that the nation could win the "War on Poverty,"[49] and the result would eliminate, or severely reduce, racial, economic, and educational disadvantages. The idea that the "cycle of poverty" could be broken was widely accepted. It was also expected that with assistance, the poor would move into the middle class.[50]

President Lyndon Johnson envisioned public schools as the remedy for socioeconomic inequality and initiated compensatory programs such as Head Start,[51] Title I of the Elementary and Secondary Education Act of 1965,[52] and Upward Bound.[53] His pursuit of "A Great

[47] *See* James Sundquist. *Politics and Policy: The Eisenhower, Kennedy and Johnson Years*. Washington, D.C.: The Brookings Institution, 1968, 206. He stated that the NDEA "has shown that special-purpose aid, carefully designed, could be enacted at a time when general-purpose aid could not be."

[48] 347 U.S. 483, 74 S. Ct. 686 (1954).

[49] Lyndon B. Johnson. "Proposal for a Nationwide War on the Sources of Poverty: Lyndon B. Johnson's Special Message to Congress, March 16, 1964." *Public Papers of U. S. Presidents, Lyndon B. Johnson, 1963-1964*. Washington: G.P.O., 1965, 1, pp. 375-380. Available at http://www.fordham.edu/halsall/mod/1964johnson-warpoverty.html.

[50] *See* John F. (Jack) Jennings. "Title I: Its Legislative History and Its Promise." *Phi Delta Kappan*. Vol. 81, No. 7 (March 2000), 516-522.

[51] Economic Opportunity Act of 1964, 42 U.S.C. 2701 *et seq*., Pub. L. 88-452, Aug. 20, 1964, 78 Stat. 508, created a number of anti-poverty programs including Head Start program.

[52] Title I of the Elementary and Secondary Education of 1965, 20 U.S.C. 2701 et seq.

[53] Economic Opportunity Act of 1964, 42 U.S.C. 2701 *et seq*., Pub. L. 88-452, Aug. 20, 1964, 78 Stat. 508, created a number of anti-poverty programs including Upward Bound. This program was designed to help economically disadvantaged students complete high school and to enter and succeed in postsecondary education.

Society"[54] was, however, overshadowed by America's involvement in the Vietnam War and civil unrest at home.

Equality of Educational Opportunity

In the 1960s the national trend, led by President Johnson, was achieving equality of opportunity for all Americans. The traditional concept of equal educational opportunity concentrated on the issue of legal access. Equal opportunity exists when educational and occupational systems do not overtly discriminate against any persons on the basis of morally irrelevant criteria such as racial identity, socio-economic status, or gender.

Congress proposed civil rights legislation to ameliorate racial injustices. Civil rights legislation had been enacted after the Civil War,[55] but those laws had been largely ignored or replaced in the 1880s and 1890s by other statutes.[56] In Plessy v. Ferguson,[57] the doctrine of "separate but equal" set the precedent that "separate" facilities (i.e., restaurants, restrooms, public schools, and public buses) for blacks and whites were constitutional as long as they were "equal." In Brown v. Board of Education,[58] the U. S. Supreme Court took a significant step toward equal civil rights by overturning the Plessy decision. The Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place"[59] as well as violated

[54] *See* Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq*., Pub. L.88-352, July 2, 1964, 78 Stat. 241; Voting Rights Act of 1965, 42 U.S.C. 1971, 1973 *et seq*., Pub. L. 89-110, Aug.6, 1965, 79 Stat. 437; Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq*., Pub. L. 90-284, title VIII, Apr. 11, 1968, 82 Stat. 81.

[55] *See* Civil Rights Act of 1866, 42 U.S.C. §1981, April 9, 1866, ch.31, 14 Stat. 27-30 and Civil Rights Act of 1875, 18 Stat. 335, Act of Mar. 1, 1875.

[56] *See* Michael J. Klarman. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press, 2004.

[57] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[58] *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, (1954).

[59] *Id*. at 495.

the Fourteenth Amendment, which guarantees all citizens "equal protection of the laws."[60] The moral mandate to achieve equality of educational opportunity was stated by Justice Warren writing for the Court,

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[61]

Prior to Brown, Americans had tolerated great disparities in educational opportunity, but following the Brown decision, public schools were seen as the vehicle to ensure that all students had an equal chance to succeed.[62] The federal government concentrated funding on compensatory education programs such as Head Start preschool programs, Title I compensatory education programs, and special education funding. Title I of the Elementary and Secondary Education Act of 1965 was legislation that increased the federal government's financial support of K-12.[63] This legislation was viewed as "… a major shift in public policy: it changed both what society expected of schools and what the more disadvantaged in society expected for themselves."[64] The Title I specified that the funds were to be used for the education of children in poor districts who needed help on basic academic skills. Equality was defined primarily in resource or input terms that included universally available and free education, common curriculum, and equality of instructional resources.[65] An underlying belief was that all students

[60] Amendment XIV, Section I

[61] *Brown* at 492-493.

[62] Helen F. Ladd and Janet S. Hansen, eds. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999, 105.

[63] Title I of the Elementary and Secondary Education of 1965, 20 U.S.C. 2701 *et seq*. created grants for educational programs at the state and local levels (i.e., Title I of the Elementary and Secondary Education, Pub. L. 103-382).

[64] *See* John F. (Jack) Jennings. "Title I: Its Legislative History and Its Promise." *Phi Delta Kappan*. Vol. 81, No. 7 (March 2000), 516-522.

[65] James S. Coleman, "The Concept of Equality of Educational Opportunity," 38 *Harv. Educ. Rev.*7 (1968).

deserve an equal chance to succeed, with individual results dependent on motivation, desire, effort, and innate ability. Success should not be dependent on external factors, such as the financial ability of the family, geographical location, race or ethnicity, gender, or disability.[66] After Brown, many school reformers sought redress from the courts to remediate other educational inequalities such as differences in place of residence (i.e., rural v. urban), family occupation and income, gender, and students with disabilities.

Title IV of the Civil Rights Act of 1964 called for a survey "concerning the lack of availability of equal educational opportunity by reason of race, color, religion, or national origin in public educational institutions at all levels."[67] In 1966, James S. Coleman presented the "Equality of Educational Opportunity Study," commonly known as the "Coleman Report" to Congress.[68] To the surprise of many, Coleman reported that unequal achievement between the races was not so much a product of differences in school facilities, curriculum materials, or teacher quality, as it was a function of the racial and socio-economic isolation of African Americans. The study found that low-income students have higher levels of achievement, and/or larger achievement gains over time, when they attend middle-class schools than when they attend high poverty schools.

School desegregation became the principal policy response to the Coleman Report. In 1967, the U. S. Civil Rights Commission issued a report that called for legislation providing that

[66] Mark G. Yudof et al., *Educational Policy and the Law*, 4th ed. Belmont, CA: Wadsworth Group, 2002, 770.

[67] Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c *et seq*., Pub. L.88-352, July 2, 1964, 78 Stat. 241.

[68] James S. Coleman, Ernest Q. Campbell, Carl J. Hobson, James McPartland, Alexander M. Mood, Frederic D. Weinfeld, and Robert L. York. *Equality of Educational Opportunity*. Washington, DC: U. S. Government Printing Office, 1966.

no school be more than 50 percent African American.[69] These mandatory desegregation plans, implemented to protect the constitutional rights of minority students, often resulted in middle-class parents, unhappy with their children's assigned school, exercising their power of choice by moving, using private schools, or manipulating the system to get preferred school assignments for their children.[70]

Responding to the findings of educational inequality in the Coleman Report, many liberal school reformers focused on the educational needs of low-income students by advocating targeted vouchers.[71] Sociologist Christopher Jencks suggested that private schools could provide families an alternative to poorly performing schools in the inner city.[72] He proposed regulated government-financed education vouchers or 'tuition grants.' Jencks believed that an overly bureaucratic public school system could have detrimental effects on inner-city public schools. Private control would make it possible to attack management problems, and the use of tuition grants would put an end to neighborhood schools. Though a radical idea, Jencks believed that neighborhood schools were stratifying students by socio-economic background, thus academically limiting students at the lower end of the achievement curve. Therefore, he advocated a regulated voucher system that contained safeguards for disadvantaged students.

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[69] U. S. Commission on Civil Rights. *Racial Isolation in the Public Schools*. Washington: Government Printing Office, 1967.

[70] Charles Glenn. "Parent Choice and American Values in Public Schools by Choice: Expanding Opportunities for Parents, Students, and Teachers." In *Public Schools by Choice*. Joe Nathan, ed. St. Paul, MN: The Institute for Learning and Teaching, 1988, 48.

[71] *See* John E. Coons and Stephen D. Sugarman. *Education by Choice: The Case for Family Control*. Berkeley, CA: University of California Press, 1978; John E. Coons and Stephen D. Sugarman. "Family Choice in Education: A Model State System for Vouchers." *California Law Review*, 59:321-438, 1971; Christopher Jencks. "Giving Parents Money to Pay for Schooling: Education Vouchers." *New Republic*, July 4, 1970, 19; Theodore Sizer. "The Case for a Free Market." *Saturday Review*, January 11, 1969, 34; Theodore Sizer and Philip Whitten. "A Proposal for a Poor Children's Bill of Rights." *Psychology Today*, Aug. 1968, 59.

[72] *See* Christopher Jencks. "Is the public school obsolete?" *The Public Interest* 2 (Winter) 1966, 18-27; Christopher Jencks. "Education Vouchers: A Report on Financing Education by Payments to Parents." Cambridge, MA: Center for the Study of Public Policy, 1970.

According to Jencks, an unregulated voucher system that contains no safeguards would be worse than no voucher system at all.

Equality of educational opportunity as a policy initiative had two significant weaknesses. First, no consensus or clear definition existed regarding which educational outcomes were of the most importance for individual student achievement. Second, equality of opportunity requires no particular level of student achievement. It does not forbid significant inequalities in achievement between high-achieving and low-achieving individuals so long as variations in achievement are not associated with "morally irrelevant" characteristics. For instance, a morally relevant characteristic is a student's ability or effort, and a morally irrelevant characteristic is a student's race or origin of birth.[73] The concept of equality of educational opportunity implied that the educational effects of primary and secondary schooling could equalize children's total educational opportunities, those arising from family, community, and school.[74] Others argue that a more accurate view would be that equality of educational opportunity implied "a direction of effort, not a goal to be achieved"[75] and "equal results across social groups is not itself the goal, but simply the measure of its fulfillment. The moral emphasis is upon equalizing opportunities, not equalizing results."[76]

[73] Helen F. Ladd and Janet S. Hansen. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999, 105-16.

[74] Gregory J. Fritzberg. " Schools Can't Do It Alone: A Broader Conception of Equality of Educational Opportunity." *New Horizons for Learning*. February 2003. Vol. 14, No. 2. Available at http://www.newhorizons.org/strategies/multicultural/fritzberg.htm

[75] Charles Frankel. "Equality of Opportunity." *Ethics*, Vol. 81, No.3, 1971.

[76] Gregory J. Fritzberg. "Equality of Educational Opportunity versus 'Excellence': Keeping the Pressure on Goliath." *Educational Foundations*. Spring 2000. Available at http://www.findarticles.com/p/articles/mi_qa3971/is_200004/ai_n8889074

Equity

Equity was a corresponding federal goal with equality of educational opportunity in public education in the 1960s and 1970s.[77] Equity is a belief comprised of the legal values of justice, impartiality, and fairness.[78] From a strictly economic viewpoint, equity refers to fairness in the distribution of some good, service, or burden.[79] Efforts to achieve equality of student expenditure followed from the national commitment to equality of educational opportunity. Educational equity implies that educational funding will be relatively the same for all students with the exception of formula adjustments due to differing educational costs across the country and special needs for some students that may require additional funding.

From an educational perspective, equity focuses on providing equal educational opportunity for all children.[80] The purpose of education should be to level out differences among students from different incomes, parents of varying education levels, and any other factors impeding students from reaching their full potential. Greater equity can be achieved when every child has an equal chance of attending any public school without restrictions based upon

[77] Jack Jennings. "An Education Agenda for the Congress and the New Administration" in *The Future of the Federal Role in Elementary & Secondary Education*. Washington, D.C.: Center on Education Policy, 2001.

[78] Helen F. Ladd and Janet S. Hansen. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999, 69.

[79] David H. Monk. *Educational Finance: An Economic Approach*. New York: McGraw-Hill Publishing Company, 1990, 35.

[80] Louann A. Bierlein. *Controversial Issues in Educational Policy.* Newbury Park, CA: Sage Publications, 1993, 3.

residence.[81] This assumes equalizing resources (inputs) will also equalize performance and life outcomes.[82]

Educational Trends in the 1970s

President Nixon commissioned the Panel on Non-Public Education, a subgroup of the President's Commission on School Finance, to investigate the feasibility of government aid to religious schools.[83] "Parochiaid" did not develop beyond a proposal due to the lack of adequate political support, and the issue of whether public aid to religious schools was constitutional.[84] The arguments surrounding the "Parochiaid" debate of the 1970s are very similar to contemporary arguments over school voucher programs that include religious schools participation.[85]

During the 1970s, there were key judicial decisions in several jurisdictions that impacted national educational policy.[86] After the U. S. Supreme Court decision in *Lemon v. Kurtzman*,[87] the legislative momentum of direct aid to religious schools ceased at the federal level. The Court

[81] Charles Glenn. "Parent Choice and American Values in Public Schools by Choice: Expanding Opportunities for Parents, Students, and Teachers." In *Public Schools by Choice*. Joe Nathan, ed. St. Paul, MN: The Institute for Learning and Teaching, 1988; Louann A. Bierlein. *Controversial Issues in Educational Policy.* Newbury Park, CA: Sage Publications, 1993, 91.

[82] Robert Berne and Leanna Stiefek, "Concepts of School Finance Equity: 1970 to the Present" in National Research Council, *Equity and Adequacy in Education Finance* 7-24 (1999).

[83] *See* Pr37-President of the United States Richard M. Nixon. Available at http://library.wustl.edu/units/westcampus/govdocs/sudocs/pres/pr37.html; Alex Molnar. "Educational Vouchers: A Review of the Research." CERAI-99-21, October 1999. Available at http://www.asu.edu/educ/epsl/EPRU/documents/EdVouchers/educationalvouchers.html#historical

[84] Alex Molnar. "Educational Vouchers: A Review of the Research." CERAI-99-21, October 1999. Available at http://www.asu.edu/educ/epsl/EPRU/documents/EdVouchers/educationalvouchers.html#historical

[85] *See* Thomas W. Lyons, "Parochiaid? Yes!" *Educational Leadership*, November 1971,102-104; Glenn L. Archer, "Parochiaid? No!" *Educational Leadership*, November 1971,105-107; Grace Graham, "Can the Public School Survive Another Ten Years?" *Educational Leadership*, May 1970, 800-803.

[86] *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Serrano v.Priest*, 487 P.2d 1241 (Cal. 1971); *PARC v. Pennsylvania*, 334 F.Supp. 1257 (E.D. PA 1972); *Mills v. Board of Education of the District of Columbia*, 348 F.Supp.866 (D.D.C. 1972).

[87] 403 U.S. 602 (1971).

held that the First Amendment was violated when state funds paid private school teachers' salaries and purchased instructional materials for religious schools. The Court created a three-prong standard for determining Establishment Clause challenges to state statutes.[88] First, the statute must have a secular legislative purpose.[89] Second, the primary effect cannot have the effect of advancing or inhibiting religion.[90] Finally, the law cannot result in the state becoming excessively entangled with religion.[91] The *Lemon* decision established a significant precedent forbidding direct aid to religious schools. The Court's unanimous opinion set the judicial tone for the majority of public aid to religious school cases during the following two decades.

In 1971, *Serrano v. Priest* was the first school finance case that challenged the wealth-related disparities in per-pupil spending generated by California's education finance system.[92] The plaintiff's argued that the school funding scheme violated the equal protection clause of the California constitution. The plaintiffs' argued that children in property poor school districts with limited taxing power were discriminated against because the ability of the school to raise funds depended on the wealth of the students' neighborhood. The California Supreme Court held that the state's funding scheme violated the Equal Protection Clause of the U. S. Constitution. The California Supreme Court ruled that education is a fundamental constitutional right and that the existing system of public finance, which was essentially the local property tax, was unconstitutional. This ruling reasoned that all children in California had a fundamental right to equal public education. The California Supreme Court ordered the legislature to equalize funding

[88] *Id.* at 612-13.

[89] *Id*. at 612.

[90] I*d*.

[91] I*d*. at 613.

[92] 487 P.2d 1241 (Cal. 1971).

among school districts. The California legislature ultimately equalized school funding downward to the level spent by the low-wealth districts instead of leveling school funding upward to the amount spent in high-wealth districts.[93]

While working on *Serrano*, law students John Coons and Stephen Sugarman recommended school vouchers as a potential remedy for unconstitutional school-funding inequities for students in poor school districts.[94] They proposed the use of regulated vouchers to alleviate equity concerns in education. One type of voucher proposal, intended to overcome problems associated with different educational needs, was that all children receive a voucher of equal value. Additionally, grants were to be made to each family according to economic needs. The largest grants were to go to the poorest families, with a progressive reduction to zero for families of average income.[95] Coons and Sugarman suggested strengthening the family's role in education by promoting freedom of choice for all families regardless of income.

In the 1970s, the Office of Economic Opportunity (OEO) launched the first voucher experiment in Alum Rock, California.[96] Christopher Jencks and colleagues from Harvard University's Center for the Study of Public Policy (CSPP) designed the voucher system. The project was plagued with problems from the start. No state was willing to provide enabling legislation for private schools to receive public funds and few school districts were willing to accept the experiment. The Alum Rock School District, a racially diverse system located to the east of San Jose, California, agreed to implement the OEO voucher plan with twenty-two "mini-

[93] *Serrano v. Priest*, 226 Cal.Rptr. 584 (Cal. App. 1986) (Serrano III).

[94] John E. Coons, William H. Clune, and Stephen D. Sugarman. *Private Wealth and Public Education*. Cambridge, Mass. : The Belknap Press of Harvard University Press, 1970.

[95] John E. Coons and Stephen D. Sugarman. *Education by Choice: The Case for Family Control*. Berkeley, CA, University of California Press, 1978.

[96] Judith Areen and Christopher Jencks. "Education Vouchers: A Proposal for Diversity and Choice," *Teachers College Record*, February 1971, 72: 327-335.

schools" formed from six of the district's twenty-four public schools. The project began in 1972 and was discontinued when federal funding ceased.[97] During the program, "no appreciable differences" in reading achievement between students in regular and choice schools was observed.[98] It was noted that most parents preferred neighborhood schools to alternative schools.[99]

Voucher opponents used the Alum Rock data to discredit vouchers. Voucher advocates protested, claiming that since no private schools participated, a free market place did not exist. They claimed that this experiment was actually more founded on school decentralization than free market opportunity. The Alum Rock experiment amounted to a voucher system of mini-schools within the existing public system, each with a nominally diverse curriculum.[100] This early voucher plan was the first to include public school choice as a method to address issues of economic and ethnic inequality. [101]

Educational Trends in the 1980s

A conservative cultural and ideological shift occurred in America with the election of Ronald Reagan in 1980. During President Reagan's two terms, "education goals changed from

[97] *See* Daniel Weiler. *A Public School Voucher Demonstration: The First Year at Alum Rock, Summary and Conclusions.* Santa Monica, CA: Rand, 1974*;* Amy Stuart Wells. *Time to Choose: America at the Crossroads of School Choice Policy*. New York: Hill and Wang, 1993, 152.

[98] F. J. Capell and L. Dosher. 1981. *A Study of Alternatives in American Education: Vol. VI, Student Outcomes at Alum Rock 1974-1976*. Santa Monica, CA: Rand.

[99] Carol Ascher, Norm Fruchter, and Robert Berne. *Hard Lessons: Public Schools and Privatization.* New York: Twentieth Century Fund, 1996.

[100] *See* Pierce Barker, Tora K. Bikson, Jackie Kimbrough, and Carol Frost. *A Study in Alternatives in American Education, Vol. V, Diversity in the Classroom*. Santa Monica, CA: Rand Corporation, 1981.

[101] Peter Cookson, Jr. and Kristina Berger. *Expect Miracles: Charter Schools and the Politics of Hope and Despair*. Boulder: Westview Press, 2002, 27.

equity to excellence, from equality for all to quality for all."[102] President Reagan was critical of federal aid to education and sought to have Title I repealed. Although not successful in eliminating Title I, he was able to cut back on the program's expenditures. As an alternative, President Reagan proposed that funds be combined into "block grants" with few federal requirements regarding their use to be made available to all states. Congress passed Chapter 2 of the Education Consolidation and Improvement Act,[103] which was a block grant that combined more than 40 smaller education programs. The nation's prevailing attitude became one of resistance to federal involvement in states' activities leading to support for privatization. Furthermore, policymakers support for federal compensatory education faded in comparison to the political support of the 1960s and 1970s.

In 1983, the National Commission on Excellence in Education released *A Nation at Risk*.[104] The report warned of a "rising tide of mediocrity" in American schools "that threatens our very future as a Nation and as a people."[105] The report's rhetoric prompted a concentrated effort to improve public primary and secondary education. Many states enacted laws that increased instructional time and graduation requirements.

The late 1980s continued to be marked by heightened public concern about the quality of public primary and secondary schools. President George H. W. Bush campaigned on the need for educational accountability. After his election, he oversaw many educational reforms in his

[102] *See* Dick M. Carpenter, III. "Ronald Reagan and the Redefinition of the 'Education President.'" *Texas Education Review*. Winter 2003-04; Chester F. Finn, Jr. "The Original Education President: Reagan's ABCs." June 9, 2004. Available at http://www.nationalreview.com/comment/finn200406090839.asp

[103] Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. Sec. 7301 et seq. (P. L. 97-35, Aug. 13, 1981, 95 Stat. 469.

[104] National Commission on Excellence in Education. *A Nation at Risk: The Imperatives for Educational Reform*. Washington, D.C.: U. S. Government Printing Office, 1983.

[105] *Id.*

pursuit of being known as the"Education President." In 1988, the reauthorization of ESEA established accountability measures for Title I (then Chapter 1).[106] States were now required to identify schools with ineffective Chapter 1 programs on the basis of average individual student gains on annual standardized norm-referenced tests and to provide capacity-building support. Schools were deemed ineffective if disadvantaged students did not show substantial progress toward meeting defined levels of academic achievement.

In 1989, President Bush assembled the Nation's Governors' Association for a summit on education, focusing on the establishment of national performance goals in order to raise the academic achievement of American students. Policies growing out of that summit caused a massive shift in power over education from local to the federal government. During this summit, state governors adopted National Education Goals that required all students to master subject matter in core disciplines. Student assessment was the key piece of Goals 2000. Participation by states was not mandatory, but states that participated received federal funding.

During the 1980s, the U. S. Supreme Court's Establishment Clause opinions shifted from strict separationist to favoring a neutrality approach. In 1983, the U. S. Supreme Court upheld a tuition tax credit for Minnesota families who sent their children to private schools, including religious schools.[107] The Court reasoned that public aid became available to religious schools "only as a result of numerous private choices of individual parents of school-age children."[108]

[106] Title I was renamed "Chapter I" as part of the 1981 reauthorization but was returned to its original name in the 1994 reauthorization.

[107] *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062 (1983).

[108] *Id* at 399.

Educational Trends in the 1990s

Interest in Milton Friedman's school voucher concept was renewed during the 1990s. His voucher theory maintained that all individuals must have a basic level of education in order to significantly participate in society, and that this participation results in both an individual and public benefit. He advocated private rather than public provision of education as most effective in achieving this goal.[109] Friedman was the first to argue that school vouchers should be used to separate the functions of providing schooling and paying for schooling.[110] He proposed vouchers as a way to separate government financing of education from government administration of schools. The fact that government should finance schools due to the public benefits of education does not mean that government should operate them.[111]

Friedman recommended that families be given subsidies in the form of educational vouchers to purchase educational services for their children at government approved schools, in much the same way people buy any necessary commodity. He advocated freedom for families to spend the voucher amount, and any additional amount, at the educational institution of their choice. From his point of view, the government's role should be restricted to upholding minimum standards of approval of educational institutions.[112] Friedman also argued that educational vouchers would allow innovative instructional approaches and increased responsiveness to parental concerns via a larger variety of public and private schools.

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[109] Milton Friedman, "The Role of Government in Education." in R. A.Solow, ed. *Economics and the Public Interest*. New Brunswick, Rutgers University Press, 1955; Milton Friedman. *Capitalism and Freedom*. Chicago, IL, The University of Chicago, 1962.

[110] Harry Brighouse. *School Choice and Social Justice*. New York: Oxford University Press, 2000, 25.

[111] Milton Friedman. *Capitalism and Freedom*. Chicago: University of Chicago Press, 1962, 86.

[112] Milton Friedman, "The Role of Government in Education." in R. A.Solow, ed. *Economics and the Public Interest*. New Brunswick, Rutgers University Press, 1995, 127.

During the 1990s, "market force advocates became a political force and demanded changes in the policies and practices of urban schools."[113] Attention was focused on the appropriate role of government and private markets in meeting society's needs and fostering economic prosperity.[114] Free market advocates favored using private rather than public mechanisms for producing and distributing educational opportunities. From this viewpoint, the most essential private mechanism for producing and distributing valued goods and services is an unregulated market in which buyers and sellers meet and make exchanges to improve their respective positions.[115] Choice makes schools accountable to the families who do the choosing. If problems arise, free-market theory tends to link solutions to less government.[116] Private-sector provision (i.e., charter schools, contracts for profit educational services, and vouchers) of publicly funded education services increased in the 1990s.

In 1990, political scientists John Chubb and Terry Moe claimed public schools are failing because of bureaucracy and lack of autonomy.[117] According to Chubb and Moe, bureaucracy is counterproductive for effective school organization because a large system is administered through governmental departments and subdivisions. They cited Coleman's 'High School and Beyond' research which found that school autonomy was the single most important element in

[113] Carolyn S. Ridenour, Thomas J. Lasley, II, and William L. Bainbridge. "The Impact of Emerging Market-Based Public Policy on Urban Schools and a Democratic Society." *Education and Urban Society*. Sage Publications Nov 01, 2001 34: 66-83. Available at http://www.schoolmatch.com/articles/EUS1101.htm

[114] Daniel Yergin and Joseph Stanislaw. *The Commanding Heights: The Battle Between Government and the Marketplace that is Remaking the Modern World.* New York: Simon and Schuster, 1998.

[115] David H. Monk. *Educational Finance: An Economic Approach*. New York: McGraw-Hill Publishing Company, 1990, 3.

[116] Jeffrey R. Henig. *Rethinking School Choice: Limits of the Market Metaphor.* Princeton, NJ: Princeton University Press, 1994, 190.

[117] John E. Chubb and Terry M. Moe. *Politics, Markets, and America's Schools.* Washington, DC: Brookings Institution Press, 1990.

the academic improvement of schools.[118] Chubb and Moe proposed eliminating centralized bureaucracies and giving authority directly to schools, parents, and students.

The degree to which the institutional environment is a barrier to educational productivity depends on the extent to which bureaucracy and direct democratic control affect school administration. Chubb and Moe argue that environments that are relatively homogeneous and problem-free are likely to be the least bureaucratic, while urban areas are more likely than suburbs or rural areas to suffer from the negative consequences of bureaucratic controls and political pluralism.[119] According to Chubb and Moe, these are the places where productivity problems are the worst and where the need for exceptionally effective schools is the greatest.[120]

Productivity, the ratio of inputs to outputs, is one way to measure the quality of public schools. Specifically, educational productivity is measured by dividing a measure of student achievement by per-pupil spending in inflation-adjusted dollars. Many researchers have documented that school spending has increased but student achievement as measured on the Student Aptitude Test (SAT) has not.[121]

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[118] James S. Coleman, Thomas Hoffer, and Sally Kilgore. *High School Achievement*. New York: Basic Books, 1982.

[119] John E. Chubb and Terry M. Moe. *Politics, Markets, and America's Schools.* Washington, DC: Brookings Institution Press, 1990, 64.

[120] Helen F. Ladd and Janet S. Hansen. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999, 160.

[121] *See* Eric A. Hanushek, "The Productivity Collapse in Schools," W. Allen Wallis Institute of Political Economy Working Paper #8. Rochester, N.Y.: University of Rochester, 1996. Available at http://nces.ed.gov/pubs97/97535/97535k.asp; Richard Rothstein and K.H. Miles. *Where's the Money Gone? Changes in the Level and Composition of Education Spending*. Washington, DC: Economic Policy Institute, 1995 & Caroline M. Hoxby, "School Choice and School Productivity, or Could School Choice Be a Tide That Lifts All Boats?" in Caroline Hoxby, ed., *Economics of School Choice*. Chicago: University of Chicago Press for the National Bureau of Economic Research, 2001.

Since the release of the "Coleman Report" in 1966, educational scholars have argued the significance of money in determining the quality of education provided to students.[122] The Coleman Report, which was prepared to meet a mandate of the 1964 Civil Rights Act, set the debate about productivity in motion. The original goal was to determine differences in the quality of education available to different groups in the population, particularly minority groups. The researchers extended the study and attempted to show how differences in student performance on standardized tests were connected to differences in socioeconomic background characteristics and school resources.[123]

This report produced two controversial conclusions. First, the gap in educational resources available to black and white students was less than expected. Second, the report found the effects of school resource allocation on student achievement to be minor. The authors concluded that the measurable characteristics of teachers and schools were negligible in determining student outcomes. Socioeconomic background variables and the composition of the student body played a more important role in determining student success. Students of well educated and higher socio-economic parents tended to outperformed students raised in families having lower socioeconomic status and less education.

In 1986, after surveying the literature, Eric Hanushek agreed with Coleman, concluding, "There appears to be no strong or systematic relationship between school expenditures and

[122] James S. Coleman, E.Q. Campbell, C.J. Hobson, J. McPartland, A.M. Mead, F.D. Weinfeld, and R.L. York. *Equality of Educational Opportunity.* Washington, DC: U. S. Department of Health, Education, and Welfare, 1996.

[123] Gary Burtless., ed. *Does Money Matter? The Effect of School Resources on Student Achievement and Adult Success.* Washington, DC: Brookings Institution Press, 1996, 6-7.

student performance."[124] Needless to say, educators and other researchers from other academic disciplines fervently disputed these conclusions.[125]

In 1990, John Chubb and Eric Hanushek stated that average United States spending per student, controlling for the effect of inflation, rose more than 60 percent between 1966 and 1980, when the majority of test score decline had occurred.[126] Hanushek stated bluntly, "For more than two decades…researchers have tried to identify inputs that are reliably associated with student achievement. The bottom line is, they have not found any. Researchers have found no systematic relationship between student achievement and the inputs that reformers (and researchers) always assumed matter."[127]

Critics of public schools claim bureaucracy interferes with efforts to improve educational productivity in several ways: discretion and autonomy is reduced at the school level;[128] administrators and teachers are drawn from their primary concern, instruction; accountability for educational outcomes is found lacking; and schools are unable to exercise meaningful control over the instructional outputs and are denied free access to resources intended for school improvements. "Competition for resources has created an over constrained system in which

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[124] Eric A. Hanushek. "The Economics of Schooling: Production and Efficiency in Public Schools." *Journal of Economic Literature* 24 (3), 1986, 1162.

[125] *See* David C. Berliner and Benjamin J. Biddle, *The Manufactured Crisis: Myths, Fraud and the Attack on America's Public Schools*. Reading, MA: Addison-Wesley, 1995; Richard Rothstein, *The Way We Were: The Realities of America's Student Achievement*. Washington, D.C.: Century Foundation, 1998; and Gerald Bracey, "Are U. S. Students Behind?" *American Prospect*, vol. 37 (March-April 1998).

[126] John E. Chubb and Eric A. Hanushek. "Reforming Educational Reform." In Henry J. Aaron, ed. *Setting National Priorities: Policy for the Nineties*. Washington, D.C.: Brookings Institution Press, 1990, 217-219.

[127] *Id*. at 220.

[128] John E. Chubb and Terry M. Moe. *Politics, Markets, and America's Schools.* Washington, DC: Brookings Institution Press, 1990; Paul T. Hill, Lawrence C. Pierce, and James W. Guthrie. *Reinventing Public Education: How Contracting Can Transform America's Schools.* Chicago: University of Chicago Press, 1997; and J. E. Brandl. "Governance and Educational Quality." in *Learning from School Choice*, Washington, DC: Brookings Institution Press, 1998, 55-81.

every dollar is allocated to teacher salaries or to existing programs. New funds…are spoken for before they arrive…flexible categories of funds…are committed in advance to separate categorical programs or to programs selected by central office administrators."[129] Policy makers increasingly act to reduce the discretion permitted at the school level in order to reduce compliance problems, to reduce interference from outside interest groups, and to insulate their decisions from change by future policy makers.[130]

During the 1990s, school choice legislation was successfully implemented in many parts of the country. In 1990, the Wisconsin legislature passed the Milwaukee Parental Choice Program,[131] the first school voucher legislation allowing students to attend private nonreligious schools, and subsequently expanded the program to include religious schools in 1995.[132] In 1991, Minnesota was the first state to enact a charter school law with many other states following suit.[133] In 1995, Ohio enacted legislation to allow Cleveland students to use school vouchers at religious schools.[134] In 1999, Florida became the first state to enact a statewide voucher program.[135]

During his presidency, President George H. W. Bush supported three choice proposals. In 1989, the first proposal was included in the Excellence in Education Act, which would have

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[129] Paul T. Hill, Lawrence C. Pierce, and James W. Guthrie. *Reinventing Public Education: How Contracting Can Transform America's Schools*. Chicago: University of Chicago Press, 1997, 29.

[130] Helen F. Ladd. and Janet S. Hansen. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999, 159.

[131] Wis. Stat. § 119.23 (1995-96).

[132] Wis. Stat. Ann. § 119.23 (2001).

[133] Minnesota Statute 124D. 10. Before enacting the charter school law, Minnesota was the first state to enact statewide interdistrict public school choice for all students.

[134] Ohio Rev. Code Ann. § 3313.974 – 3313.979 (Baldwin Supp.2001).

[135] 2001 Fla. Stat., Title XVI, Chapter 229.0537.

allotted $230 million to fund choice scholarships and experiments. In 1991, President Bush introduced "America 2000," an education reform initiative that included the country's first-ever national academic standards, but it however, was not passed by Congress. In 1992, before leaving office, he unsuccessfully proposed including a"GI Bill for Children" in the budget.[136]

President Clinton was elected in 1993 and continued the educational accountability theme of President Bush and the governors. President Clinton was a leading participant in President Bush's National Governors" Association that emphasized student outcomes over inputs. Congress passed President Clinton's educational proposal Goals 2000: Educate America Act in March of 1994.[137] Each participating state was required to implement explicit standards at the state level for curriculum content and pupil performance to receive Goals 2000 grants, or to continue to receive grants under Elementary and Secondary Education Act (ESEA) Title I.[138] The Clinton Administration maintained that the way to improve public schools was to require states to embrace high standards and to hold all children to the same standards.

President Clinton was for expanding public school choice and supported the growth of public charter schools to deal with failing public schools. He was in favor of rewarding the best schools and shutting down or redesigning schools that are failing.[139] Though in favor of public school choice, President Clinton opposed school vouchers because they divert limited federal resources away from public schools. In 1998, he vetoed "The Education Savings and School

[136] Education Commission of the States. "Legislative Activities Involving Open Enrollment (Choice)." *Clearinghouse Notes.* December 1994, 91.

[137] Goals 2000: Educate America Act, 20 U.S.C. 5801 *et seq*. Pub. L. 103-227, Mar. 31, 1994, 108 Stat. 125-191, 200-211, 265-280.

[138] James B. Stedman and Wayne C. Riddle. *Goals 2000: Educate America Act Implementation Status and Issues*. Congressional Research Service Report 95-502, Washington, D.C.: The Library of Congress, 1998. Available at http://opencrs.cdt.org/rpts/95-502_19980217.pdf

[139] William Jefferson Clinton. *Between Hope and History*: *Meeting America's Challenges for the 21st Century*. New York: Random House, 1996, 44.

Excellence Act of 1999" which would have permitted families to place $2,000 a year in accounts which would earn tax free interest.[140] The money could be used to cover educational expenses including private school tuition, after-school tutoring, uniforms and computers.

Current Educational Trends

With the election of George W. Bush, the trend of privatization in government has been renewed and become the acceptable norm in many areas of public policy. Many different government programs utilize vouchers to provide social services. Typically, the funding trail for these voucher programs runs from a federal agency to a state and/or local agency. Many voucher programs permit faith-based organizations to participate, but these faith-based service providers may not use government funds for religious worship, instruction, or proselytization.[141] Secular alternatives must exist for voucher recipients who do not want services from faith-based organizations. Examples of federal programs that permit the use of vouchers include: Temporary Assistance for Needy Families (TANF) which replaced Aid to Families with Dependent Children (AFDC), funded by the U. S. Department of Health and Human Services and administered by state and local human services agencies;[142] child care subsidies funded by the Child Care and Development Block Grant (CCDBG) through the U. S. Department of Health and Human Services and administered by state and local human services agencies which provides child care subsidies for low-income working families, families receiving public assistance, and those

[140] *See* Joint Committee on Taxation, *Description of H.R. 7 (The "Education Savings and School Excellence Act of 1999")*. (JCX-30-00), March 21, 2000. Available at http://www.house.gov/jct/x-30-00.pdf

[141] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. 1305 *et seq.* Pub. L. 104-193, Aug. 22, 1996, 110 Stat. 2105. Available at http://wdr.doleta.gov/readroom/legislation/pdf/104-193.pdf

[142] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 created Temporary Assistance for Needy Families (TANF), 42 U.S.C. § 601 *et seq*. Pub. L. 104-193 a welfare reform program which utilizes a variety of voucher programs including child care subsidies and substance abuse treatment.

enrolled in training or education;[143] food stamps funded by the U. S. Department of Agriculture and administered by state and local human services offices;[144] Individual Training Accounts funded by the Workforce Investment Act (WIA) of 1998 through the U. S. Department of Labor and administered by local workforce development systems;[145] low-income housing funded by the U. S. Department of Housing and Urban Development and administered by local public housing authorities;[146] and, under No Child Left Behind Act of 2001 (NCLB), low-income students who do not make adequate yearly progress for three consecutive years are eligible for Supplemental Educational Services (SES) which are funded by the U. S. Department of Education and administered by local school districts.[147] Within a broader policy environment that favors consumer choice and market-based accountability, the political barriers to primary and secondary education voucher programs are possibly being reduced.

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act (NCLB) into law.[148] A reauthorization of the ESEA of 1965, this legislation holds schools accountable for student achievement levels and penalizes schools that do not make adequate

[143] Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9801 *et seq*. Pub. L. 104-193, title VI, Aug. 22, 1996, 110 Stat. 2278. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 authorized the CCDBG with current funding level providing assistance to only one out of 10 eligible children. Available at www.naeyc.org/policy/federal/ccdbg.asp

[144] Food Stamp Act of 1964 was renamed Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq*. Pub. L. 88-525, Aug. 31, 1964, 78 Stat. 703. *See* also Child Nutrition and WIC Reauthorization Act of 2004, 42 U.S.C. 1751 et seq. Pub. L. 108-265,June 30, 2004 amended the Food Stamp Act to ease the certification and verification process for food stamp households with school-age children in public and private schools (Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 *et seq*.)

[145] Workforce Investment Act of 1998, 20 U.S.C. 9201 *et seq*. Public Law 105-220, Aug. 7, 1998, 112 Stat. 936.

[146] Housing Act of 1937, 42 U.S.C. §§ 1437 *et seq*. Sept. 1, 1937, ch. 896, 50 Stat. 888 Housing and Urban Development, Tenant Based Assistance: Housing Choice Voucher Program. Available at www.access.gpo.gov/nara/cfr/waisidx_00/24cfr982_00.html

[147] No Child Left Behind Act of 2001, 20 U.S.C. 6301 *et seq*. Pub. L. 107-110, Jan. 8, 2002, 115 Stat. 1425. Available at www.ed.gov/policy/elsec/leg/esea02/index.html

[148] *Id*.

yearly progress toward meeting the goals of NCLB. With this law, federal educational policy was no longer limited to small categorical programs for underserved children but addressed general curriculum. Most controversial in this proposed plan was the voucher program. Due to congressional opposition, the voucher provision for private schooling was defeated and removed from the bill.[149]

Liberty and Parental Rights

An existing fundamental controversy within educational policy has been whether the interests of the state take precedence over parental interests. James Coleman underscored this point in a book preface. He stated, "The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children."[150] In a historic essay David Tyack describes the struggle between parents and the state:

> Over the long perspective of the last century, …compulsory school attendance may be seen as part of significant shifts in the functions of families and the status of children and youth…Advocates of compulsory schooling often argued that families-or at least some families, like those of the poor and foreign-born were failing to carry out their traditional functions of moral and vocational training…Much of the drive for compulsory schooling reflected an animus against parents considered incompetent to train their children. Often combining fear of social unrest with humanitarian zeal, reformers used the powers of the state to intervene in families and to create alternative institutions of socialization.[151]

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[149]*See* Lizette Alvarez. "House Democrats Block Voucher Provision," *New York Times,* May 3, 2001. Available at http://www.nytimes.com/2001/05/03/politics/03EDUC.html; H. Dewar.. "Senate Passes Major Revamp of Education." *Washington Post*, June 15, 2001. Available at http://washingtonpost.com/ac2/wp-dyn/A3404-2001Jun14?language; Lizette Alvarez. "Senate Approves Legislation to Penalize Failing Schools." *New York Times*, June 15, 2001. Available at http://www.nytimes.com/2001/06/15/politics/15EDUC.html

[150] James Coleman, In forward to George D. Strayer and Robert M. Haig. *The Financing of Education in the State of New York*. New York: The Macmillan Co., 1923, vii. Coleman's quote was cited in *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1, 49 (1973).

[151] David Tyack. "Ways of Seeing: An Essay on the History of Compulsory Schooling." 46 *Harv. Educ. Rev*. 355, 363 (1976).

Additionally, public school vouchers involve the question of control. *Who is in charge of America's children's future, their parents or the state?* From the parental viewpoint, two slightly different arguments exist. One position asserts that the right to raise children is fundamental, therefore any direction by the state over education is illegitimate. The second states that since parents are more vested in and familiar with their children's future, they should make educational decisions.[152]

State courts, after interpreting state constitution and statutes, find that the state is concurrently responsible with parents for providing a basic public education to children and ensuring that children are minimally educated citizens. In *Zelman v. Simmons-Harris,*[153] the U.S. Supreme Court opinion "strongly emphasized parental freedom of choice."[154] From a multitude of opinions presented in briefs and during oral arguments, the Court found the issue of parental freedom of choice compelling.

More and more, parents desire the freedom to make choices about the schools their children attend.[155] Parental rights and educational choice are intertwined with the longstanding American ideal of liberty. Liberty can be defined as the rights of individuals to make decisions from among different courses of action.[156] Voucher proponents who favor universal vouchers, argue that parents should have the liberty to choose any public or private school for their

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[152] Harry Brighouse. *School Choice and Social Justice*. New York: Oxford University Press, 2000, 28.

[153] 536 U.S. 639 (2002).

[154] Clive Belfield and Henry Levin. "Does the Supreme Court Ruling on Vouchers in Cleveland Really Matter for Education Reform?" *Teachers College Record*, 2002. Available at http://www.tcrecord.org/PrintContent.asp?ContentID=10952

[155] Charles Glenn. "Parent Choice and American Values in Public Schools by Choice: Expanding Opportunities for Parents, Students, and Teachers." In *Public Schools by Choice*. Joe Nathan, ed. St. Paul, MN: The Institute for Learning and Teaching, 1988, 45-46.

[156] *See* David H. Monk. *Educational Finance: An Economic Approach.* New York: McGraw-Hill Publishing Company, 1990, 16; Louann A. Bierlein. *Controversial Issues in Educational Policy.* Newbury Park, CA: Sage Publications, 1993, 3.

children, with public funding supporting all or a portion of the costs. Some proponents claim that *Pierce v. Society of Sisters*[157] provides the precedent for that opinion. In *Pierce*, the U. S. Supreme Court unanimously held that the Compulsory Education Act[158] requiring all children to attend public schools was unconstitutional. The Court also upheld the "liberty of parents and guardians to direct the upbringing and education of children under their control."[159]

Voucher advocates who are in favor of targeted vouchers assert that this fundamental parental right is meaningless if poor families can't exercise true private choice. State compulsory attendance laws highlight the fact that education is tremendously important to individuals and to society. Therefore, parents should have the right to direct the education of their children within the bounds of reasonable state control.

School voucher opponents counter this viewpoint with concerns about the "good stewardship of parents."[160] They worry that voucher advocates assume good parenting "on the basis of their life in a middle class culture."[161] They say that for the poor, the "pressing demands of survival," such as providing food and shelter, often interfere with good parenting practices regarding their children's education.[162]

Individuals on both sides of the school voucher debate share similar concerns. Amy Gutmann, an opponent of school vouchers, writes that if parents are unfit to make educational

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[157] 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

[158] Ore. Gen. Laws, ch. 1, p.9 (1923).

[159] *Pierce*, 268 U.S. at 535.

[160] Gene V. Glass, ed. "School Choice: A Discussion with Herbert Gintis." Education Policy Analysis Archives, 2(6), 1994. Available at: http://epaa.asu.edu/epaa/v2n6.html. Bill Hunter, professor at the University of Calgary, stated concerns about parental abilities to choose appropriate schooling for their children.

[161] *Id*.

[162] *Id*.

decision for their children, society must intervene to protect those children.[163] Economist Herbert Gintis, a proponent for competitive markets for the delivery of education, writes, "Schools are for students, but society is the ultimate protector of students' rights and interests. Parents are the immediate protector, but parental rights can be superseded when parents egregiously violate their trust."[164]

Voucher proponents argue that to question parents' capacities without sufficient evidence of their inabilities is unsatisfactory. Empowering the average family to take charge of their children's educational goals is fundamental to American democracy. Voucher advocates also claim that accreditation of approved schools should make it easier for parents to make appropriate educational choices.

Proponents of School Vouchers

Proponents of vouchers are a diverse group of individuals who support voucher programs for different philosophical reasons. Some are free market advocates while others' motivation is more liberal, seeking increased educational opportunity for low-income students. Voucher proponents are committed to personal choice/ individual freedom in education.

At this time, school vouchers are supported most strongly by those with a conservative philosophy.[165] In general, conservatism regards the free market system as the preferable economic system, even though capitalism has a tendency to produce social, economic, and political inequalities. The conservative viewpoint suggests that the role of government should be limited and should not aggressively seek to redistribute wealth and eliminate inequalities.

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[163] Amy Gutmann. *Democratic Education*. Princeton, NJ: Princeton University Press, 1987.

[164] Gene V. Glass, ed. "School Choice: A Discussion with Herbert Gintis." Education Policy Analysis Archives, 2(6), 1994. Available at: http://epaa.asu.edu/epaa/v2n6.html. Herbert Gintis made this statement in response to a question about public schools as a market system.

[165] Myron Lieberman. *Privatization and Educational Choice*. New York: St. Martins Press, 1989.

Primary control of education should rest with the states, not the federal government or the courts. This viewpoint encourages an educational system with limited or no government control in order to maximize individual choices.[166]

An increasing number of evangelicals and fundamentalists have found their moral and religious beliefs at odds with the public schools and have turned to private schools that are consistent with their beliefs. They see vouchers as a legitimate way for children to receive an education at public expense. They feel their perspective has been systematically removed from public schools. Following *Everson v. Board of Education*,[167] the U. S. Supreme Court used the Establishment Clause to invalidate a variety of state and local educational practices that promoted religion. These practices included state-sponsored, nondenominational prayer in which student participation was voluntary;[168] starting the school day with Bible reading and recitation of the Lord's Prayer;[169] posting of the Ten Commandments in school rooms;[170] and beginning the school day with a moment of silence for either meditation or voluntary, teacher-led prayer.[171]

Through the years, school voucher proponents have adopted the rhetoric of bondage and liberty, class differences, and consumer economics in support of their cause. Low-income, minority students in public schools are often described as being "held hostage" or as

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[166] Tyll van Geel "Equal Protection and School Finance: Bargained Incoherence." In Deborah A. Verstegen and James G. Ward, eds. *Spheres of Justice in Education: The 1990 American Education Finance Association Yearbook*. New York: Harper Business, 1991, 297-316.

[167] 330 U.S. 1, 67 S. Ct. 504 (1947).

[168] *Engel v. Vitale*, 370 U.S. 421 (1962).

[169] *Abington School District v. Schempp*, 374 U.S. 203 (1963).

[170] *Stone v. Graham*, 449 U.S. 39 (1980).

[171] *Wallace v. Jaffree*, 472 U.S. 38 (1985).

"captives."[172] Public schools are said to be monopolistic and unresponsive to the needs of students in urban schools.

Voucher advocates draw attention to the fact that parents with higher incomes have choices about where their children attend school while poor families do not have the same choices. Wealthy families can pay private school tuition and, more importantly, they can purchase homes in neighborhoods that have the good schools. Low-income families do not have these choices. Fairness demands that the poor, whose children are in failing schools, have the same educational opportunities. Public education as it is currently organized is inequitable. Voucher advocates argue that school vouchers give poor parents the freedom to become consumers of educational services for their children, resulting in the improvement of all schools.

Voucher advocates emphasize the benefits to individuals that result from providing more education options and argue that voucher systems provide poor families with educational choices that only the wealthy enjoy.[173] If the free market, instead of the government, becomes the primary regulatory mechanism for schools, parents would have the freedom to decide their children's educational placement. Lastly, vouchers are seen, as the remedy for rising public school spending that has not brought higher average student performance and the failure to close the achievement gap between the races and socioeconomic classes.[174]

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[172] *See* David W. Kirkpatrick. *Choice in Schooling: A Case for Tuition Vouchers*. Baltimore, MD: Loyola University Press, 1990.

[173] Martha McCarthy. "What Is the Verdict on School Vouchers." *Phi Delta Kappan*, 81, 5 (January 2000): 371-78.

[174] *See* Caroline Minter Hoxby. "Are Efficiency and Equity in School Finance Substitutes or Complements?"*Journal of Economic Perspectives*, 1996, 10:4, 51-72; Paul Peterson and William G. Howell. "School Choice is a Civil Rights Issue," June 12, 2002. Available at http://www.hoover.org/pubaffairs/dailyreport/archive/2855376.html (last visited Feb. 2, 2007).

School Voucher Opponents

School voucher opponents strongly believe that nowhere in the world is access to educational opportunity broader than in the United States.[175] Public school advocates maintain that as the United States has become more diverse, public education stands out as the one institution that unifies Americans. Public schools are committed to educate all students and private schools provide a useful purpose but do not offer the same guarantee to all students.

Opponents of vouchers are committed to the special status of public schools "…as producers of values, perspectives, knowledge, and skills which are fundamental to community."[176] Opponents fear that "privatizing the governance and operation of schools will undermine their public purposes"[177] by the erosion of the public forum where all citizens participate in discussions over what constitutes an appropriate public education.[178]

Voucher opponents view education as a public good and see the goals of education as advancing and sharing knowledge, while the main goal of the free market is to maximize profits.[179] Public education is similar to the military's responsibility for national defense or the police's responsibility for public safety. It is not like a corporation's goal of providing an efficient product or service at a profit.

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[175] Louann A. Bierlein. *Controversial Issues in Educational Policy.* Newbury Park, CA: Sage Publications, 1993, 1.

[176] *See* WEAC Professional Development and Training Paper. "Private School Vouchers." 1996. Available http://www.weac.org/resource/may96/vouchers.htm (last visited Jan. 27, 2007).

[177] Brian P. Gill, P. Michael Timpane, Karen E. Ross, and Dominic J. Brewer, *Rhetoric Versus Reality: What We Know and What We Need to Know About Vouchers and Charter Schools.* Santa Monica, CA: RAND, 2001, 22. Available at http://rand.org/publications/MR/MR1118/MR1118.ch1.pdf. (last visited Feb. 2, 2007).

[178] Michael Mintrom. *Policy Entrepreneurs and School Choice.* Washington D.C.: Georgetown University Press, 2000, 2-3.

[179] John McMurtry. "Education and the Market Model." *Journal of Philosophy of Education*, 25(2): 209-218, 1991, 211.

Voucher opponents fiercely argue against that view of education as a commodity that should be regulated by market forces. In 1996, the Twentieth Century Fund reported that giving public funds to private individuals means "education ceases to be a collective public undertaking and becomes instead a private relationship between each family and its school. Schooling ceases to be part of the public sphere; no longer a public service, it becomes a consumable item."[180] Alex Molnar, an advocate for public schools, states

> Over time, market values have eroded and debased the humane values of democratic civil society. Listen closely to the language that already fills discussions about school reform. It is the language of commerce applied to human relationships. Children are defined as 'future customers', 'future workers' and 'future taxpayers'…When logic of the market is allowed to dominate society, relationships are inevitably turned into commodities to be bought or sold.[181]

Opponents of school vouchers believe strongly in the importance of a common civic and collective national interest. Educational policy is designed to promote the common good; therefore it should be a matter in the public, rather than the private, domain. "The 'public' in public schools means not just paid for by the public but procreative of the very idea of a public. Public schools are how a public--a citizenry--is forged."[182]

Opponents argue that public school vouchers fail to help economically disadvantaged students, while jeopardizing the democratic ideals that underlie publicly funded, universally available education. According to Henig, "the real danger in the market-based choice proposals is not that they might allow some students to attend privately run schools at public expense, but

[180] Carol Ascher, Norm Fruchter, and Robert Beme. *Hard Lessons*. New York: Twentieth Century Fund Press, 1996, 7.

[181] Alex Molnar. *Giving Kids the Business*. Boulder, CO: Westview Press. 1996, 184.

[182] Benjamin Barber. "America Skips School," *Harper's Magazine*. November 1993, 43.

that they will erode the public forums in which decisions with societal consequences can democratically be resolved."[183]

Voucher opponents claim that voucher advocates who support marketplace education have a political agenda that has nothing to do with concern for lower income students. The belief is that wholesale vouchers would allow the wealthy to free themselves from the legislative and legal safeguards (i.e., affirmative action) won for the disenfranchised in the l960s.[184] Public school supporters argue that the forms of protection that exist for low-income families have been secured by governmental regulation, not the free market. They argue that deregulation over the past decade has eroded those protections and greatly increased the disparity between the wealthy and the poor in the United States. According to these opponents, a market system of education is merely an extension of deregulation and promises to compound social inequities.[185] In addition, voucher opponents claim that even though the many governmental regulations (i.e., desegregation, bilingual education, and education of the handicapped) in public schools have not adequately secured equality of educational opportunity, it does not follow that the market can do any better.[186]

Free market opponents argue that education is a fundamental right that should not be distributed according to parental income. Their justification for government run schools is the belief in redistribution of educational opportunity. Parental resources are unequal, so even with a

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[183] Jeffery R. Henig. *Rethinking School Choice: Limits of the Market Metaphor.* Princeton, N.J.: Princeton University Press, 1993, xiii.

[184] Bob Lowe. "The Hollow Promise of School Vouchers." In *Education, Inc. Turning Learning into Business*. Alfie Kohn and Patrick Shannon, eds. Portsmouth, NH: Heinemann, 2002. Available at http://www.rethinkingschools.org/special_reports/voucher_report/v_sosholw.shtml (last visited Feb. 1, 2007).

[185] Bob Lowe. "The Hollow Promise of School Vouchers." http://www.rethinkingschools.org/SpecPub/sos/soshollo.htm#6b

[186] *Id.*

well functioning private market system there will be differences in the quality of education that children receive. These differences in education have the potential to negatively impact student's future earning opportunities.[187]

In summary, according to opponents, vouchers negatively impact public schools and society as a whole by diverting public funds, attention, and commitment to private entities.[188] They claim that "cream-skimming" will occur, with public schools losing the best most motivated students and most involved parents to private schools, leaving behind the more poorly performing or disruptive students the private schools will not accept.[189] Opponents argue that private school funds are unaccountable to governmental authorities,[190] improperly move public schools' governance from democratic control to a private sphere governed by market standards;[191] and discard the idea of a commitment to common future[192] because private schools may not promote cultural tolerance and democratic values.[193] Lastly, public school supporters

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[187] *See* James Poterba. "Government Intervention in the Markets for Education and Health Care: How and Why?" In Victor Fuchs, eds. *Individual and Social Responsibility: Child Care, Education, Medical Care, and Long-Term Care in America*. Chicago, IL: University of Chicago Press, 1996, 277-304.

[188] *See* Marcus Egan. *Keep Public Education Public: Why Vouchers Are a Bad Idea*. Alexandria, VA: National School Boards Association, 2003, 15. Available at http://www.nsba.org/site/docs/33800/33736.pdf (last visited Jan. 26, 2007).

[189] U. S. Department of Education. "What Really Matters in American Education." White paper prepared for U. S. Secretary of Education Richard Riley for speech at the National Press Club, Washington, D.C, September 23, 1997. Washington, DC: U. S. Department of Education, 1997. Available at http://www.ed.gov/Speeches/09-1997/index.html (last visited Jan. 27, 2007).

[190] *See* Erik Gunn. "Vouchers and Public Accountability." *Rethinking Schools Online*. Available at http://www.rethinkingschools.org/special_reports/voucher_report/vvouc141.shtml (Updated on May 12, 2003).

[191] *See* Jennifer Lutzy. "School Vouchers: Necessary Choice or Downfall of Public Education Ideals." *Community Youth Development Journal*. Volume 2, No. 3, Summer 2001. Available at http://www.cydjournal.org/2001Summer/lutzy_0613.html (last visited Jan. 27, 2007).

[192] *Id.*

[193] *See* Richard Just. "Voucher Nation? Why School Choice Could Demolish National Unity." *The American Prospect Online Edition*. Jul 11, 2002. Available at http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=790 (last visited Jan. 27, 2007).

claim that school vouchers are constitutionally suspect even though the U. S. Supreme Court has upheld a voucher program in Cleveland.[194]

School Voucher Politics

Voucher politics can be viewed as "a classic political confrontation, engaging partisan strategies and implicating political ideologies."[195] Ideology and partisanship are the most strongly related characteristics that define support and opposition for vouchers. Political ideology forms policy, since policymakers either support or oppose vouchers according to their different worldviews regarding the purposes and desired outcomes of education. Value conflicts make it difficult for policymakers to reach consensus concerning goals for education or which goals should receive priority. A tension exists between the values of concern for the collective good and the concern for personal liberty.[196] These values or attitudes are directly related to educational policies.[197] While values encompass the political rhetoric, school voucher implementation rests heavily on how interest groups calculate their own benefits or losses.

School vouchers have been a recurring and politically emotional issue at both the federal[198] and state[199] levels for decades. The debate raises questions about how to interpret the federal and

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[194] *See* Anti-Defamation League. "School Vouchers: The Wrong Choice for Public Education." Available at http://adl.org/vouchers/vouchers_constit_suspect.asp (last visited Jan. 27, 2007).

[195] Sheila Suess Kennedy. "Privatizing Education: The Politics of Vouchers." *Phi Delta Kappan*, 82,6. (Feb 2001): 450-456. Available at http://www.pdkintl.org/kappan/kken0102.htm (last visited Feb. 2, 2007).

[196] *See* John Witte. *The Market Approach to Education: An Analysis of America's First Voucher Program*. Princeton, NJ: Princeton University Press, 2000, 11.

[197] Joel Spring. *American Education* 9th edition. New York: McGraw-Hill, 2000, 22.

[198] D.C. School Choice Incentive Act of 2003 (Title III of Division C of the Consolidated Appropriations Act, 2004); (Pub. L. 108-199, Stat. 3) to Fiscal Year 2004 Omnibus Appropriations Bill (H.R. 2673); The District of Columbia fiscal 2004 Appropriations Bill (HR 2765). Available at http://www.ed.gov/programs/dcchoice/legislation.html

[199] A publicly funded voucher program has yet to be approved through a state's initiatives. *See* California Proposition 38 (2000), 71% of voters voted no to the school voucher initiative; Michigan Proposal 00-1 School Choice (2000), 70% of voters voted no to school voucher initiative; Washington (1996) 64% of voters voted no to

state constitutions and how to best educate children. Many proponents[200] and opponents[201]of school vouchers believe "the controversy over vouchers is a struggle over America's educational future."[202] Michael Engel noted, "It is not possible to offer empirical or quantitative evidence that a democratic school system is somehow superior to one based on market models. Rather it is a choice of values that leads one in one direction or another…"[203]

American public education is a reflection of the political philosophy of policymakers and the social and cultural traditions of the general population. The political spectrum ranges from conservative to liberal persuasions within the two major political parties. For decades liberals and conservatives have disagreed about educational policy. Policymakers incorporate aspects from many viewpoints while serving multiple constituencies. In this process education becomes the focal point for public debate and criticism. To better understand the fundamental differences involved in the school voucher debate participants and agendas need to be identified.

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the school voucher initiative; California (1993) 70% of voters voted no to the school voucher initiative; Colorado (1992) 67% of voters voted no to school voucher initiative; Michigan Proposal of 1978 was defeated at the polls by a margin of 74.3 percent to 25.7 percent (http://www.crcmich.org/PUBLICAT/2000s/2000/rpt331.pdf); and Maryland (1972) 55% of voters voted no to school voucher initiative.

[200] *See* Milton Friedman. *Capitalism and Freedom.* Chicago: University of Chicago Press, 1962; John E. Coons and Stephen D. Sugarman. *Education by Choice: The Case for Family Control*. Berkeley: University of California Press, 1978; John E. Chubb and Terry M. Moe. *Politics, Markets, and America's Schools*. Washington, D.C.: Brookings Institution Press, 1990; John E. Coons and Stephen D. Sugarman. *Scholarships for Children*. University of California, Berkeley: Institute of Governmental Studies Press, 1993; and Andrew J. Coulson, *Market Education: The Unknown History*. New Brunswick: Social Philosophy and Policy Center and Transaction Publishers, 1999.

[201] *See* Amy Stuart Wells. *Time to Choose: America at the Crossroads of School Choice Policy*. New York, NY: Hill and Wang, 1993; Peter W. Cookson, Jr. *School Choice: The Struggle for the Soul of American Education*. New Haven: Yale University Press, 1994: Kevin B. Smith and Kenneth J, Meier. *The Case against School Choice: Politics, Markets, and Fools*. Armonk, N.Y.: M.E. Sharpe, 1995; and Bruce Fuller and Richard F. Elmore, eds. *Who Chooses? Who Loses? Culture, Institutions, and the Unequal Effects of School Choice*. New York: Teachers College Press, 1996.

[202] Terry M Moe. *Schools, Vouchers, and the American Public*. Washington, D.C.: Brookings Institution Press, 2001, 2.

[203] Michael Engel. *The Struggle for Control of Public Education: Market Ideology vs. Democratic Values*. Philadelphia: Temple University Press, 2000, 65.

Democrats/Republicans

Politicians are divided on the school voucher issue mostly along party lines, with Democrats typically opposed and Republicans generally in favor. Both political parties recognize that education is an important issue to voters and American society. They recognize the public demand for more flexibility and accountability in education with failing schools being a priority.

Major educational policy differences exist between the Republican and Democratic Parties regarding the appropriate degree of federal involvement in public and private schools.[204] Both parties appear to have concerns regarding the effect of school vouchers. Republicans worry that the state might interfere with private education through the type of rules and regulations found in public education, while Democrats are concerned with the possibility of school vouchers draining resources from public schools.[205] The Republican Party is in favor of family choice in the selection of public, private, or for-profit schools while Democrats prefer parent choice to be limited solely to public schools (i.e., charter schools and magnet schools).

Prior to the George W. Bush presidential victory, Republicans championed many unpopular policies such as eliminating the Department of Education, cutting education spending, and proposing private school vouchers.[206] According to the Republican point of view, the two national teachers' unions, the National Education Association (NEA) and the American Federation of Teachers (AFT), dictate the educational policies of the Democratic Party.[207] In

[204] Joel Spring. *American Education* 9th edition. New York, NY: McGraw-Hill Higher Education, 2000, 22.

[205] 2004 Democratic National Convention Committee, Inc. "Strong at Home, Respected in the World: The 2004 Democratic National Platform for America." July 27, 2004, 34. Available http://www.democrats.org/pdfs/2004platform.pdf (last visited Feb. 2, 2007).

[206] Andrew J. Rotherham. "How Bush Stole Education." *Democratic Leadership Council Blueprint Magazine*. March 25, 2002. Available http://www.ndol.org/ndol_ci.cfm?kaid=110&subid=181&contentid=250319

[207] David J. Strom and Stephanie S. Baxter. "From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade." *Journal of Law and Education*. 30, 2 (April 2001): 275-303.

general, Democrats favor parental choice limited solely to public schools. The NEA and AFT are both adamantly opposed to vouchers that can be used at private and for-profit schools. Both unions consider any government support of private or for-profit schools as a threat to public schooling.

Typically, Republicans challenge the unions' motives concerning school choice. Voucher opponents claim the NEA, the larger labor union, and the AFT primarily oppose school choice because religious schools need not recognize unions as exclusive bargaining agents for their teachers. The U. S. Supreme Court in *NLRB v. Catholic Bishop of Chicago*,[208] held that religious schools that teach both religious and secular subjects are not within the jurisdiction of the National Labor Relations Act.[209] According to conservative legal scholars, union opposition to school choice is simply an effort to maintain a collective bargaining monopoly. If school choice proposals become widely implemented and upheld by the courts, membership and dues would decline as students and teachers transfer to religious schools that are beyond the authority of the National Labor Relations Board (NLRB).[210]

Summary

Beginning in the 1950s,[211] school vouchers have continuously been a controversial public policy subject. This chapter traced the path of school vouchers from a purely academic consideration to a recognized school reform implemented in select cities[212] and states.[213] The

[208] 440 U.S. 490 (1979).

[209] 29 U.S.C. §§ 151-169.

[210] Robert Alt. "Cleveland's School Voucher Program: The Politics and the Law." *On Principle*. Vol. 6, No. 1, 1998. Available at http://www.ashbrook.org/publicat/onprin/v6n1/alt.html (last visited Feb. 4, 2007).

[211] Milton Friedman. "The Role of Government in Education." *Economics and the Public Interest*. Robert A. Solo, ed. New Brunswick, NJ: Rutgers University Press, 1955, 123-144.

[212] *See* Milwaukee Parental Choice Program (Wis. Stat. § 119.23 (1995-96)) and Ohio Pilot Project Scholarship Program (Ohio Rev. Code Ann. § 3313.974 – 3313.979 (Baldwin Supp.2001)).

policy trends behind the school voucher movement provide insight into the policy arguments on both sides of the school voucher controversy. This study focused on the constitutional issues surrounding the use of publicly funded vouchers to pay for elementary and secondary education at religious schools, but, to thoroughly understand the underlying assumptions and implications of legal commentary on the school voucher controversy, it was first necessary to comment on vouchers as public policy.

Justifiable arguments exist on both sides of the voucher debate. Particular values and ideological perspectives are associated with advocates on both sides of the school voucher issue. It is critical that policymakers question how institutions governing the education of children should be structured. In addition to defining what constitutes a good education, the political process must define the boundaries of state control with regards to ensuring a quality education for students.[214]

Policymakers oppose or support school vouchers for a variety of reasons. No one fact exists that single-handedly resolves the school voucher policy debate. It is reality that policymakers are forced to make tradeoffs between competing or complementary policy goals. Political, legal, and philosophical considerations continue to shape decisions about school vouchers. The ideologies presented are based on central values that Americans hold in high esteem, but are in conflict. Debates over school vouchers deal with the hopes and fears about American society and particularly the tension that exists between individual liberty and cultural unity.

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[213] Fla. Stat. § 229.0537.

[214] Harry Brighouse. *School Choice and Social Justice*. New York: Oxford University Press, 2000, 2.

The school voucher debate reflects the fundamental economic choice policymakers face when deciding how to allocate scarce resources: whether to use the marketplace or to use government as the predominant regulator.[215] There are no proven, clear-cut solutions. Since the present organizational structure appears to be "ill-suited to the effective performance of American schools,"[216] legislators must decide whether to reform the present paradigm or to build a completely new one. These choices rely on individual conclusions regarding meaningful change prospects within the current educational structure, and on values that, hopefully, will enhance both fairness and productivity.[217]

[215] C. Wolf, Jr. *Markets or Governments: Choosing between Imperfect Alternatives.* RAND Research Study. Cambridge, MA: MIT Press, 1993, 1. Available at http://www.rand.org/pubs/notes/2006/N2505.pdf (last visited Feb. 4, 2007).

[216] John E. Chubb and Terry M. Moe. *Politics, Markets, and America's Schools.* Washington, DC: Brookings Institution Press, 1990, 21.

[217] Helen F. Ladd and Janet S. Hansen. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999, 164.

CHAPTER 3
ESTABLISHMENT CLAUSE JURISPRUDENCE

Introduction

Since the early 1900s, the U. S. Supreme Court has resolved a broad array of constitutional appeals that involve public elementary and secondary schools. By 1918 all states had adopted compulsory school attendance laws. Compulsory attendance laws required all children to attend state approved schools. The early public school cases before the Court dealt with Fourteenth Amendment issues.

In *Pierce v. Society of Sisters*[1] the U. S. Supreme Court unanimously over-turned an Oregon law that would have required all children to attend only public schools. The Court held that the Oregon Compulsory Education Act[2] requiring all children to attend public schools violated the due process clause of the Fourteenth Amendment. The due process clause states, "…nor shall any state deprive any person of life, liberty, or property without due process of law."[3] The landmark decision established the right of privately operated schools to coexist with publicly operated and funded school systems. The Court affirmed that the state may reasonably regulate all schools and may require all children to attend some school, but the state may not force children to attend only public schools.

In *Pierce* the Court acknowledged the "liberty of parents and guardians to direct the upbringing and education of children under their control."[4] Currently, some scholars view *Pierce* *Pierce* as providing precedent for school vouchers, especially for low income families who

[1] 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

[2] *Id.*

[3] U. S. Const. Amend. XIV § 1.

[4] *Pierce* at 534-35.

cannot afford private school tuition.[5] The *Pierce* decision was an extension of the *Meyer v. Nebraska*[6] ruling that held that states' compelling interest in education may not interfere with the power of parents to direct their children's education.[7] Parents have a constitutional guarantee to determine placement of their children in either public or nonpublic schools. In affirming a lower court decision the Court concluded:

> Under the doctrine of *Meyer v. Nebraska,* we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. [8]

In 1930 the U. S. Supreme Court in *Cochran v. Louisiana State Board of Education*[9] ruled on the issue of indirect aid to parochial school students. In 1930 the Court upheld a 1928 Louisiana statute providing "school books for school children free of cost" to all children in the state, including children attending private schools.[10] Cochran protested under the Fourteenth Amendment claiming his property was taxed for private education and that was taxation without due process.[11]

The state claimed the legislation provided aid to children, not to religious schools. "The schools obtain nothing from them, nor are they relieved of a single obligation because of them.

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[5] *See* Ira Bloom. "The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?" *32 J.L. & Educ.* 139, 169 (2003).

[6] 262 U.S. 390 (1923).

[7] *Id.* at 400.

[8] *Pierce*, 268 U.S. at 535.

[9] 281 U.S. 270 (1930).

[10] *Id.* at. 374

[11] *Id.* at 374

The school children and the state alone are the beneficiaries."[12] The Court unanimously upheld the state rationale and constructed, what has become known as, the "child benefit" theory. Chief Justice Hughes writing for the majority wrote:

> Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislature does not segregate private schools or their pupils, and its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded. Judgment affirmed.[13]

The Court ruled that the Fourteenth Amendment does indeed, forbid the states from depriving a person of life, liberty, or property without due process of law. However, according to the Court's ruling the provision of secular texts to all school children serves the public interest and not a private interest of church schools in such a way as to violate the due process clause. The Louisiana statute that allowed providing secular textbooks to students attending private religious schools and to those attending public school was found constitutional.[14]

Doctrinal Background

In aid to religious school cases, the critical provision of the U. S. Constitution is the Establishment Clause of the First Amendment, which reads: "Congress shall make no law respecting an establishment of religion. . ."[15] A brief review of the Court's Establishment Clause jurisprudence is necessary in order to understand how *Zelman v. Simmons Harris* aligns with previous U. S. Supreme Court decisions. This chapter relies on narrative and opinion excerpts to demonstrate how the U. S. Supreme Court, during the past sixty years, has interpreted the

[12] *Id.* at 375.

[13] *Id*. at374

[14] Perry A. Zirkel. *A Digest of Supreme Court Decisions Affecting Education* (3rd ed.). Bloomington, IN: Phi Delta Kappa, 1995.

[15] U.S. Const. Amend. I

Constitution concerning public aid to religious schools.[16] The reasoning of the Court has fluctuated from case to case and decision-to-decision reflecting the philosophies and dispositions of shifting majorities.[17]

Public education Establishment Clause issues have to do with the extent to which the state may aid religious schools and the extent to which religion may be advanced by public schools. An overview of the most significant court cases dealing with the degree to which public funds can be used to support the education of private school students, in particular religious schools, over the last fifty plus years follows. It is crucial to note that many of these rulings are very fact specific and should be analyzed and applied cautiously to other fact situations.

The Court has attempted to define the conditions under which public aid to religious schools is permissible under the Establishment Clause of the First Amendment.[18] "Congress shall shall make no law respecting an establishment of religion,"[19] commonly referred to as the Establishment Clause, was the legal basis in *Zelman v. Simmons-Harris*.[20] The Establishment Clause separates government and religion to maintain religious freedom while sharing a commitment to liberty and equality. This study focused on the U. S. Supreme Court's almost

[16] *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U. S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. (1971); *Bd. Of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson*, 330 U.S. 1.

[17] Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 Cal. L. Rev. 5, 6 (1987); Michael W. McConnell & Richard A. Posner, *An Economic Approach To Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 25-26 (1989).

[18] *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Mueller v. Allen*, 463 U.S. 388 (1983); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Mitchell v. Helms*, 530 U.S. 793 (2000).

[19] U.S. Const. Amend. I § 1.

[20] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

exclusive reliance on the Establishment Clause when deciding cases of public funding for religious schools.[21]

The constitutionality of school voucher programs that permit religious school participation rely on the U. S. Supreme Court's evolving interpretation of the Establishment Clause. The Establishment Clause is one of the most passionately debated sections of the Constitution. At first glance it appears to be straightforward, but interpreting its meaning when dealing with government aid to religious schools has proved to be a controversial and challenging task.[22] While there is general agreement that the government may not create a formal establishment by recognizing a state church, taxing citizens to support churches, or requiring church membership, broad consensus ends there.

The history surrounding the enactment of the Establishment Clause leaves the intent of the Framers open to several interpretations.[23] There exists little primary evidence regarding the Framers' interpretation of the term "establishment" when the phrase was written.[24] The U. S. Supreme Court views regarding the Establishment Clause range from strict separationists, who believe that even incidental aid to or recognition of religion by government violates the Establishment Clause, to accommodationists, who believe that government should act according to the religious character of the people, and that non-preferential aid to religious institutions does

[21] The state of Maine has examined the Free Exercise implications of its voucher program. Tuition payments to secondary school students, whose school district does not have a secondary school, are available only to students attending non-religious schools. The Maine Supreme Court held that denying religious schools from participation in the program is not an impermissible burden on an individual's free exercise of religion and therefore does not violate the Free Exercise Clause. *Bagley v. Raymond School Dept*., 728 A.2d 127, 130 (Me. 1999).

[22] See *Mitchell v. Helms*, 530 U.S. 793, 807 (2000). "In the over 50 years since *Everson* we have consistently struggled to apply these simple words in the context of government aid to religious schools."

[23] Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment*. Washington, D.C.: American Enterprise Institute, 1978.

[24] Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment*. 2nd ed. Chapel Hill: University of North Carolina Press, 1994. p. xxiii.

not constitute an establishment of religion. Justice Rehnquist while concurring with Justice White in *Mueller v. Allen*[25] remarked,

> It is easy enough to quote the few words constituting that Clause '…Congress shall make no law respecting an establishment of religion.' It is not at all easy, however, to apply this court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions we have expressly or implicitly acknowledged that 'we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'[26]

Strict Separation

According to the theory of strict separation, the Establishment Clause disallows any involvement by the state in religion: "…[t]he framers of the establishment clause meant to make explicit a point on which the entire nation agreed: the United States had no power to legislate on the subject of religion."[27] Separationists point to founding father James Madison, author of the Establishment Clause, who advocated a complete denial of state support for any type of religious activity.[28] Separationists contend that the Establishment Clause erects a "wall of separation between Church and State"[29] that does not allow any public funds to benefit a religious organization. Consequently, according to separationists school voucher programs that provide money to private, religious schools are unconstitutional.

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[25] 103 S.Ct. 3062 (1983).

[26] *Mueller* at 3062.

[27] Leonard Levy. *The Establishment Clause: Religion and the First Amendment.* (2d ed.) Chapel Hill, N.C.: North Carolina Press, 1994, 111.

[28] I*d*. at 122.

[29] It is important to note that the phrase "separation of Church and State" does not appear in the United States Constitution. Rather, it was first utilized by Thomas Jefferson in a letter to the Danbury Baptist Association in 1802. See *id.* at 246

Nonpreferentialism

Nonpreferentialism is the converse of strict separation and holds that the Establishment Clause simply prevents the federal government from benefiting one religion over all other religions and establishing a national church.[30] For historical support, nonpreferentialists point to the Congress that passed the First Amendment and the same Congress that reenacted the Northwest Ordinance, which declared: "Religion, morality, and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged."[31] Nonpreferentialists conclude that Congress did not intend the Establishment Clause to forbid government interaction with religion.[32]

Nonpreferentialism asserts that the state may provide support to a religious organization so long as it provides equal support to all other religious organizations. The nonpreferentialism approach first appeared in the 1984 dissent by Justice Rehnquist, however it was not adopted by a majority of the U. S. Supreme Court.[33] Rehnquist wrote,

> The Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. . . Nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.[34]

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[30] *See* Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction*. New York: Lambeth Press, 1982, 5.

[31] Ordinance of the Northwest Territory, 1Stat. 51 (1787).

[32] See Michael J. Malbin. *Religion and Politics: The Intentions of the Authors of the First Amendment*. Washington, D.C.: American Enterprise Institute, 1978, 14-15.

[33] *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court struck down an Alabama statute to establish a moment of silence in public schools on Establishment Clause grounds. *Id*. at 61. In strong dissent, Rehnquist argued the nonpreferentialist viewpoint in terms of the Establishment Clause.

[34] *Id*. at 113.

Therefore, from this perspective, a voucher program that permits religious school participation does not violate the Establishment Clause even though it benefits religious schools, as long as the government does not discriminate amongst religions.

Government Neutrality

Government neutrality is a compromise between strict separation and nonpreferential interpretations. It suggests that government should take a neutral position between church and state without favoring either. From a government neutrality approach, the Establishment Clause forbids preferential treatment of religion over non-religion and non-religion over religion. The Constitution requires equal treatment of religion, not discrimination against it.

U. S. Supreme Court Justice William Brennan clearly expressed this view when he said, "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."[35] Justice Brennan expressed the belief that "The Establishment Clause does not license government to treat religion and those who teach or practice it … as subversive of American ideals and therefore subject to unique disabilities."[36]

From this perspective government may treat religious groups the same as other nonreligious groups. This interpretation constitutionally permits states to provide reading teachers to low-performing students at religious schools,[37] allows states to provide computers to both religious and public schools,[38] and permits religious schools to participate in a generally available voucher program.[39]

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[35] See *McDaniel v. Paty*, 435 US 618, 639 (1978), which struck down a law that banned clergy from public office.

[36] *Id.*

[37] *Agostini v. Felton*, 521 U.S. 203 (1997).

[38] *Mitchell v. Helms*, 530 U.S. 793 (2000).

[39] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Early Cases: Separationist Perspective

In 1947 the Court first addressed the constitutionality of public funds flowing to religious schools in *Everson v. Board of Education*.[40] The Court upheld a New Jersey statute[41] authorizing authorizing reimbursement to parents who paid for their children's bus transportation to public or private schools, including religious schools. The Court found that the "legislation, as applied, does no more than provide a general program to help parents get their children regardless of their religion, safely and expeditiously to and from accredited schools."[42] The Court reasoned that transportation was a neutral, supplemental service, unrelated to the religious purpose of sectarian schools, and therefore constitutional.[43] The legislation also served the secular purpose of protecting the welfare of all the state's schoolchildren.[44] In a 5-4 decision the Court's majority maintained the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[45]

Justice Hugo Black, writing the majority opinion, adopted a separationist position. After detailing the history and importance of the Establishment Clause, he emphasized Jefferson's "wall of separation",[46] and defined permissible or impermissible practices.

> The "establishment of religion" clause of the First Amendment means at least this: Neither the state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force him to

[40] 330 U.S. 1 (1947).

[41] *Id*. at 3 n. 1 (citing 1941 N. J. Laws 191; N.J. Rev. Stat. § 18:14-8).

[42] *Everson*, 330 U.S. at 18.

[43] *Id*. at 17-18.

[44] *Id*. at 17.

[45] *Id*.

[46] 330 U.S. 1, 15-16 (1947). See also *Reynolds v. United States*, 98 U.S. at page 164, 25 L.Ed. 244.

> profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. 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.[47]

The *Everson* opinion proposed two positions that were fundamentally incompatible. Justice Black introduced the wall of separation metaphor as a controlling limitation on state power. Yet the Court, using the theory of neutrality to believers and nonbelievers alike held in favor of state reimbursement of bus transportation costs for parents of public and private religious students.[48] The Court said, "…state power is no more to be used so as to handicap religions than it is to favor them."[49] The Court found it compelling that "[t]he State contributes no money to the schools."[50] The Court reasoned that under the New Jersey statute, the state does not financially support religious schools.[51] Therefore, the New Jersey statute had not breached the First Amendment's "wall between church and state."[52]

In dissenting, Justice Robert Jackson insisted the majority's judicial logic contradicted its decision: "… the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."[53] In regards to the logic upon which the child-benefit

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[47] *Everson*, 330 U.S. at 15-16.

[48] S. H. Friedelbaum. *The Religion Clauses: Perennial Themes, Unsettled Directions in The Rehnquist Court: In Pursuit of Judicial Conservatism*. Westport, CT: Greenwood Press, 1994, 95.

[49] *Everson*, 330 U.S. at 18.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 24.

theory was predicated, Justice Jackson wrote, "…[i]t is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school."[54]

Justice Wiley Rutledge wrote in his dissent that the *Cochran* decision had opened the way for the majority's *Everson* decision and warned that these two decisions would create a rationale for future decisions: "…[t]hus with time the most solid freedom steadily gives way before continuing corrosive decision."[55]

The Court ruled for the state, but Justice Black's opinion acknowledged Madison and Jefferson's philosophy of the need of a strong wall of separation of church and state. In addition, Black's opinion provided a framework of fundamental legal issues that aid was secular in purpose (to provide safe transportation for all students), that aid was indirect (it was not paid directly to a religious institution), that beneficiaries of the aid were children (not churches), and that the state was "neutral in its relations with groups of religious believers and non-believers" (all schoolchildren were eligible for aid). These themes foreshadowed the legal standard the Court eventually crafted.[56] Finally, *Everson* illustrated the divisiveness and complexity of establishment cases. The majority and the dissenters of the *Everson* opinion all agreed with a strict separation of church and state and yet came to different conclusions. This has set the pattern for future establishment cases.

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[54] *Id*.

[55] *Id*.at 29.

[56] Lee Epstein & Thomas G. Walker. Religion: Exercise and Establishment in Constitutional Law for a Changing America: A Short Course, 2nd. Ed. Washington, D.C.: CQ Press, 2000, 379

The *Everson* decision was the initial determination by the Court to define the permissible interaction between religion and public schools under the Establishment Clause.[57] The Court attempted to reconcile the tension between the Establishment Clause, which had historically been interpreted as allowing "no aid" to religious institutions[58] and the Free Exercise Clause,[59] which prohibits discrimination based on religious beliefs.[60] The *Everson* court established a "non-discrimination" theory, whereas government may not advance or inhibit religion, thereby replacing the view that the Establishment Clause permits no aid of any kind to religious institutions.[61] The precedent established that acceptable government aid to religious schools was possible in situations where activities other than direct religious education were funded.

In *Board of Education of Central School District v. Allen*[62] the U. S. Supreme Court re-addressed the constitutional question of "apportioning state funds to school districts for the purchase of textbooks to be lent to parochial students"[63] which originally had been addressed in *Cochran.*[64] A New York State statute required local public school authorities to lend textbooks free of charge to public and private school students in grades seven through twelve. Appellant Board of Education of Central School District No. 1 in Rensselaer and Columbia Counties

[57] U. S. Const. amend. I ("Congress shall make no law respecting an establishment of religion…")

[58] *See* John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279 (2001) (discussing the evolution of the modern Establishment Clause)

[59] U. S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof….").

[60] *Everson*, 330 U.S. at 16.

[61] *Id*. at 18.

[62] 392 U.S. 236 (1968).

[63] *Id.* at 240.

[64] 281 U.S. 270 (1930)

challenged the allocation of state funds for students attending private, religious schools as unconstitutional.

After conceding, "the line between state neutrality to religion and state support of religion is not easy to locate,"[65] the Court held that the statute was not in violation of the Constitution. Justice Byron R. White, writing for a six-person majority, utilized the "purpose"[66] prong from *School District of Abington Township v. Schemmp*[67] to reach an accommodationist outcome.

> The express purpose was stated by the New York legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to this stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fare in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.[68]

Justice Hugo Black who wrote the majority opinion in *Everson* was one of three dissenting justices (William O. Douglas and Abe Fortas) in this case. He maintained:

> It requires no prophet to foresee that on the argument used to support this law others could be upheld providing for state or federal government funds…I still subscribe to the belief that tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny. The First Amendment's prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny. And I still believe that the only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide. The Court's affirmance here bodes nothing but evil to religious peace in this country…[69]

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[65] 392 U.S. at 242

[66] *Id*. at . To pass constitutional muster an enactment must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

[67] 374 U.S. 203, 83 S.Ct. 1560. (1963).

[68] *Allen*, at

[69] *Id*. at 253

Concurring with Justice Black, Justice William Douglas acknowledged, "the principle of separation of church and state, inherent in the Establishment Clause of the First Amendment, is violated by what we today approve."[70]

Although the Court could be categorized as adhering to a separationist philosophy in regards to church and state issues, the Court was willing to uphold some kinds of support for religion. The *Allen* decision exemplified the Court's use of the child benefit theory, one that had been used in *Cochran* and *Everson*. In it, the view of religious accommodation resulted in the favorable acceptance of legislation apportioning state funds to purchase textbooks for religious schools.

Following *Everson* and *Allen* the Court changed its approach toward public aid to religious schools. *Everson* and *Allen* "identified constitutionally permissible public funding by the content of that aid."[71] The Court reasoned that bus transportation and loaned textbooks were types of assistance that were secular and therefore not unconstitutional. Additionally, in *Allen* the concept of private choice began to emerge. The Court acknowledged that some public programs made benefits available to all, without regard to religion, and that families made the decision regarding the use of those benefits. The private choice of the families to use public funds at a religious school separates the state from the decision and constitutional challenges. Years later, private choice was to be a determining factor in the *Zelman v. Simmons-Harris* decision.

[70] *Id*. at 266.

[71] Nathan Lewin. "How School Vouchers Can Win in the Supreme Court-Distinguishing 'What' from 'How' in Aid to Religious Schools. *Jewish Law Articles*. Available at httyp://www.jlaw.com/Articles/SchoolVouchers.html#2.a (last visited Mar. 22, 2007).

Landmark Lemon and Progeny

After upholding the provision of transportation services in Everson[72] and textbooks in Allen[73] for both public and private school students, the U. S. Supreme Court established a significant precedent forbidding direct aid to religious schools. The Court's unanimous decision set the judicial tone for the majority of public aid to religious school cases during the following two decades. In 1971, the Court held in *Lemon v. Kurtzman*[74] that payment of sectarian schoolteachers' salaries[75] in Pennsylvania's "Nonpublic Elementary and Secondary Act" [76] and the "Rhode Island Salary Supplemental Act"[77] was direct government aid to religious schools and therefore unconstitutional. Following the separationists philosophy from Everson, the Court stated that the Establishment Clause prohibited the establishment of a national religion and all legislation that could possibly lead to any type of establishment of religion.

The Court created a three-prong standard for determining Establishment Clause challenges to state statutes.[78] The tripartite Lemon test was a synthesis of essential elements articulated in previous U. S. Supreme Court cases.[79] First, the statute must have a secular legislative purpose.[80]

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[72] 330 U.S. 1 (1947).

[73] 392 U.S. 236 (1968).

[74] 403 U.S. 602 (1971).

[75] *Id*. at 606-07.

[76] Pa.Stat. Ann. Tit. 24 §§ 5601-5609 (West 1992) (repealed 1977).

[77] R.I.Gen.Laws Ann. § 16-51-1 to 16-51-9 (2001) (repealed 1980).

[78] See *Lemon*, 403 U.S. at 612-13.

[79] The "purpose" and "effect" prongs were discussed in *School District of Abington Township v. Schempp*, 374 U.S. 844, 858 (1963). The "excessive entanglement" prong was discussed in *Walz v. Tax Commission*, 397 U.S. 664 (1970).

[80] See *Lemon*, 403 U.S. at 612.

Second, the primary effect of the statute cannot advance or inhibit religion.[81] Finally, the law cannot result in the state becoming excessively entangled with religion.[82] The Court found that both the Pennsylvania and Rhode Island statutes passed the first prong of the Lemon test, which required a secular purpose of promoting education.[83] The second prong, which deals with primary effect, was not addressed because the Court found the laws involved a severe entanglement between church and state.[84] The U. S. Supreme Court majority declared that both programs violated the third "prong" of the test because "comprehensive, discriminating, and continuing state surveillance [would] inevitably be required to ensure" that the subsidized teachers did not "inculcate religion."[85]

Even though both the Rhode Island and Pennsylvania programs provided parents a choice in determining whether to send their children to private or public school, the Court found that parental free choice did not outweigh the direct aid religious schools received.[86] The Court distinguished the direct aid programs in *Lemon* from the indirect aid programs upheld in *Everson*[87] and *Allen*,[88] and found that in these cases "state aid was provided to the student and his his parents--not to the church-related school."[89] The Court viewed direct subsidization of

[81] See *id*. at 612.

[82] See *id*. at 613.

[83] See *id*. at 613.

[84] See *id*. at 613-14.

[85] See *id*. at 619.

[86] *See id*.at 621.

[87] 330 U.S. 1 (1947).

[88] 392 U.S. 236 (1968).

[89] *Lemon*, 403 U.S. at 621.

religious schools as the equivalent of governmental indoctrination, which is prohibited by the Establishment Clause.[90]

Therefore, the manner by which the benefit was provided to the religious school, and not merely the content of the public aid, was acknowledged to be relevant to the constitutional determination. *Lemon* was the first in a series of cases in which the Court held unconstitutional nearly every form of aid whether it was direct or indirect to religious schools.

School voucher proponents must consider each prong of the *Lemon* test when proposing aid to religious schools. To satisfy the purpose prong the legislation must show a plausible and controlling secular purpose behind the legislation. The Court has never invalidated a state program to assist religious schools on the secular purpose prong. However, the two remaining prongs of the *Lemon* test were more formidable hurdles. In the cases following *Lemon* it proved difficult to design school aid programs that did not have the primary effect of advancing religion or excessively entangling government and religion.[91]

In 1973 the U. S. Supreme Court delivered three opinions regarding public aid to religious schools.[92] The first case was *Levitt v. Committee for Public Education and Religious Liberty*.[93] A A New York statute appropriated funds to reimburse nonpublic schools for administration, grading, compiling, and reporting of student test results. The nonpublic schools were given a single per-pupil allotment and not required to account for the funds. The Court ruled that the statute impermissibly aided religion therefore violating the Establishment Clause.

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[90] *Id*. at 621, 625.

[91] *See Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

[92] *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973).

[93] 413 U.S. 472 (1973).

The *Committee for Public Education and Religious Liberty v. Nyquist*[94] was the second opinion delivered by the U. S. Supreme Court and remains the most potent anti-voucher argument employed by voucher opponents. The significance of *Nyquist* was the establishment of a broad rule that public aid cannot go to religious schools if those funds are not restricted to secular expenditures.[95] The New York legislature amended the Education and Tax Laws to include three financial aid programs for nonpublic elementary and secondary schools. The first program, "Health and Safety Grants for Nonpublic School Children,"[96] involved financial assistance to nonpublic schools for maintenance and repair of facilities. The second program was a tuition reimbursement plan for nonpublic elementary and secondary students.[97] The last statute provided tax deductions for families who did not qualify for the tuition reimbursement plan.[98]

The Court adopted the reasoning of *Lemon* in invalidating all three financial aid programs for private schools holding the statutes had the primary effect of advancing religion.[99] The Court held that despite the legislature's secular purpose, the program impermissibly endorsed religious schools[100] because the tuition reimbursements were available only to parents of students of private schools, the majority of which were religious.[101] The Court also held that the unrestricted,

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[94] 413 U.S. 756 (1973).

[95] *See* Matthew D. Fridy "What Wall? Government Neutrality and the Cleveland Voucher Program" 31 Cumb. L. Rev. 709 (732).

[96] See *id*. at 762-63. The Health and Safety Grants for Nonpublic School Children program is codified at N.Y. Educ. Law. §§ 549-53. (McKinney 1988).

[97] See *id*. at 764-65. The tuition reimbursement program is codified at N.Y. Educ. Law §§ 55963 (McKinney 1988).

[98] See *id*. at 765-67. The tax deduction program is codified at N.Y. Tax Law § 612(j) (McKinney 1988).

[99] See *id*. at 774-94.

[100] *See id.* at 794.

[101] *Id*. at 780.

direct aid for religious schools is prohibited by the Establishment Clause.[102] In the Court's opinion, the New York program created a financial incentive for parents to choose religious schools over public schools[103] and therefore impermissible.[104]

The Court distinguished the New York programs from the approved aid in *Everson* and *Allen*, which "…assist[ed] only the secular functions of sectarian schools" and bestowed only an "indirect and incidental" benefit to the schools' religious functions. The Court was not persuaded by the fact that the benefits of the tuition-reimbursement and tax-relief programs went directly to parents, not schools. The Court was adamant that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[105]

Allen and *Everson* differed from *Nyquist* in an important aspect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools."[106] The tuition grants and tax credits at issue in *Nyquist* were restricted only to parents who chose to send their children to nonpublic schools.

School voucher proponents often highlight a footnote in the *Nyquist* majority opinion. The Court stated, "…we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." [107] Voucher proponents

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[102] *Id.*

[103] *Id*. at 786-87.

[104] *Id*. at 786.

[105] *Id*. at 783.

[106] *Id*.

[107] See *Nyquist*, 413 U.S. at 782 n. 38

believe this passage suggests that school-voucher programs that are facially neutral and include public, private, or religious schools pass constitutional muster. The important fact is that what is placed in a footnote is *obiter dictum* or *dicta*. The comment was extraneous to the line of reasoning that led to the decision in the case and therefore not a binding authority.

In the third case, *Sloan v. Lemon*,[108] the Court held that Pennsylvania's tuition grant program violated the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions. After the *Lemon* decision the Pennsylvania General Assembly enacted the "Parent Reimbursement Act for Nonpublic Education."[109] The act provided funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. The statute violated the "primary effect" prong of the *Lemon* test. Justice Powell delivered the opinion of the Court stating,

> The State has singled out a class of its citizens for a special economic benefit. Whether the benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequences is to preserve and support religion-oriented institutions.[110]

In *Meek v. Pittenger*[111] the U. S. Supreme Court invalidated a Pennsylvania state-sponsored program that provided three types of public aid for private schools.[112] The first type of aid dealt with the lending of textbooks to nonpublic students. Another type dealt with the state lending instructional material directly to private schools. Lastly, the state was to offer "auxiliary services" to students of private schools, which included "guidance, counseling, and testing

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[108] 413 U.S. 825, 93 S. Ct. 2982. (1973).

[109] Pa. Laws 1971, Act 92, Pa. Stat. Ann., Tit. 24, 5701-5709 (Supp. 1973-1974) (the entire enactment is printed in an appendix to the District Court's opinion, 340 F. Supp. 1356, 1365-1368).

[110] *Sloan v. Lemon*, 413 US 825, 832 (1973).

[111] 421 U.S. 349 (1975).

[112] 24 Pa. Cons. Stat. Ann. § 9-972 (1992) (repealed 1975).

services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; service for the improvement of the educationally disadvantaged," "and such other secular, neutral, non-ideological services as are . . . provided for public school children of the Commonwealth."[113]

The U. S. Supreme Court, as it had done previously in *Nyquist*, analyzed the Pennsylvania programs under the *Lemon* test.[114] Implementing the first prong, the Court acknowledged that all three of the programs had a secular purpose.[115] Relying on the precedent from *Allen*,[116] the Court held that the textbook loan program was constitutionally permissible.[117] The Court noted, "the textbook provisions . . . extend to all schoolchildren the benefits of Pennsylvania's well-established policy of lending textbooks free of charge to elementary and secondary school students."[118] The Court emphasized that since textbooks are loaned directly to the student with ownership remaining with the State, it is the parents and children and not the private schools that benefit.[119] The Court also held that no suggestion existed that the loaned textbooks would be used for anything other than secular purposes.[120] The *Meek* decision reinforced the proposition that secular aid to religious schools may be permitted, but only as long as that aid could not be diverted to religious purposes.

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[113] § 9-972.1 (b); *Meek*, 421 U.S. at 353 n.2.

[114] *Meek*, at 358-59.

[115] See *id*. at 362-63, 368.

[116] 392 U.S. 236.

[117] See *id*. at 359-62.

[118] Meek, 421 U.S. at 360.

[119] See *id*. at 361.

[120] See *id*. at 361-62.

In contrast, the Court held that the instructional materials loan program had the impermissible effect of advancing religion.[121] The Court reasoned that it was impossible to separate sectarian and secular elements in religious education.[122] The Court reasoned that any aid for education at religious schools advances religious education and violates the Establishment Clause.[123]

Lastly, the Court found that the provision of auxiliary services at private schools by public schoolteachers resulted in excessive entanglement and violated the Establishment Clause.[124] The Court reasoned that the state would have to monitor the teachers receiving government-subsidized salaries to ensure that religious indoctrination did not occur and thus advance the school's religious mission.[125]

In *Wolman v. Walter*[126] the Court assessed the constitutionality of an Ohio law[127] that provided various forms of publicly-funded aid to students in religious schools.[128] The statute authorized the state to provide nonpublic school children with "books, instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation."[129]

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[121] See *id*. at 366.

[122] See *id*. at 366.

[123] See *id*.

[124] *Id*. at 370-72.

[125] *Id*.

[126] 433 U.S. 229 (1977).

[127] Ohio Rev. Code Ann. § 3317.06 (Anderson 2002).

[128] *Wolman*, 433 U.S. at 234.

[129] *Id*. at 229, 233.

In separate opinions, six justices upheld the provision of textbooks to sectarian school students, finding that the Ohio textbook program[130] had a "striking resemblance to the systems approved in *Board of Education v. Allen* and in *Meek v. Pittenger*."[131] The Court also upheld the segment of the Ohio statute that authorized state-funded standardized testing and scoring by public school personnel.[132] The Court differentiated the Ohio statute from the New York statute found unconstitutional in *Levitt v. Committee for Public Education & Religious Liberty*,[133] which the Court held impermissible because religious teachers prepared and administered the tests.[134] In *Wolman*, because the religious schools did not control the content of the tests, and nonpublic school personnel did not participate in the drafting or scoring of tests, the Court reasoned that the program did not violate the Establishment Clause.[135]

The Court also upheld the provision of diagnostic services by public school personnel on private school premises.[136] The Court found this program to be similar to the neutral, generally available services upheld in *Everson* and *Allen*,[137] finding that "the provision of health services to all schoolchildren--public and nonpublic--does not have the primary effect of aiding religion."[138] In distinguishing the diagnostic services from the auxiliary services struck down in *Meek*,[139] the

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[130] Ohio Rev. Code Ann. § 3317.06 (A).

[131] *Wolman*, 433 U.S. at 237-38 (opinion of Blackmun, J., joined by Burger, C.J., Stewart & Powell, JJ.); see also *id*. at 255 (White & Rehnquist, JJ., concurring in part, dissenting in part).

[132] Ohio Rev. Code Ann. § 3317.06 (H).

[133] 413 U.S. 472 (1973).

[134] *Wolman*, 433 U.S. at 239-40; *Levitt*, 413 U.S. at 482.

[135] *Wolman*, 433 U.S. at 239 (Blackmun, J., writing for the Court).

[136] Ohio Rev. Code Ann. § 3317.06 (B), (D).

[137] *Wolman*, 433 U.S. at 242.

[138] *Id.*

[139] *Id*. at 242-44.

Court in *Wolman* found that "[t]he nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student."[140] Therefore, the Court held that Ohio could permissibly provide diagnostic services to students who attended religious schools.

Additionally, the Court upheld the provision of "certain therapeutic, guidance, and remedial services" for special-needs children provided by public school personnel at religiously-neutral locations.[141] These neutral locations were on the premises of public schools or in "mobile units located off the nonpublic school premises."[142] The distinguishing feature in the Ohio program, from the program found impermissible in *Meek*, was the services were not provided on the premises of the religious school.[143] The Court held that "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement."[144]

In *Wolman* the Court relied on the *Meek* rationale[145] to find lending "instructional materials and equipment" section in the Ohio statute[146] unconstitutional.[147] The state provided the materials to the students and parents rather than to the private school but this did not change the

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[140] *Id*. at 244.

[141] Ohio Rev. Code Ann. § 3317.06 (E)-(H).

[142] *Wolman*, 433 u.S. at 244-45 (citing Ohio Rev. Code Ann. § 3317.06 (G)-(I), (K) (Supp. 1976), which is currently codified as § 3317.06 (E)-(H)).

[143] *Wolman*, 433 U.S. at 247.

[144] *Id*. at 248.

[145] *Id*. at 250-51.

[146] *Id*. at 248 & n.15 (citing Ohio Rev. Code Ann. § 3317.06 (B) – (C) (Supp. 1976)).

[147] *Id.* at 247.

substance of the program, and therefore impermissible.[148] The Court reasoned that "[t]he equipment [was] substantially the same; it [would] receive the same use by the students; and it [could] still be stored and distributed on the nonpublic school premises."[149] According to the Court, religion would be advanced because it is impossible to separate "the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools."[150]

Finally, the Court addressed the constitutionality of the state providing transportation for field trips for nonpublic students at private schools.[151] The Court held that the program was unconstitutional because religion could be integrated into the field trips.[152] The Court reasoned that field trips were "an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct."[153] Constant monitoring would be required to prevent this integration with the result being an excessive entanglement of church and state.[154]

In *Wolman* the Court upheld only programs providing neutral services, such as textbooks, standardized testing, and diagnostic, guidance, and remedial services. The Court was consistent with *Lemon*, *Nyquist*, and *Meek*, which rejected programs providing substantial aid to the religious goal of sectarian schools.[155] In each case, the Court was appraised whether public aid

[148] *Id*. at 250-51.

[149] *Id.* at 250.

[150] *Id*.

[151] *Id*. at 252 (citing Ohio Rev. Code Ann. § 3317.06 (L) (Supp. 1976).

[152] *Id*. at 254.

[153] *Id.*

[154] *Id.*

[155] *See supra* Parts I.A. 1-3.

that was secular might be subverted to religious use and whether the amount of aid was sufficiently "massive" to call it "direct" rather than "indirect." The secular content of government aid was no longer sufficient to guarantee its constitutionality. The Court found that the educational function could not be separated from the religious mission of the sectarian schools, and therefore aid to the educational function necessarily resulted in the impermissible endorsement of religion.[156]

In *Committee for Public Education and Religious Liberty ("PEARL") v. Regan*,[157] the New York Legislature enacted a new statute directing payment to nonpublic schools for the costs incurred for compliance with specific state-mandated requirements. These requirements included testing (pupil evaluation, achievement, and scholarship and college qualification tests), reporting, and record keeping. Unlike the earlier version, this statute provided a means by which state funds were to be audited, thus ensuring that only actual costs of providing covered secular services were reimbursed out of state funds. The Court held that the statute did not violate the Establishment Clause.

In *Grand Rapids v. Ball*,[158] the local school district operated the two programs "Shared Time" and "Community Education Programs" in nonpublic schools. These programs provided classes for nonpublic students at public expense in classrooms located in and leased from the nonpublic schools.[159] "Shared Time" classes were offered during the regular school day and supplemented the core curriculum.[160] "Community Education" classes were voluntary and

[156] *See supra* Parts I.A.4.

[157] 444 U.S. 646 (1980).

[158] 473 U.S. 373 (1985), overruled by *Agostini v. Felton*, 521 U.S. 203 (1997).

[159] *Id*. at 375.

[160] *Id*. at 375-76.

offered after normal school hours.[161] Publicly employed teachers taught both types of these classes. Taxpayers sued, claiming that both programs violated the Establishment Clause of the First Amendment made applicable to the states through the Fourteenth Amendment. The Federal District Court applied the *Lemon* test[162] and struck the programs down under the second prong.[163]

The Court held that the challenged programs impermissibly promoted religion in three ways.[164] First, state-paid teachers might be influenced by the "pervasively sectarian nature" of the religious school environment and might "subtly or overtly indoctrinate the students in particular religious tenets at public expense."[165] Second, the use of the parochial school classrooms "threatens to convey a message of state support for religion"[166] through "the symbolic union of government and religion in one sectarian enterprise."[167] Third, "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects."[168] The significance of *Ball* was the Court's continued reluctance to permit public employees to act as instructors within nonpublic schools. The impressionability of the young students and the chance of unintentionally adding to their indoctrination were the main reasons.

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[161] *Id* at 376-77.

[162] *Id* at 382.

[163] *Id* at 397.

[164] *Id.*

[165] *Id* at 388.

[166] *Id* at 397.

[167] *Id* at 392.

[168] *Id* at 397.

In *Aguilar v. Felton*,[169] the Court invalidated a New York program that used federal funds to provide instructional services for low-income students in religious schools.[170] The services included were "remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services," and were provided by public school employees at religious school.[171] As in *Lemon* and *Meek*, the Court reasoned that the program was impermissible because it created an excessive entanglement of church and state.[172] In the state's effort to design a program within the guidelines of the *Lemon* test, the program had a secular purpose and prevented the "effect" of "advancing" the religion prong but the program was then in conflict with the no "entanglement" prong.[173]

The Court noted in *Aguilar* and its companion case *Grand Rapids v. Ball* many similarities between the New York City program and the Grand Rapids program.[174] "In both cases publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both cases an overwhelming number of the participating private schools are religiously affiliated. In both cases the publicly funded programs provide not only professional personnel but also all materials and supplies necessary for the operation of the programs. Finally,

[169] 473 U.S. 402 (1985), overruled by *Agostini v. Felton*, 521 U.S. 203 (1997).

[170] *Id* at 407.

[171] *Id* at 406.

[172] *Id*. at 412-13.

[173] *Id.* at 00. In dissenting opinion, Justice Rehnquist stated "… for the reasons stated in my dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985)…the Court takes advantage of the "Catch-22" paradox of its own creation … whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement."

[174] *Id*. at 409.

the instructors in both cases are told that they are public school employees under the sole control of the public school system."[175]

The major difference between the two programs was that the New York City program provided a system of monitoring whereby administrative personnel would visit program classes unannounced.[176] The purpose of this monitoring program was to avoid Establishment Clause problems by ensuring that program teachers were not including religion in their classes.[177] This plan developed by the city of New York to monitor public school teachers teaching at the parochial schools failed the third prong of the Lemon test. The Court concluded that this supervisory system created an excessive entanglement with religion.[178]

Although the Court acknowledged the secular intent of the New York statute, it is significant to note that the Court found potential for religious advancement and entanglement making it unconstitutional. The Court was hesitant to permit public school teachers into religious classrooms for fear that they may engage in direct or indirect religious instruction.

Transition to Government Neutrality

As the 1970s ended, for the most part the strict separationist attitude of the U. S. Supreme Court also ended. During the 1980s the U. S. Supreme Court's philosophy became more conservative and the justices began to change in favor of a neutrality approach to the resolution of Establishment Clause issues. In *Mueller v. Allen*[179] the Court upheld a Minnesota income tax

[175] *Id*.

[176] *Id*. at 406-07, 409.

[177] *Id*. at 409.

[178] *Id*.

[179] 463 U.S. 388 (1983).

deduction program which included "tuition, textbooks and transportation" expenses[180] that was generally available to parents of both public and private school students.[181]

The plaintiffs argued that the statute violated the Establishment Clause of the First Amendment by providing financial assistance to religious schools. The overwhelming majority of deductions (96 percent) went to families whose children attended religious schools.[182] The Court reasoned the law "channel[ed] whatever assistance it may provide to parochial schools through individual parents."[183] The public aid became available to religious schools "only as a result of numerous private choices of individual parents of school-age children."[184] This marked a difference from earlier decisions involving "the direct transmission of assistance from the State to the schools themselves."[185]

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[180] *Id*. at 390 citing Minn. Stat. § 290.09, subd. 22 (1982) permits a taxpayer to deduct from his or her computation of gross income the following:

> "Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, `textbooks' shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extra-curricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature."

[181] *Id*. at 398-99.

[182] *Mueller*, 463 U.S. at 401.

[183] *Id*. at 399.

[184] *Id*.

[185] *Id*.

In writing for the majority, Chief Justice Rehnquist applied the three-pronged *Lemon* test[186] and determined that the Minnesota statute had a secular purpose, did not have the impermissible effect of advancing religion, and did not create excessive entanglement.[187] The tax deduction served the secular purpose of ensuring that the state's citizenry is well educated and assured the financial health of private schools, both sectarian and nonsectarian.[188] The deduction did not have the primary effect of advancing religion in nonpublic schools because it was only one of many deductions under the Minnesota tax laws and was available for educational expenses incurred by all parents, no matter whether their children attend public schools or private schools.[189] The statute did not "excessively entangle" the State in religion, although state officials must determine whether particular textbooks qualify for the tax deduction and must disallow deductions for textbooks used in teaching religious doctrines. The Court held this an insufficient basis for finding such entanglement.[190]

The Court also held that a tax deduction was not comparable to the tuition reimbursement program struck down in *Nyquist*[191] but rather emphasized that the program was analogous to the neutral, generally applicable programs the Court had upheld[192] in *Everson*[193] and *Allen*.[194] Specifically, in these programs "the class of beneficiaries included all schoolchildren, those in

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[186] *Id*. at 394-404.

[187] *Id*. at 394-96.

[188] *Id*. at 395.

[189] Id.

[190] *Id*.

[191] 413 U.S. 756, 93 S.Ct. 2955 (1973).

[192] *Mueller*,. at 394, 398.

[193] 330 U.S. 1 (1947).

[194] 392 U.S. 236 (1968).

public as well as those in private schools," and "public assistance [was] available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited."[195] The program created no additional incentives for parents to choose religious school over public school.[196] It is the "numerous private choices of individual parents" that determines whether public funds ultimately reach religious schools.[197]

The Court employed the *Lemon* test to uphold the statute by depending on two neutrality themes. First, footnote thirty-eight of *Nyquist*[198] allowed for the possibility that financial aid could be given to a religious school as part of an overall general plan, making aid available to all schools without regard to religious affiliation or whether the school is public or private. Secondly, aid to religious schools is permissible under such a general plan if it is made available based upon the independent choices of parents and not the state.

In *Witters v. Washington Department of Services for the Blind*[199] the Court unanimously upheld a vocational rehabilitation program which provided benefits directly to qualifying individuals regardless of the nature of the institution benefited. The use of public funds by a student who is blind at a Bible college does not violate the Establishment Clause.[200]

Justice Thurgood Marshall, writing for the Court, analyzed the case under the *Lemon* test.[201] The Court reaffirmed the importance of individual choice from *Mueller*,[202] holding that

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[195] *Mueller*, at 398.

[196] *Id*. at 399.

[197] *Id*.

[198] 413 U.S. 756, 93 S.Ct. 2955 (1973).

[199] 474 U.S. 481 (1986).

[200] *Id*. at 489-90.

[201] *Id*. at 485.

[202] 463 U.S. 388, 399 (1983).

"any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[203] In addition, the program created no financial incentives to choose sectarian education and provided no greater benefits to those who did elect to pursue a religious education.[204] The Washington program also was similar to footnote thirty-eight of the *Nyquist* decision because the benefit was available to students generally because regardless of the sectarian/nonsectarian or public/nonpublic nature of the schools,[205] all students benefited equally under the program.[206] No indication was found that program funds were being used "'to provide desired financial support for nonpublic, sectarian institutions.'"[207] According to the Court, when individuals, as opposed to government, determine whether and how much money flows to religious institutions, it is no more constitutionally troubling than when a government employee donates his or her paycheck (public funds) to a church.[208] The Court concluded that a neutral, generally applicable program of genuine private choice did not constitute an impermissible advancement of religion.[209]

In *Zobrest v. Catalina Foothills School District*[210] independent choice was a determining factor in the Court ruling. Public funding was upheld for a sign language interpreter for a student

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[203] *Witters*, at 487. Said the Court in *Mueller*, "Under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children." *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

[204] *Id*. at 487-88.

[205] Witters, 474 U.S. at 487-88.

[206] I*d*.

[207] *Id*. at 488. Justices were quoting *Committee for Public Education and Religious Liberty v. Nquist*, 413 U.S. 756, 782-83 (1973). Cf. *Meek v. Pittenger*, 421 U.S. 349, 363-64. (1975).

[208] *Id*. at 486-87.

[209] *Id.* at 489-90.

[210] 509 U.S. 1 (1993).

attending a Catholic high school pursuant to the federal Individuals with Disabilities Education Act.[211] In a 5-4 decision, the Court held that the provision of a sign language interpreter did not constitute state sponsorship of religion. Parents select the school their children attend and therefore "a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents."[212] Additionally, the program did not create an incentive to choose religious over public school, and the primary beneficiary of the aid was the student, not the religious institution.[213]

Relying on *Mueller* and *Witters* , Justice Rehnquist, writing for the majority, found that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[214] The Court focused on the fact that "IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decision-making."[215]

Justice Rehnquist concluded that providing an interpreter differed from providing a teacher or counselor because an interpreter, unlike a teacher or counselor, would not add or subtract from the overall environment of the school.[216] The program was found to be constitutionally

[211] *Id*. at 3; 20 U.S.C. §§ 1400-91 (2000). The Arizona counterpart of the IDEA is codified at Ariz. Rev. Stat. Ann. § 15-761 to -774 (West 2002).

[212] *Id*. at 10-11.

[213] *Id*.

[214] *Id.* at 8.

[215] *Id*. at 10.

[216] *Id*. at 13.

permissible when applied to students at religious schools because it represented "a neutral government program dispensing aid not to schools but to individual handicapped children."[217]

The dissenting Justices, Blackman, Stevens, Souter, and O'Conner, argued that the Establishment Clause prohibited the provision of a public employee to transmit religious views. The Justices argued that the Court should have remanded the case to determine whether the federal act actually required the school district to provide an interpreter in a private school.

The significance of *Zobrest* was that it emphasized two crucial facts. First, "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents."[218] Second, "[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any [qualified] child . . . without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[219] For the first time the Court permitted public employees to work in religious schools. Although the person would be translating religiously based information the function of the interpreter was not considered religious. The Court determined that the provision of the interpreter did not relieve the religious school of a cost that it otherwise would have borne. After *Zobrest*, the Court began to shift away from its position of "no direct aid" to religious schools toward a broader view permitting state aid to religious schools in certain instances.

[217] See *id*. at 13-14.

[218] *Id*. at 10.

[219] *Id*.

Significant Doctrinal Shift

In *Agostini v. Felton*,[220] the U. S. Supreme Court approved a program that, under Title I of the Elementary and Secondary Education Act of 1965 (ESEA),[221] provided public school employees to teach remedial classes at private schools, including religious schools. In so holding, the Court overruled *Aguilar v. Felton*[222] and partially overruled *School District of Grand Rapids v. Ball*.[223] Justice O'Connor, writing the majority opinion, summarized "… New York City's Title I program does not run afoul of any of the 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."[224]

The decision marked a dramatic shift in school aid jurisprudence when the Court departed from ruling that all government aid to religious schools was unconstitutional. In Aguilar the Court held that publicly funded remedial education services provided at religious schools violated the Establishment Clause of the First Amendment because it created an excessive entanglement between Church and State.[225] As a result of this decision remedial education services were provided off-site. Students were bussed from their religious schools or they received their remedial education services in vans parked outside of their religious schools.

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[220] 521 U.S. 203 (1997).

[221] 20 U.S.C. § § 6321(a) (1994). Part A of Title I of the Elementary and Secondary Education Act requires federal funds to be made available on an equitable basis to eligible students attending private as well as public schools.

[222] 473 U.S. 402 (1985).

[223] 473 U.S. 373 (1985).

[224] *Agostini* at 234.

[225] See *Aguilar*, 473 U.S. at 412-13.

In 1995, parents and the New York City Board of Education filed suit in federal court seeking relief from the *Aguilar* injunction under Federal Rule of Civil Procedure 60(b)(5).[226] This rarely used rule permits parties to seek relief from an earlier court order that is no longer supported by law. Both the district court[227] and the Court of Appeals[228] denied the requested relief because the U. S. Supreme Court had not yet explicitly overruled the Establishment Clause jurisprudence of *Aguilar*.

On appeal to the U. S. Supreme Court, the plaintiffs' appeal "hinged on whether later Establishment Clause cases had so undermined *Aguilar* that it was no longer good law."[229] The Court held that Federal Rule of Civil Procedure 60(b)(5) allowed the challenge to the decision in *Aguilar*.[230] Justice O'Connor, writing for a 5-to-4 majority, noted that *Witters* and *Zobrest* undermined several assumptions upon which *Aguilar* and *Grand Rapids* had been based.[231] The Court in *Zobrest* eliminated the presumption that a public school employee on the premises of a religious school create a symbolic link between Church and State, and that public employees inculcate religion in students if permitted to teach in religious schools.[232] In *Witters* the Court overruled its earlier position that "all government aid that directly assists the educational function

[226] See *id*. at 214.

[227] See *Agostini*, 521 U.S. at 214.

[228] See *Felton v. Secretary, U.S. Department of Education*, 101 F.3d 1394 (2d Cir. 1996), rev'd sub nom. *Agostini v. Felton*, 521 U.S. 203 (1997).

[229] See *Agostini*, 521 U.S. at 217-18.

[230] Fed. R. Civ. P. 60(b)(5) (1996). The rule states that "on motion and upon such terms as are just, the court may relieve a party, from a final judgment [or] order for the following reasons: …[or when] (5) it is no longer equitable that the judgment should have prospective application."

[231] See *id*. at 222.

[232] See *id*. at 224.

of religious schools is invalid,"[233]and noted instead that *Nyquist*'s footnote thirty-eight allowed for general aid without regard to the nature of the institution benefited.[234] Justice O'Connor concluded that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here."[235] The Court's final point was that Title I money reached religious institutions as a result of private, individual choices, not a government decision.[236] Any aid to religious schools was the "result of the private decision of individual parents [and] could not be attributed to state decisionmaking."[237]

The Justices who dissented argued that the case should not be overturned, since this was essentially the same case that was ruled on twelve years earlier and that the Court does not as a rule rehear cases. Justice Ginsburg, wrote that "lower courts lack the authority to determine whether adherence to a judgment of this Court is inequitable."[238]

The *Agostini* decision characterizes the U. S. Supreme Court shift in approach toward whether an absolute wall must exist between public and religious schools. In *Agostini*, the Court substantially modified the *Lemon* test by collapsing the entanglement prong into the primary effect prong.[239] Additionally, this decision was significant in that the state could conduct public

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[233] See *id*. at 225.

[234] See *id*.

[235] *Id*. at 234-35.

[236] 117 S. Ct. at 2011-2012, 2014.

[237] *Id* at 2012 (quoting *Zobrest*, 509 U.S. at 10).

[238] *Agostini*, 117 S. Ct. at (Ginsgurg, J., dissenting).

[239] *See* Agostini at 232-33 "[r]egardless of how we have characterized the issue, … the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'"

programs in religious schools without becoming excessively entangled with religion. Previous to *Agostini* the Court had upheld aid programs only if they provided neutral, generally available benefits, such as transportation, textbooks, and tax deductions.[240] Prior to *Agostini* the Court consistently struck down school aid programs that provided funds to private, religious schools because such funds created incentives to choose religious schools over public schools. As in *Lemon,*[241] *Nyquist,*[242] *Meek,*[243] and *Wolman,*[244] the Court found public aid that benefited religious schools in the form of teachers' salaries, tuition reimbursements, and educational equipment that was potentially divertible to religious uses unconstitutional. In *Agostini* the Court rejected three presumptions that had been previously relied upon in rulings: (1) permitting public employees to work within religious schools inevitably results in the state-sponsored indoctrination of religion; (2) permitting public employees to work within religious schools constitutes a symbolic union between church and state; and (3) any government aid that enhances the educational function of religious schools impermissibly violates the separation between church and state. In *Agostini*, by contrast, it was found that government aid impermissibly advances religion only if aid (1) results in governmental indoctrination; (2) defines in recipients by reference to religion; or (3) creates an excessive entanglement.

In *Mitchell v. Helms*[245] the constitutionality of a program providing aid to both public and religious schools in the form of educational equipment, including books and computers was

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[240] *See Mueller v. Allen*, 463 U.S. 388 (1983); *Board of Education v. Allen*, 392 U.S. 236 (1986); and *Everson v. Board of Education*, 330 U. S. 1 (1947).

[241] 403 U.S. 602 (1971).

[242] 413 U.S 756 (1973).

[243] 421 U.S. 349, 366 (1975).

[244] 433 U.S. 229, 250 (1977).

[245] 120 S. Ct. 2530 (2000).

upheld by the Court. This decision expanded the definition of permissible government aid for religious schools under the Establishment Clause. Most importantly, *Mitchell* paved the way for the continuing shift that came in *Zelman.*

The Court found similarities between Chapter 2 of the Education Consolidation and Improvement Act of 1981[246] and Title I of the Elementary and Secondary Education Act,[247] which the Court upheld in *Agostini*.[248] The federal government distributed money to state and local educational agencies, which, in turn, bought educational material and equipment on behalf of certain public and private schools. The local agencies then lent what they had purchased to the schools.[249] Through the program, private schools were able to acquire such items as library books, computers, television sets, and laboratory equipment to implement "secular, neutral, and non-ideological" programs.[250] The enrollment of each participating school determined the amount of Chapter 2 funding.[251] In the challenged school district, approximately 30 percent of the funds went to private schools. Of the forty-six private schools participating in the program, forty-one were religiously affiliated.

The plurality opinion,[252] written by Justice Thomas, relied on the modified *Lemon* test used in *Agostini* that restated the primary criteria used in Establishment Clause challenges to "evaluate

[246] 20 U.S.C. §§ 7301-73 (2000).

[247] 20 U.S.C. §§ 6301-38 (1994).

[248] *Mitchell*, 530 U. S. at 801-02; *Agostini*, 521 U. S. at 230.

[249] *Id.*

[250] *Id*.

[251] *Id*.

[252] *Mitchell*, 530 U.S. at 801 (Thomas, J., announcing judgment of the Court, joined by Rehnquist, C.J. & Scalia & Kennedy, J.J.); *id.* at 836 (O'Connor, J., joined by Breyer, J., concurring).

whether government aid has the effect of advancing religion."[253] Since *Agostini* the Court has considered whether a given program "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement" between church and state.[254] The Court, however, evaluated the first two prongs of the test because the Fifth Circuit's holding on the question of excessive entanglement was not challenged.[255] The Court found a clear secular purpose to the program and held that Chapter 2 was "not a 'law respecting an only establishment of religion'" because the program "neither result [ed] in religious indoctrination by the government nor define[d] its recipients by reference to religion."[256] The Court concurrently overturned the *Meek*[257] and *Wolman*[258] decisions concluding that there were "anomalies in our case law."[259]

The *Mitchell* Court relied on the precedents established in *Agostini*, *Zobrest*, *Witters*, and *Mueller*.[260] In these cases, the neutral availability of program benefits allowed to individual beneficiaries significantly contributed to the permissibility of the programs under the Establishment Clause.[261] The Court found that Chapter 2 "makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof,"[262] and aid was

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[253] *Mitchell*, 521 U.S. at 234.

[254] *Id*. (quoting *Agostini*, 521 U.S. at 234).

[255] *Id*.

[256] *Id*.

[257] 421 U.S. 349 (1975).

[258] 433 U.S. 229 (1977).

[259] *Mitchell*, 530 U.S. 808.

[260] *Id*. at 810-11.

[261] *Id*. at 810-14.

[262] *Id*. at 2552.

"allocated on the basis of neutral, secular criteria that neither favor[ed] nor disfavor[ed] religion, and [was] made available to both religious and secular beneficiaries on a nondiscriminatory basis."[263] Since aid was allotted to each school on the basis of enrollment, the independent and private decisions of parents determined how much money was provided to private schools.[264] Parents had no incentive to choose religious education over public school because "[t]he aid follow[ed] the child."[265]

The plurality's reliance on neutrality as the most important factor in evaluating constitutionality was not reflected in Justice O'Connor's concurring opinion.[266] Justice O'Connor maintained that "[t]he plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs."[267] Justice O'Connor instead relied on criteria outlined in *Agostini*.[268] The Chapter 2 program, like the program upheld in *Agostini*, benefited all children attending both private and public schools, and the aid provided was supplemental, thereby justifying Justice O'Connor's reliance on the revised *Lemon* criteria.[269] Another important feature in Justice O'Connor's concurrence was the importance of safeguards in school aid programs to prevent the diversion of aid to religious purposes.[270] According to Justice O'Connor, the

[263] *Id*. at 829 (quoting *Agostini v. Felton*, 521 U.S 203, 231 (1997)).

[264] *Id*. at 830.

[265] *Id*.

[266] *Id*. at 837 (O'Connor, J., joined by Breyer, J., concurring).

[267] *Id*.

[268] *Id*.

[269] *Id*. at 844-49.

[270] *Id*. at 860-66.

statute[271] contained numerous limitations providing "adequate safeguards" that ensured aid was used only for secular purposes and did not have the impermissible effect of advancing religion.[272] The constitutionally significant distinction was one of "private choice" government aid programs (those that distribute funds to parents, who then disburse the money to the school of their choice) versus per capita aid programs.[273]

Summary

U. S. Supreme Court decisions in Establishment Clause cases have become more varied and complex. Frequently, the Court issued confusing, even contradictory, decisions concerning public aid to religious schools.[274] The early Court decisions focused on either the content or the nature of the aid provided an approach that concentrated on whether secular activities and education, as opposed to religious indoctrination, was being funded. In the 1970s the Court typically assumed a separationist approach that focused on whether public aid was secular, whether any potential of either "advancing religion" or of creating the appearance of a government "endorsement" of religion existed, and whether an excessive government entanglement with religion was fostered.[275] During this period the Court primarily employed the three-part *Lemon* test which proved a formidable obstacle to nearly all proposals to public aid for children in religious schools.

[271] See 20 U.S.C. §§ 7301-7373 (2000).

[272] *Id*. at 867 (O'Connor, J. concurring).

[273] *Id*. at 2559 (O'Connor, J. concurring).

[274] Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 Cal. L. Rev. 5, 6 (1987); Michael W. McConnell & Richard A. Posner, *An Economic Approach To Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 25-26 (1989).

[275] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

In response, state legislatures designed indirect assistance for religious schools schemes via religion-neutral tax exemptions or tying the funds to other governmental entitlements.[276] Increasingly, the Court assumed a more nonpreferentialist approach which focused on the role of independent private choice as a means of guaranteeing that government does not "establish" a religion. In these cases the Court shifted from examining the content of the aid program to evaluating the means by which the aid reaches religious schools. Programs that provided benefits to individuals under secular neutral criteria, even if those individuals then use those benefits to support or attend religious schools were found constitutional. The key to constitutional viability revolved around the concept of independent private choice. Some legal scholars wondered whether the Court was turning away from the *Lemon* test as the primary guide and whether it should be abandoned in Establishment Clause cases.[277]

In *Zelman v. Simmons-Harris,*[278] the nature of school choice is no longer designed to benefit particular schools, but rather is a remedial effort to expand the range of educational options available to students from failing public school systems. The Court drew a "distinction between government programs that provide aid directly to religious schools… and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[279] Cases that involved government programs that provided aid directly to religious schools included *Mitchell* v. *Helms,*[280] *Agostini v.*

[276] *See Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

[277] *See* Michael Stokes Paulsen. "Lemon Is Dead," Symposium: Religion and the Public Schools After *Lee v. Weisman*, *43 Case W. Rev. 795* (Spring, 1993). Paulsen contended that the Court in *Weisman* replaced the *Lemon* test with a new "coercion" test).

[278] 536 U.S. 639 (2002).

[279] *Zelman, supra* at 2470.

[280] 530 U.S. 793, 810-814 (2000) (plurality opinion); *id.*, at 841-844 (O'Connor, J., concurring in judgment)

Felton,[281] *Rosenberger* v. *Rector and Visitors of Univ. of V.*[282] Cases that involved programs of true private choice included *Mueller* v. *Allen*,[283] *Witters* v. *Washington Dept. of Servs. for Blind*,[284] and *Zobrest* v. *Catalina Foothills School District.*[285] Chief Justice Rehnquist remarked that the Court's "jurisprudence with respect to the constitutionality of direct aid programs has 'changed significantly' [286] over the past two decades,"[287] but the Court's "jurisprudence with respect to true private choice programs has remained consistent and unbroken."[288] He added that, "Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges."[289]

[281] 521 U.S. 203, 225-227 (1997).

[282] 515 U.S. 819, 842 (1995).

[283] 463 U.S. 388 (1983).

[284] 474 U.S. 481 (1986).

[285] 509 U. S. 1 (1993).

[286] *Agostini*, *supra* at 236.

[287] *Zelman*, *supra* at 2470.

[288] *Id*.

[289] *Id.*

CHAPTER 4
ZELMAN V SIMMONS-HARRIS DECISION

Introduction

Public school teachers unions, the general public,[1] legal scholars,[2] and policymakers[3] were sharply divided over the Establishment Clause issue as it pertained to school vouchers and whether school vouchers constitute good public policy. The arguments took many forms, but in general, opponents of vouchers believe such financial assistance to parents of students in religious schools weakens the wall of separation between church and state and undermines public schools. School voucher proponents believe that vouchers provide an opportunity, particularly for low-income families, to escape failing schools and broaden the freedom of educational choice in a manner that does not violate the Establishment Clause.

The deeply divided Court,[4] by a 5-4 majority, in *Zelman v. Simmons-Harris*[5] held that the Cleveland Scholarship and Tutoring Program (CSTP) did not violate the Establishment Clause of the U. S. Constitution. The Court rejected the Sixth Circuit's holding that the voucher program

[1] *See* The 36th Annual PhiDeltaKappa/Gallup Poll of the Public's Attitudes Toward the Public Schools, Support for school vouchers ranged from 41% to 44%. Available at http://www.pdkintl.org/kappan/k0409pol.htm

[2] *See* i.e., online legal issues debate about school vouchers between Michael McConnell and Kathleen M. Sullivan that took place Dec. 8, 1998 through Jan. 13, 1999. Available at http://www.slate.com/id/10146/entry/11351/

[3] *See* Sen. Edward M. Kennedy, D-Mass in regards to Washington D.C. voucher program states, "The administration couldn't pass a voucher provision honestly, so they've attached it to an omnibus appropriations bill to avoid a vote to eliminate it" in Caroline Hendrie. (January 28, 2004). "Federal plan for vouchers clears Senate." [Electronic version]. *Education Week*., p.2. Available at http://www.edweek.org/ew/ew_printstory.cfm?slug=20Vouch.h23; After the successful passing of the DC School Choice Incentive Act, DC Mayor Williams stated "I have confidence in the wisdom of parents to make the best choices for their children's education. It's government's job to provide the options." District of Columbia Mayors Office. "Mayor Williams Hails Passage of DC School Choice Bill." January 22, 2004. Available at http://dc.gov/mayor/news/release.asp?id=561&mon=200401

[4] *See* Sara J. Crisafulli. (2003). *Zelman v. Simmons-Harris*: Is the Supreme Court's latest word school voucher programs really the last word? 71 *Fordam Law Review*, 2227-2281.

[5] 536 U.S. 639 (2002).

impermissibly aided religious schools.[6] The Court found the program was enacted for a "valid secular purpose,"[7] was "neutral in all respects toward religion,"[8] provided aid "directly to a broad class of individuals defined without reference to religion,"[9] and in the program individuals were "empowered to direct the aid to schools or institutions of their own choosing."[10]

Central to the Court's decision in *Zelman* was the fact that eligible families were offered community schools,[11] magnet schools,[12] and participating private schools as alternatives to the inner-city public schools.[13] When the Court considered all of the parents' options, religious schools represented only 16.5 percent of Ohio's total educational expenditures.[14] First, this chapter focuses on the details of the Ohio voucher program that provided the basis for the U. S. Supreme Court's decision. Second, it examines the lower courts' treatment of the voucher program highlighting by contrast the Court's ultimate decision in *Zelman*. Finally, this chapter discusses the Court's decision and analyzed the differences between *Zelman* and prior decisions on similar facts.

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[6] *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

[7] *Zelman*, 536 U.S. at 649.

[8] *Id*. at 653.

[9] *Id*.

[10] *Id*. at 651.

[11] *Zelman* at 647 (defining community schools as those "funded under state law but … run by their own school boards" which are free to "hire their own teachers and to determine their own curriculum").

[12] *Id* (defining magnet schools as "public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students").

[13] *Id*.

[14] *Id*. at 664 (O'Connor, J., concurring).

The Ohio Pilot Project Scholarship Program

In 1802, Ohio was the first state Congress created from the Northwest Territory. Following the terms of the Northwest Ordinance, Ohio made land grants available to every township for the use of schools. The first Ohio Constitution required the legislature to "… to pass suitable laws to protect every religious denomination …and to encourage schools and means of instruction."[15] During the constitutional convention of 1850-1851, the delegates modified the provision to a "thorough and efficient system of common schools throughout the state," which remains in the constitution to this day.[16]

In 1992, then-Governor and former Cleveland Mayor George Voinovich established the Governor's Commission on Educational Choice to investigate the implementation of a voucher system.[17] In March 1995, the educational and fiscal crisis in the Cleveland Municipal School District was so severe that the U. S. District Court for the Northern District of Ohio ordered the state to take over the administration of the district.[18] The decision resulted in the Cleveland Municipal School District being placed under the direct supervision of the state department of education.[19] The Ohio Department of Education gave the Cleveland Municipal School District "academic emergency" status.[20] A pilot project was established for any school district in the

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[15] Ohio Const. art. I, § 7.

[16] Ohio Const. art. VI, § 2. The General Assembly shall make such provisions, by taxation, or otherwise, as with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state. http://www.legislature.state.oh.us/constitution.cfm?Part=6&Section=02

[17] Michael Charney. "High Court Takes up Vouchers." *Rethinking Schools Online.* Winter Volume 16, No.2-2001/2002, at http://www.rethinkingschools.org/special_reports/voucher_report/v_high162.shtml.

[18] *Zelman v. Simmons-Harris*, 536 U.S. at 644-48.

[19] *Simmons-Harris v.Zelman*, 72 F. Supp. 2d 834,836.

[20] A rating of "academic emergency" applies to districts that meet eight or fewer of Ohio's twenty-seven performance standards. CCSD did not meet any of the standards during the 1998-1999 school year [score: 0/27], thus earning last place among all Ohio's school districts. *See* http://www.ode.state.oh.us/reportcard/Ratingby

State that had been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent."[21] The Cleveland Municipal School District was the only district meeting those criteria.

On June 30, 1995, the Ohio General Assembly enacted the Pilot Project Scholarship Program,[22] making Ohio the first state to pass a publicly funded private school choice program that included religious schools.[23] The statewide program provided financial assistance to families in any Ohio school district that was or had been "under federal court order requiring supervision and operational management of the district by the state superintendent."[24] The Cleveland City School District was the only district that met the program requirement. The Cleveland Scholarship and Tutoring Program (CSTP) was designed to provide low-income students in the critically low-performing Cleveland City School District with a wider range of educational options.[25] The program was largely supported by funds from Ohio's Disadvantaged Pupil Impact Aid (DPIA) budget previously earmarked for the Cleveland Municipal Public Schools. The district initially kept up to 55 percent of state aid for each departing voucher student, as well as its entire local and federal financial allotment.[26]

CD.pdf. In 1999-200 CCSD met three standards, and remains an "academic emergency." *See* http://www.ode.state.oh.us/reportcard/ratings/fy00_std_seq.htm.

[21] Ohio Rev. Code. Ann. § 3313.975(A).

[22] Ohio Rev. Code Ann. § 3313.974-.979.

[23] Milwaukee Parental Choice Program was the country's first voucher program but it did not originally include religious schools.

[24] Ohio Rev. Code Ann. § 3313.975(A).

[25] *Zelman* at 643-644.

[26] Fredrick M. Hess and Patrick J. McGuinn, "Muffled by the Din: The Competitive Noneffects of the Cleveland Voucher Program." Available at http://www.tcrecord.org/Content.asp?ContentID=10896

Fully operational the next year, the Pilot Project Scholarship Program included two separate educational assistance programs.[27] First, the program provided grants to students for tutorial assistance.[28] The second, much more controversial component provided selected kindergarten through eighth-grade students with tuition assistance to attend any participating "alternative schools."[29] The legislative term "alternative school" was defined as *a public school located in an adjacent school district or a private school within the Cleveland City School District.*[30]

The Cleveland Scholarship and Tutoring Program provided scholarships to students, preferably those from low-income families, for tuition at private schools, including religious schools.[31] Students of families with incomes twice below the poverty level were eligible for vouchers worth 90 percent of the tuition charges at an alternative school of their choice. Students of families with incomes equal to or exceeding twice the poverty level were eligible for vouchers worth 75 percent of such charges.[32] Students from families above the low-income guidelines were allowed to any remaining available vouchers. The available amount per voucher was not to exceed $2,500.[33]

Vouchers were distributed through a random-selection lottery system. The lottery system allowed students previously enrolled in private schools to participate, with a limitation of 25

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[27] Ohio Rev. Code Ann. § 3313.975(A) (West Supp. 1999).

[28] *Id.* at § 3313.974(H). Tutorial assistance was defined by the Legislature as "instructional services provided to a student outside of regular school hours approved by the commission on school choice."

[29] *Id.* at § 3313.975(A).

[30] *Id.*at § 3313.974(G).

[31] Your School and the Law. March 14, 2001 Vol. 4, No. 11. LRP Publications 2001

[32] *Id.* at § 3313.978.

[33] *Id.*

percent of the vouchers being awarded to those students. Vouchers were available to students attending kindergarten through third grade.[34] Any student enrolled in the program, would continue in the program, receiving an annual voucher through the eighth grade.[35]

There were four types of educational settings outlined in the Cleveland voucher program. First, private schools within the boundary of the Cleveland School District were eligible to participate. Second, state operated magnet and community schools (charter schools) were available options to families.[36] Cleveland Public School District, with state funded tutorial assistance to students was the third. Fourth, public schools that were adjacent to the Cleveland Public School District could also participate.[37] If adjacent public schools chose to participate they would receive a tuition grant up to $2,250 for each voucher program student in addition to the ordinary per-pupil state funding for that student.[38] The voucher check would be sent directly to the school in which the student was enrolled and made payable to that school district.[39]

For students attending participating private schools, voucher checks were made payable to the student's parents.[40] As a precaution, though not required by the legislation, school voucher checks were sent directly to the private school, where parents would then go and endorse the

[34] *See id.*

[35] Ohio Rev. Code Ann. §§ 3313.977(A)(2).

[36] Ohio Rev. Code Ann. §§ 3314.01(B).

[37] Ohio Rev. Code Ann. §§ 3313.976(C).

[38] Ohio Rev. Code Ann. §§ 3317.03(I)(1), 3317.022(A)(1).

[39] Ohio Rev. Code Ann. §§ 3313.979.

[40] *See id.*

checks over to the school.[41] The state placed no restrictions on the use of the scholarship money by the participating private schools.[42]

Schools that participated in the program were to consider only two student eligibility factors: the student must live in the Cleveland Public School District and the student's family must qualify as low-income. The schools were required to be non-discriminating in both admissions policies and educational practices. This meant no participating school may "discriminate on the basis of race, religion, or ethnic background"[43] and participating schools must "not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."[44]

In the 1999-2000 school year, 46 of the 56 participating private schools (82 percent) were religiously affiliated, and 96 percent of the 3,700 students enrolled were students in religiously affiliated schools.[45] During the 2001-02 school year there were 4,266 voucher students with 96 percent of the students attending religious schools.[46] No suburban public schools participated in the program.[47]

Legal Challenges to the Voucher Program

The Cleveland voucher program permitted religious schools to participate from its inception and as a result the program's constitutionality was immediately challenged. In 1996,

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[41] *See* Simmons-Harris v. Goff, 711 N.E.2d 203, 206 (Ohio 1999).

[42] See *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 836-37 (ND Ohio 1999).

[43] Ohio Rev. Code Ann. § 3313.976(A)(4).

[44] R.C. 3313.976(A)(6).

[45] *Zelman*, at 647.

[46] Linda Greenhouse. "Supreme Court Agrees to Look at Vouchers." New York Times, September 26, 2001, at http://nytimes.com/2001/09/26/national/26SCOT.html?todaysheadlines.

[47] *Simmons-Harris, et al. v. Zelman, et al.,* 234 F.3d at 959.

two groups of Cleveland taxpayers filed suit against the Cleveland Scholarship and Tutoring Program.[48] The trial judge consolidated both taxpayer lawsuits.[49] The suits alleged the voucher program violated the Establishment Clause of the First Amendment primarily because the overwhelming majority of the schools funded by the public program were religious. In support of the Scholarship Program, two organizations also filed suit in the Franklin County Court of Common Pleas.[50] Each group of defendants moved for summary judgment from the trial court.

On July 31, 1996, the Franklin County Court of Common Pleas held the program constitutional and allowed it to be implemented.[51] The trial judge interpreted two articles (Article I, Section 7[52] and Article VI, section 2[53]) of the Ohio state constitution to be no more restrictive than the First Amendment Establishment Clause of the U. S. Constitution. Judge Lisa L. Sadler noted that since the scholarships were awarded to parents without regard to the public or nonpublic nature of the chosen schools, any benefit to religious private schools is indirect. She found immaterial the fact that no public school district opted to participate in the voucher program. This was not attributable to action either by the General Assembly or by the State Superintendent, whose office implemented the program. The program was found to conform to

[48] On January 10, 1996, the Gatton plaintiffs (Ohio Federation of Teachers and private individuals) filed suit against the State of Ohio and John M. Goff, Superintendent of Public Instruction. On January 31, 1996, the second suit was filed in the Franklin County Court of Common Pleas by the Simmons-Harris plaintiffs.

[49] *Simmons-Harris v. Goff*, 684 N.E.2d 705 (Ohio App. 1997).

[50] *Id*. The Hope defendants, the first group, were parents who planned to enroll their children in the Scholarship Program and private organizations who planned to form private schools that would participate in the Scholarship Program. The second group, Hannah Perkins defendants, included a parent whose child had been selected to enroll in the Scholarship Program and private schools that were registered to enroll Scholarship Program students.

[51] *Gatton v. Goff*, Nos. 96 CVH-01-198, 96 CVH-01-721, 1996 WL 466-499 (Ohio Com.Pl., Franklin Cnty. July 31, 1996).

[52] "No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society…"

[53] "No religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."

the U. S. Supreme Court ruling in *Mueller v. Allen*[54] and subsequent cases. The judge further ruled that the voucher program met the uniformity requirement (Article II, Section 26)[55] and the thorough and efficient requirement (Article VI, Section 2).[56]

Plaintiffs argued that the Cleveland program was unconstitutional based on the U. S. Supreme Court's 1973 decision in *Community for Public Education & Religious Liberty v. Nyquist*.[57] In *Nyquist*, the Court held that the state may not provide unrestricted direct financial grants for maintenance and repairs to religious schools, unrestricted partial tuition grants to parents of low-income students attending religious schools, or income tax benefits directed exclusively to parents attending private schools. The position of plaintiffs was that the Cleveland program was indistinguishable from the New York tuition reimbursement program that was held unconstitutional in *Nyquist*. The defendants countered with an argument based on footnote 38 in *Nyquist*, in which the U. S. Supreme Court noted that that case did not involve a situation in which funds were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[58] Subsequent U. S. Supreme Court decisions that upheld a variety of other programs that benefited religious schools were also cited.[59]

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[54] 463 U.S. 388, 103 S. Ct. 3062 (1983).

[55] "All laws, of a general nature, shall have a uniform operation throughout the State"

[56] "Secure a through and efficient system of common schools throughout the State…"

[57] 413 U.S. 756, 93 S.Ct. 2955, 37 L. Ed. 2d 948 (1973).

[58] *Nyquist*, 413 U.S. at 782 n. 38, 93 S. Ct. at 2970 n. 38.

[59] Supreme Court decisions subsequent to *Nyquist* that have upheld a variety of programs that provided public funds to religious schools include *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L.Ed. 2d 391 (1997) (public school teachers providing remedial education to disadvantaged students in parochial schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S. Ct. 2462, 125 L.Ed. 2d 1(1993) (sign-language interpreter provided for deaf student in a religious high school); *Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481, 106 S. Ct. 748, 88 L.Ed. 2d 846 (1986) (state financial assistance for a student who is blind attending a private Christian

On January 10, 1996, suit was filed in Ohio state court against the State of Ohio and the State Superintendent of Public Instruction, seeking to have the Cleveland Scholarship and Tutoring Program invalidated as violative of both the Ohio Constitution and the Establishment Clause of the U. S. Constitution's First Amendment.[60] On January 31, 1996, three more individuals filed an additional suit against the superintendent, also asserting the program's unconstitutionality.[61] The two cases were subsequently consolidated, and the trial court granted the state's motion for summary judgment.[62]

The trial court found the public aid that flowed to the private schools involved in the Cleveland Scholarship and Tutoring Program was indirect, and therefore did not violate the Establishment Clause[63] On appeal, the Ohio Court of Appeals reversed the trial court's grant of summary judgment, finding that the program violated the Establishment Clause by impermissibly advancing religion.[64] This decision was appealed to the Supreme Court of Ohio and, once again, was reversed.[65]

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college); *Mueller v. Allen*, 463 U.S. 388, 103 S. Ct. 3062, 77 L.Ed. 2d 721 (1983) (state income tax deduction for educational expenses which included religious schools).

[60] *See id*. The plaintiffs included Sue Gatton, Millie Waterman, Walter Hertz, Reverend James Watkins, Robin McKinney, Loretta Heard, Reverend Don Norenburg, Deborah Schneider, and the Ohio Federation of Teachers.

[61] *See id*. The plaintiffs in this second action included Doris Simmons-Harris, Sheryl Smith, and Reverend Steven Behr.

[62] See *Gatton v. Goff*, 1996 WL 466499, *20 (Ohio Com. Pl. 1996), rev'd sub nom. *Simmons-Harris v. Goff*, 1997 WL 217583 (Ohio Ct. App. 1997), rev'd, 711 N.E.2d 203 (Ohio 1999).

[63] *Id*. at *15. The trial court said: Whether viewed on the face of the statute or as it is applied, the program does not appear to pose any of the dangers the Supreme Court was concerned with in earlier cases striking down programs which resulted in direct aid to sectarian schools . . . . Plaintiffs have not established beyond a reasonable doubt that the scholarship program violates the Establishment Clause of the First Amendment to the United States Constitution.

[64] See *Simmons-Harris v. Goff*, 1997 WL 217583, *10 (Ohio Ct. App. 1997), rev'd, 711 N.E.2d 203 (Ohio 1999). The court concluded that "because the scholarship program provides direct and substantial, nonneutral government aid to sectarian schools . . . it has the primary effect of advancing religion in violation of the Establishment Clause." Id.

[65] See *Goff*, 711 N.E.2d at 216.

In May 1999, the Ohio Supreme Court found the Cleveland Voucher Program unconstitutional, but rejected the claim that the program violated the Establishment Clause in either the Ohio or federal constitution.[66] According to the court, the legislature violated a provision in the state constitution that requires each bill to address only one subject. The legislature had approved the original voucher legislation as part of a 1,000-page general appropriations bill in 1995.[67] The court stayed its holding until June 30, 1999 in order to avoid disrupting the school year in progress.[68]

In June 1999, in response to the court's ruling, the Ohio General Assembly reinstated the voucher program as part of the state's education budget so as to satisfy the court's objection and the program continued.[69] The legislature expanded the Pilot Scholarship Program to include grade 6 in September 1999 and grade 7 in September 2000.[70]

After losing in the state courts, voucher opponents repeated their claims that the Cleveland program violated the Establishment Clause of the U. S. Constitution by filing separate suits in the U. S. District Court for the Northern District of Ohio.[71] The federal court consolidated the two cases.[72] On August 24, 1999, United States Judge Solomon Oliver Jr. of the Sixth Circuit of

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[66] *See id*. at 207-11

[67] *See id*. at 215-16. Ohio's constitution requires that every bill passed by the legislature have only one subject. See Ohio Const. art. 2, § 15(D). The court found that the bill creating the Voucher Program contained more than one subject. See *Goff*, 711 N.E.2d at 214-15. This deficiency was remedied, however, during the summer of 1999 when the Ohio legislature repealed and reenacted the Voucher Program as part of the Education Budget Bill, Ohio Rev. Code Ann. § § 3313.974-79 (Anderson 1999); see *Simmons-Harris v. Zelman*, 72 F. Supp 2d. 834, 840 (N.D. Ohio 1999).

[68] See *Goff*, 711 N.E.2d at 216.

[69] *Zelman*, 536 U.S. at 648.

[70] OHIO REV. CODE § 3313.974-3313.979 (Anderson 1999).

[71] *Simmons-Harris v. Zelman*, 72 F. Supp 2d. at 835-39.

[72] *Id*. at 836.

the Northern District of Ohio issued a preliminary injunction temporarily halting the voucher program, determining that the program would most likely be found to violate the Establishment Clause.[73] Three days later, on the state's motion, the District Court granted a limited stay, "applicable only to those students who were enrolled in the . . . voucher program during the previous academic year."[74] Returning students who had been a part of the program could continue to attend religious schools, but new students would not be permitted to use public funds to participate.

State officials then filed a motion in the Sixth Circuit Court of Appeals to extend the stay to include students new to the Program. When the Sixth Circuit Court of Appeals did not rule on the motion, state officials petitioned the U. S. Supreme Court to stay the injunction. On November 5, 1999, the U. S. Supreme Court, [75] by a 5-4 vote, granted the state's motion for a complete stay of the preliminary injunction, thereby allowing the program to continue until the Sixth Circuit resolved the issue. [76] Members in favor of granting the stay were Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. Members voting against granting the stay were Justices Stevens, Souter, Ginsburg, and Breyer.[77] U. S. Supreme Court

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[73] *Id*. at 840. The district court concluded its injunction order as follows: Plaintiffs have a very substantial chance of succeeding on the merits. The Cleveland Program does not make aid available without regard to the nature of the schools to be benefited sic. The participating schools are overwhelmingly sectarian. This means that parents cannot make an educational choice without regard to whether the school is parochial or not. Consequently, the Cleveland Program has the primary effect of advancing religion. Failing to grant the injunction under such circumstances would not only be contrary to law, but could cause an even greater harm to the children by setting them up for greater disruption at a later time. Therefore, the injunction is granted and the Defendants are enjoined from instituting or continuing to administer this Program pending the outcome of a decision on the merits in this case. *Simmons-Harris v. Zelman,* 54 F. Supp. 2d 725, 741-42 (1999) (order granting temporary injunction of the Voucher Program during the course of litigation).

[74] *Zelman*, 72 F. Supp. 2d at 840.

[75] *Zelman v. Simmons-Harris,* 120 S. Ct. 443, 145 L. Ed. 2d 346 (1999).

[76] *Zelman*, 72 F. Supp. 2d at 841.

[77] *Zelman v. Simmons-Harris,* 120 S. Ct. 443, 145 L. Ed. 2d 346 (1999).

watchers speculated that the Court's granting a stay of a lower court's decision was a strong indication of the Justices' interest in eventually hearing the case.[78]

On November 15, 1999, the Sixth Circuit Court of Appeals placed all appeals in abeyance, pending final disposition of the matter by the trial court.[79] On December 20, 1999, the trial court granted the plaintiffs' motion for summary judgment, holding that the Cleveland Scholarship and Tutoring Program impermissibly violated the Establishment Clause.[80]

In *Simmons-Harris v. Zelman*,[81] the U. S. District Court for the Northern District of Ohio ruled that the Cleveland voucher program violated the Establishment Clause of the Constitution.[82] The court stayed the injunction, leaving the Voucher Program in operation pending the resolution of the defendants' appeal to the Sixth Circuit Court of Appeals.[83]

The District Court agreed with the Ohio Supreme Court that the Cleveland voucher had a secular purpose and did not promote an excessive entanglement between church and state. However, the court disagreed with the Ohio Supreme Court by holding that the program "has the effect of advancing religion through government-supported religious indoctrination"[84] and created an incentive to attend religious schools.

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[78] Linda Greenhouse. White House Asks Justices for a Ruling on Vouchers, New York Times, July 8, 2001, available at http://nytimes.com/2001/07/08/politics/08SCOT.html.

[79] *Zelman*, 72 F. Supp. 2d at 841.

[80] *See id*. at 834.

[81] 72 F. Supp. 2d 834 (N.D. Ohio 1999).

[82] *See id*. at 865.

[83] *See id.* The court noted that "because counsel for all Plaintiffs have consented to a stay of this court's Order pending Sixth Circuit review, this court hereby stays said Order in its entirety pending such review."

[84] *Id*. at 864-865.

The District Court ruled that *Committee for Public Education and Religious Liberty v. Nyquist*[85] was the controlling precedent. The court compared the Cleveland program to the unconstitutional tuition reimbursement program in *Nyquist*. The overwhelming majority of participating schools in both programs were religious. Therefore, "…the alternatives available under the Program are so narrow that a recipient's decision to attend a religious school cannot reasonably be said to have been made only as a result of independent and private choices."[86] The court found the program impermissibly created incentives for students to attend religious schools since voucher students can only redeem their vouchers at schools which have registered and are authorized to participate in the program and the vast majority of those were religious.

On December 11, 2000, a divided panel (2-1) of the Sixth Circuit Court of Appeals affirmed the District Court's permanent injunction.[87] The majority held that the program violated the Establishment Clause on the grounds that it had the primary effect of advancing religion and "sectarian" education.[88] The Sixth Circuit Court of Appeals did not consider other educational options available to Cleveland parents because they were "at best irrelevant."[89]

Relying on the 1973 U. S. Supreme Court decision of *Committee for Public Education and Religious Liberty v. Nyquist*,[90] the Circuit Court of Appeals reasoned that in both *Nyquist* and the Cleveland Program the majority of participating schools were religious.[91] The court determined that the program was not neutral and found that the relatively low scholarship amount

[85] 413 U.S. 756, 93 S.CT. 2955 (1973).

[86] *Id.* at 863.

[87] *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

[88] *Id.* at 961.

[89] *Id.* at 958.

[90] 413 U.S. 756 (1973).

[91] *Simmons-Harris v. Zelman*, 234 F.3d at 958.

discouraged nonreligious schools from participating.[92] Therefore, Cleveland families had no "meaningful public school choice."[93]

Judge Ryan dissented, finding the New York statute at issue in *Nyquist* to be "totally different" from the Ohio statute.[94] He noted the purpose of the New York statute was to help private schools financially, whereas the purpose of the Ohio Program was to help poverty-level students.[95] Judge Ryan also noted the U. S. Supreme Court's post-*Nyquist* decisions had undermined *Nyquist*'s controlling implications as applied to Ohio's genuine private choice program.[96]

Thus, one interpretation of the Cleveland voucher program was deemed constitutional in the state court but found unconstitutional in the federal courts. In December 2000, the state of Ohio filed a petition for rehearing and suggestion for rehearing *en banc*. The Court of Appeals denied the petition in February 2001.[97] The court, in March 2001, issued a stay of mandate pending the filing of any petitions for *certiorari*, which the State Petitioners filed for on May 23, 2001.

In June 2001, in furtherance of administrative policy, Solicitor General Theodore Olson requested the U. S. Supreme Court to hear three appeals[98] concerned with the constitutionality of

[92] *Id.* at 959.

[93] *Id.* at 960.

[94] *Id.* at 963.

[95] *Id.* at 965.

[96] *Id.* at 973.

[97] State Pet. App. at 166a-67a.

[98] *Zelman v. Simmons-Harris*, *Hanna Perkins School v. Simmons-Harris*, and *Taylor v. Simmons-Harris*

the Ohio Pilot Project Scholarship Program.[99] The State of Ohio, a group of voucher parents, and several religious schools participating in the program had previously petitioned the U. S. Supreme Court to hear the cases.[100] Typically, the Solicitor General's office does not file a brief until the U. S. Supreme Court agrees to hear a case or asks the Solicitor General's view on whether to hear the case. Filing this brief in advance of the U. S. Supreme Court accepting *certiorari* sent a signal to the U. S. Supreme Court of the high priority the George W. Bush administration attached to the voucher issue.[101]

The Solicitor General argued that policymakers need to "know, without further delay, whether such programs are a constitutionally permissible option for expanding education opportunity for children enrolled in failing public schools across America, or whether other solutions must be sought for this critical national problem."[102]

U. S. Supreme Court Decision

In *Zelman v. Simmons-Harris*,[103] the Court held that the Cleveland voucher program does not violate the Establishment Clause of the U. S. Constitution. The Court held the Ohio program to be "part of a general" welfare "undertaking … to provide educational opportunities to the children of a failed school district."[104] The program was found to be "entirely neutral with

[99] Linda Greenhouse. *White House Asks Justices for a Ruling on Vouchers*, New York Times, July 8, 2001, available at http://nytimes.com/2001/07/08/politics/08SCOT.html.

[100] *See* Linda Greenhouse. *White House Asks Justices for a Ruling on Vouchers*, New York Times, July 8, 2001, available at http://nytimes.com/2001/07/08/politics/08SCOT.html; Mark Walsh. *Supreme Court To Hear Pivotal Voucher Case*, Education Week, October 3, 2001, available at http://www.edweek.org/ew/ew_printstory.cfm?slug=05scotus.h21.

[101] Linda Greenhouse. *White House Asks Justices for a Ruling on Vouchers*, New York Times, July 8, 2001, available at http://nytimes.com/2001/07/08/politics/08SCOT.html.

[102] *Id*.

[103] 536 U.S. 639 (2002).

[104] *Id*. at 653.

respect to religion,"[105] with vouchers provided "to a wide spectrum of individuals, defined only by financial need and residence in a particular school district."[106] Participants in this program are permitted to "exercise genuine choice among options public and private, secular and religious."[107] The Court, therefore, found the program to be one of "true private choice."[108] Chief Justice Rehnquist wrote the opinion of the Court and was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justices O'Connor and Thomas wrote separate concurring opinions. Of the four dissenting justices, three wrote dissenting opinions.

While the majority did not explicitly refer to the *Lemon* test, the criteria were briefly addressed. The Court held that Cleveland's voucher plan was "a program of true private choice,"[109] one "in which government aid reaches religious schools only as a result of genuine and independent choices of private individuals."[110] The Court held that the decision to use state funds at a religious school "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."[111]

Chief Justice Rehnquist, began his written analysis of the Ohio voucher program by distinguishing impermissible direct aid to religious school programs from indirect programs where the private choices of individuals determine whether, and how much, public aid reaches religious schools.[112] The Court held that the Cleveland voucher program was in the latter

[105] *Id.* at 662.

[106] *Id.*

[107] *Id*.

[108] *Id.*

[109] *Id*. at 649.

[110] *Id.*

[111] *Id*. at 652.

[112] *Id*. at 649.

category of "neutral government programs that provide aid directly to a broad class of individuals."[113] According to the Court, any aid from the Cleveland program to religious schools was a consequence of the "genuine and independent choices of private individuals."[114] The Court analogized the Ohio program to the "true private choice" programs[115] found permissible in **Mueller,[116] Witters,[117] and Zobrest.[118]**

Employing the *Mueller* precedent, the *Zelman* Court found the presence of private choice and the neutral availability of benefits to all parents of children in the Cleveland School District to be an important element in favor of the program's constitutionality.[119] The Court, in *Witters* and *Zobrest*, employed the same private choice rationale of the *Mueller* decision.

Chief Justice Rehnquist wrote "…the question presented is whether the Ohio program . . . has the forbidden 'effect' of advancing or inhibiting religion."[120] Stating that "our jurisprudence with respect to true private choice programs has remained consistent and unbroken,"[121] the Court held "…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

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[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] *Mueller v. Allen*, 463 U. S. 388 (1983) (The Court upheld the constitutionality of a Minnesota program allowing tax deductions for educational expenses to all parents, whether their children attend public school or private).

[117] *Witters v. Wash. Dept. of Servs. For the Blind*, 474 U. S. 481 (1986) (upholding a vocational rehabilitation program that paid the tuition for a student who was blind at a religious school because he freely chose to attend a religious school).

[118] *Zobrest v. Catalina Foothills Sch. Dist*., 509 U. S. 1 (1993) (holding that the presence of a sign language interpreter in a religious school did not violate the Establishment Clause).

[119] *Zelman* at 650.

[120] *Id.* at 649.

[121] *Id*.

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."[122] The Court defined "neutral educational assistance" as the offering of "aid directly to a broad class of individual recipients defined without regard to religion."[123] Since the Ohio program gives the tuition scholarships directly to parents of eligible students on a neutral basis, and these same parents alone choose where to spend these tuition scholarships, the fact that religious schools indirectly benefit from these parental choices does not offend the Establishment Clause.[124]

The majority opinion focused on whether the program had the "effect" of advancing or inhibiting religion, since there was no dispute that the program had been enacted for the "purpose" of providing educational assistance to poor schoolchildren.[125] The majority relied primarily on the private choice aspect of the scholarship program in finding it constitutional. Reliance on private choice was expected by school voucher advocates, since private choice is the defining characteristic of a voucher program. In *Mitchell v. Helms*,[126] the Court's plurality had viewed private choice as an adjunct to the more important elements of "neutrality" and the general availability aspect of the program benefit.[127]

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[122] *Id*. at 652.

[123] *Id*. at 662.

[124] *Id*. at 662-663.

[125] *Id*. at 649.

[126] *Mitchell v. Helms* 530 U.S.

[127] *Id.* at 810-11, 816 ("Although the presence of private choice is easier to see when aid literally passes through individuals' hands, there is no reason why the Establishment Clause requires such a form."); see also Green, The Constitutionality of Vouchers After *Mitchell v. Helms*, supra note 16, at 64-65.

Justice O'Connor was regarded as the swing vote on a closely divided court and therefore crucial to the *Zelman* majority.[128] She had criticized the *Mitchell* plurality for emphasizing program neutrality as the factor controlling constitutionality in her concurring opinion.[129] Justice O'Connor's opinion likely explains the *Zelman* Court's emphasis on private choice as being the determining factor for constitutionality.

According to Chief Justice Rehnquist, writing for the majority, for "true private choice" to exist and be effective for constitutional purposes,[130] government aid must "reach religious institutions only by way of the deliberate choices of numerous individual recipients."[131] In addition, the program must be "neutral with respect to religion"[132] and provide parents with a "range of educational choices."[133]

Rehnquist opined that the Cleveland program is "entirely neutral with respect to religion."[134] He noted that "Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institution of their own choosing. Three times we have rejected such challenges."[135]

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[128] *See* Tony Mauro, *All Eyes on O'Connor during Voucher Arguments*, freedomforum.org http://www.freedomforum.org/templates/document.asp?documentID=15766&printerfriendly=1; see also Mark Walsh, *A School Choice For the Supreme Court*, Education Week 2/27/02 http://www.edweek.org/ew/newstory.cfm?slug=24vouch.h21

[129] See *Mitchell*, 530 U.S. at 837 (O'Connor, J., concurring in the judgment) ("the plurality's treatment of neutrality [as] coming close to assigning that factor singular importance in the future of Establishment Clause challenges to government school-aid programs.").

[130] *Zelman*, 536 U.S. at 650.

[131] *Id.* at 652.

[132] *Id.* at 662.

[133] *Id*. at 655.

[134] *Id*. at 662.

[135] *Id*. at 649.

The majority opinion held that "neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion"[136] are constitutional. Ohio's voucher law for Cleveland does not violate the First Amendment's Establishment Clause because parents, and not the religious schools, receive the public funds and make "private choices" about where their children attend school and the number of students who choose to use that assistance at a religiously affiliated private school is irrelevant for constitutional purposes. The Court held that "[t]here 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."[137]

The Court determined that the Establishment Clause question "must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school."[138] The Court noted "none of the dissenting opinions explain how there is any perceptible difference between scholarship schools, community schools, or magnet schools from the perspective of Cleveland parents looking to choose the best educational option for their school-age children. Parents who choose a program school in fact receive from the state precisely what parents who choose a community or magnet school receive – the opportunity to send their children largely at state expense to schools they prefer to their local public school."[139] The majority opinion held that even though the majority of the private schools are religious, the character of the school does not render the program unconstitutional.

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[136] *Id*. at 662.

[137] *Id*. at 649.

[138] *Id*. at 656.

[139] *Id*. at 660, footnote 6.

In *Zelman,* the U. S. Supreme Court reasoned that any government funds going to religious schools were a result of an individual's choice of school, not the government. The Establishment Clause was not violated because families, not government, decided where to spend the vouchers.

Supreme Court Responses to Respondent's Argument

The Court responded to several questions raised by those challenging the statute. The initial question to be answered was whether the money provided through the program to participating sectarian private schools was "properly attributable to the State,"[140] as a form of "an impermissible 'direct [State] subsidy'" to the schools, or was "a permissible [parental] transfer" to the schools. The latter was "similar to [a] hypothetical salary donation" by a government employee from a government paycheck to a religious institution.

The Court found precedent for the *Zelman* decision in a series of cases that allowed government to provide services and benefits to parents and students in private and religious schools. The Court's decision can be viewed as the culmination of the gradual Supreme Court shift from requiring strict separation between government and religion, to allowing interchange between government and religious organizations.

In reaching the *Zelman* decision, the majority relied on three previous Establishment Clause cases involving private individuals choosing to use public money to indirectly support private religious schools. In *Mueller v. Allen,*[141] the Court ruled that Minnesota's tax deduction for parents paying for private and parochial school tuition was not a violation of the Establishment Clause. In *Witters v. Washington Department of Services for the Blind,*[142] the Court upheld a vocational scholarship program that provided tuition aid to a student attending a

[140] *Witters v Washington Department of Services for the Blind*, 474 U.S. 481, 489 (1986).

[141] 463 U.S. 388, 1983

[142] 474 U.S. 481, 1986

religious institution to become a pastor. In *Zobrest v. Catalina Foothills School District*,[143] the Court determined that a federal program that paid for sign language interpreters for deaf children enrolled in religious schools was not a violation of the Establishment Clause.

The Court found 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 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." This program is one of "true private choice," consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. The Court noted that they "have never found a program of true private choice to offend the Establishment Clause."

In making its decision, the Court's majority first held that the constitutional inquiry did 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." Therefore, despite the overwhelming number of parents choosing religious schools, the program does not violate the Establishment Clause because any "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."

[143] 509 U.S. 1, 1993

Second, the Court considered whether the program has "the [impermissible] effect of advancing religion by creating a financial incentive to undertake religious indoctrination." It found that "the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion (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. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion."[144] Financial incentives "[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis . . . The program here in fact creates financial *disincentives* for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools." Despite this analysis, the Court went on to hold that "[a]lthough such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program 'creates . . . financial incentive[s] for parents to choose a sectarian school.'"

Third, the Court rejected the claim that the voucher program impermissibly confers a message of the state endorsement of religion and the applicability of *Committee for Public Education and Religious Liberty v. Nyquist*.[145] In *Nyquist*, the Court had struck down the New

[144] *Zelman* at 653.

[145] 413 U.S. 756 (1973).

York program because it found the benefits were really tuition grants for parents of religious school students and not a genuine tax deduction available on neutral terms without reference to religion. In *Zelman,* the Court held that "[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general."

In summary, the majority upheld the Cleveland voucher program for several specific voucher program elements. First, the voucher program was entirely neutral with respect to religion. Second, the voucher program provided benefits directly to a wide spectrum of individuals who were defined only by financial need and residency. Lastly, the voucher program permitted individual parents to exercise genuine choice among public and private, and secular and religious school options.

Concurring Opinions

Justice O'Connor's concurrence

In her concurring opinion, Justice O'Connor wrote that the majority opinion in *Zelman* was not "a major departure from the Court's prior Establishment Clause jurisprudence" since, from the Court's first Establishment Clause ruling upholding the provision of bus transportation to public and parochial students alike, the Court only has "require[d] that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries."[146] O'Connor stated that "[t]he share of public resources that reach religious schools is not … as significant as respondents suggest" because, while "$8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments

[146] *Zelman,* at 2476.

already provide religious institutions"[147] without there being any serious question regarding the constitutionality of such support.

Similar to the full majority, O'Connor emphasized that the Court's inquiry required an evaluation of all reasonable educational options provided to the Cleveland school system, regardless of whether they are formally made available in the same section of the Ohio Code as the voucher program. She insisted that the facts are critical in cases arising under the Establishment Clause, saying that failing to look at all of the educational options is "to ignore how the educational system in Cleveland actually functions." In the Ohio program "parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools" and it is only through these choices that government monies reach religious schools. As a result, for Justice O'Connor the program "is consistent with the Establishment Clause."[148]

Justice O'Connor provided the crucial fifth vote for upholding the Cleveland voucher program in *Zelman*. Some U. S. Supreme Court observers had expected her to limit the impact of *Zelman* by including some conditions in a separate assenting opinion, but no such cautions were made.[149] In previous public aid to religious schools cases, she had qualified her opinion by insisting on the distinction between aid programs that provide funds directly to religious affiliated institutions (giving the appearance that government endorses religion) versus aid programs that provide money to individuals who in turn decide where to spend the funds.[150]

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[147] *Id.* at 2474.

[148] *Id.* at 2478.

[149] Biskupic, Joan, and Tamara Henry. "Church, State Wall Is Lowered in Schools." USA Today (June 28, 2002).

[150] Fletcher, Michael A. "High Court Joins Battle Over School Vouchers: Church-State Divide at Issue in Ohio Court." Washington Post (February 20, 2002): A6.

Justice Thomas' concurrence

Only Justice Clarence Thomas focused on civil rights issues involved in allowing poor and minority students the same choice in private education that is available to wealthier students. He began his concurring opinion by stating, "Today many of our inner-city public schools deny emancipation to urban minority students."[151] Despite the promises of *Brown* v. *Board of Education*,[152] which struck down school segregation, "urban children have been forced into a system that continually fails them."[153]

Justice Thomas criticized opponents of school vouchers who "raise formalistic concerns about the Establishment Clause but ignore the core purpose of the Fourteenth Amendment."[154] He rejected the argument that school vouchers undermine the democratic ideal of common public schools by stating:

> 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.[155]

He stated "the failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects."[156]

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[151] *Zelman*, 536 U.S. at 676.

[152] 347 U.S. 483 (1954).

[153] *Zelman*, 536 U.S. at 676.

[154] *Id.* at 682.

[155] *Id*.

[156] *Id*. at 2482.

Justice Thomas proposed that the Court apply a dual standard to Establishment Clause challenges: a restrictive one applicable to the federal government and a more relaxed one applicable to the states. He added, "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."[157]

Dissenting Opinions

The four dissenting justices asserted that the *Zelman* decision was a fundamental break with prior church-state precedent and "a major devaluation of the Establishment Clause." They argued that the program is a very large transfer of state funds to religious organizations, where the funds can be used for religious purposes.

Justice Souter's dissent

Justice David Souter wrote the principal dissent, joined by Justices Stevens, Ginsburg, and Breyer. For Justice Souter, the Ohio voucher program violates "every objective underlying the prohibition of religious establishment," and its constitutionality will have a negative impact on religious liberty.[158] He objected to the use of *any* public funds to support educational programs run by religious schools. The Cleveland voucher program allows public funding to be directed to religious schools and indoctrination.

In his view, the Court was wrong when it focused on *all* of the funds the state of Ohio makes available for public education as the backdrop for a decision on whether the program is "neutral" with respect to religion. The Court should not have considered the various types of public education to be an option because these schools are part of the public school system and

[157] *Id.*

[158] *Id*

are separate from private schools. The wide range of public school choices does not validate the inclusion of religious private school choices.

Justice Souter objected to the reasoning regarding neutrality and private choice and added that the decision will lead to religiously divisive debates about whether schools teaching doctrines abhorrent to a majority of citizens. Souter called the majority decision “a major devaluation of the establishment clause.” He argued that, "constitutional limitations exist to preserve constitutional values in hard cases, like these." The fact that the Cleveland schools are in such a dismal state does not change the constitutionality of the program. Justice Souter ended his dissent with a plea "that a future Court will reconsider [this] dramatic departure from basic Establishment Clause principle."[159]

Justice Steven’s dissent

Justice John Paul Stevens agreed with Justice Souter that the failings of the Cleveland public school system were irrelevant to the constitutionality of vouchers. He noted that since the vast majority of the voucher recipients receive religious indoctrination at state expense the conclusion may be drawn that the law is one "respecting an establishment of religion." Justice Stevens concluded, "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundations of our democracy."[160]

Justice Breyer’s dissent

In his dissent, Justice Stephen Breyer’s concern was "the risk that publicly financed voucher programs pose in terms of religiously based social conflict."[161] He explained, "voucher

[159] *Zelman*, at 2502.

[160] *Id*. at 2485 (Stevens, J., dissenting).

[161] *Id.* at 2502 (Breyer, J., dissenting).

programs differ . . . in both kind and degree from aid programs upheld in the past."[162] First, "they differ in kind because they direct financing to a core function of the church: the teaching of religious truths to young children."[163] Second, they differ in degree because "the aid programs recently upheld by the Court involved limited amounts of aid to religion," whereas the new conception of neutrality "appears to permit a considerable shift of taxpayer dollars from public secular schools to private religious schools."[164] Justice Breyer stated that the majority "turns the clock back" and "adopts, under the name of 'neutrality,' an interpretation of the Establishment Clause that this Court rejected more than half a century ago."[165]

Significance

Zelman v. Simmons-Harris[166] is a landmark decision in Establishment Clause jurisprudence.[167] The U. S. Supreme Court upheld the constitutionality of the Cleveland voucher program that allows parents to use state funds to send their children to religious schools. This is significant because, for many years, there were questions about whether the participation of religious schools in a voucher program would survive a constitutional challenge under the Establishment Clause of the First Amendment to the U. S. Constitution. After *Zelman*, it appears that the Establishment Clause will permit voucher plans to include religious schools under certain circumstances.

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[162] *Id*. at 2507.

[163] *Id.*

[164] *Id.*

[165] *Id*. at 2508.

[166] 536 U.S. 639 (2002).

[167] *See* John C. Jefferies, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 *MICH. L. REV.* 279, 279 (2001).

The Court's decision permits eligible families to use publicly funded school vouchers to send their children to private religious schools. The decision symbolized an important legal victory for school voucher proponents seeking constitutional support for existing voucher programs. Proponents also hope the *Zelman* decision may lead to voucher legislation in other states.

Zelman removed the constitutional barrier of public funding being spent on inherently religious activities so long as the funds first flowed through the hands of private individuals.[168] The key to the *Zelman* decision is to understand the three criteria the U. S. Supreme Court outlined that make a voucher program one of "true private choice."

The first important criterion met is that the Cleveland voucher program was neutral towards religion. The Court emphasized that the program was "neutral in all respects toward religion."[169] Both the class of beneficiaries – the Cleveland public school students and the class of eligible institutions were "defined without reference to religion." Both secular and religious private schools within Cleveland were eligible, as were adjacent public school districts. There were no terms more favorable to religious schools than to other schools. In fact, public schools were given more favorable treatment than private schools. Participating adjacent public schools would receive from the state not only the voucher amount but also the state's ordinary per-pupil contribution. Parents could choose community schools (charter schools) or magnet schools in the

[168] *See* Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-funding" Principle*, 2 FIRST AMENDMENT LAW REVIEW, 108 (2004); Steven K. Green, *Private School Vouchers and the Confusion over "Direct" Aid*, 10 GEO. MASON U. CIVIL R. LAW J. 47, 50 (2000); Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167, *passim* (2000).

[169] *Id*. at 653.

Cleveland public system and receive free tuition, while at private schools all parents were required to make at least some co-payment.[170]

The Cleveland program actually provided less money to private schools, including religious schools, than the state gave to various public alternatives -- $2,250 per student to private schools compared with $4,167 to $6,000 in state funding per student for the public options. The *Zelman* majority noted this fact, but also added "such features of the program are not necessary to its constitutionality."[171]

Secondly, the majority emphasized the fact that public funds reached religious schools because of the "independent choices of private individuals" as opposed to "programs that provide aid directly [from the government] to religious schools."[172] The Court cited earlier decisions approving the provision of materials and equipment to religious schools, but holding that direct aid must be restricted to secular uses even if made broadly available on the same terms to religious and nonreligious alike.[173] For school vouchers to be valid under the U. S. Constitution, the voucher program must channel funds through some mechanism of individual choice. In Cleveland, parents endorse their state check over to the school. States cannot provide funds directly to private schools on a per-student basis because parents who chose a private school would not have the option of declining the aid attributable to their child.[174]

Fundamental to the direct versus indirect question is whether the beneficiary of the program is an institution or an individual. Simply assuring that an individual receives the check

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[170] *Id*. at 2468.

[171] *Id.*

[172] *Id.* at 2465.

[173] *See Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., joined by Breyer, J., concurring in the judgment).

[174] 530 U.S. at 842.

is not sufficient, however. The Court also requires that the individual have genuine, independent choice.

Finally, *Zelman* emphasized that the Ohio program "provided genuine opportunities for Cleveland parents to select secular educational options" and it "permits [them] to exercise genuine choice among options public and private, secular and religious."[175] Parents were given the following choices for their children: nonreligious private schools, community schools (charter) or magnet public schools, adjacent suburban public schools that agreed to accept voucher students, and finally they could keep their children in Cleveland public schools with a publicly funded tutor.

The *Zelman* decision suggests several ways to determine whether choice and options available to parents are genuine. First, the actual percentage of aid that ends up at religious institutions will usually be irrelevant to whether other options are deemed genuine. Voucher opponents strongly objected to the fact that forty-six of fifty-six participating private schools (82 percent) were religious and that in the litigation year 96 percent of the voucher funds were used at religious schools. The Court responded that because 81 percent of private schools in Ohio are religious, which is approximately the same percentage as in the program, the "preponderance of religious affiliated private schools …did not arise as a result of the program" but was independent of it.[176] The Court added that basing a standard of constitutionality on the actual percentages of aid used could not provide "certainty" or "principle standards," because the statistics would vary from year to year and location to location.[177]

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[175] *Zelman*, 122 S. Ct. 2469, 2473.

[176] *Id.* at 2469-71.

[177] *Id.* at 2470.

Secondly, the requirement of genuine secular options appears to reinforce the neutrality requirement. As long as the decision of private schools to participate in the voucher program and the decision of the parents to enroll their children in religious schools cannot be attributed to any government action, the actual choices made by parents and the involvement, or lack of involvement, of particular schools has no bearing on the constitutionality of the program. A different analysis would apply if the preponderance of religious schools participating in the program or the percentage of children enrolled in religious schools could be traced to government action promoting religious school involvement or skewing parental decisions toward the enrollment of their children in religious schools.

Finally, the question as to whether the state "is coercing parents into sending their children to religious schools," the Court said, "must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren."[178] The Cleveland program was part of a much wider program of multiple educational options, community and magnet schools and after-school tutoring which offered parents a real choice between religious and nonreligious schools (perhaps even providing incentives for nonreligious education). When the community and magnet schools were counted as relevant options, the percentage of children who chose religious schools was less than 20 percent.[179] The Court majority places the burden of proof on those challenging the genuineness of the options. They found "no evidence that the program fails to provide [secular] opportunities."[180]

The Court concluded that vouchers did not lend "official" endorsement to any religion or religious message by leaving the school choice decision to parents rather than government. The

[178] *Id*. at 2469 (emphasis in original).

[179] *Id*. at 2471.

[180] *Id.* at 2469 (O'Connor, J., concurring).

result of *Zelman* is that now according to the U.S Constitution, there is no federal constitutional impediment to government subsidies of private and religious schools provided 'true choice' exists in the voucher program. In *Zelman* a significant portion of the funds appropriated for the voucher program reached religious schools without restrictions on the use of those funds, which is a change from past decisions.

Implications

Voucher opponents and proponents argued very categorical viewpoints. Opponents of vouchers invoked the "wall of separation" between church and state. While proponents of vouchers held the view that equal treatment of religious and secular institutions is required and that the principle of "true private choice" are essential to the Religion Clauses of the First Amendment. The result in *Zelman* was a narrow constitutional victory for voucher proponents.

The legal impact of private choice remains undetermined. To fully understand the effect of private choice on earlier constitutional analysis, it needs to be understood how a voucher differs from other forms of public aid the Court had previously allowed to flow to religious schools. The Court noted that its previous decisions consistently distinguished between government programs that provide aid directly to religious schools and programs of "true private choice" (where government aid reaches religious schools only as a result of the choice of private individuals).

In the past, the Court's Establishment Clause decisions have been criticized for being perplexing,[181] but there had been an unwavering prohibition on unrestricted public funds flowing to pervasively religious institutions.[182] Several of the cases the Court found unsatisfactory

[181] See, e.g., Carl H. Esbeck, A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?, 70 Notre Dame L. Rev. 581 (1995).

[182] *Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988). ("Even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religious affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are "pervasively sectarian."'). See also *Agostini v. Felton*, 521 U.S. 203, 228-29

involved aid to religious schools, even though the aid was designated for secular purposes.[183] As the Court then indicated, such aid was unconstitutional because there was no guarantee, due to the fungible nature of money that the public funds would not pay for religious activities.[184] Until the *Zelman* decision, every public aid program upheld by the Court (with the exception of *Witters)*[185] involved a benefit that was controlled or provided by public authorities,[186] targeted or earmarked for a discrete, secular activity,[187] or of an identifiable secular nature such that there was no danger that the benefit could be diverted for religious uses.[188] An additional factor the Court considered was whether the benefit supplemented or supplanted the educational functions of the religious school.[189] Applying these criteria, the Court upheld benefits such as public transportation,[190] text and library books,[191] mandated testing,[192] nursing,[193] diagnosis,[194]

(1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993); *Tilton v. Richardson*, 403 U.S. 672, 679-80 (1971).

[183] See *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-75 (1973); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971); accord, *Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 392 (1985). *Cf. Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 657-58 (1980) (allowing cash reimbursements to religious schools for administering and grading state prescribed tests).

[184] *Ball*, 473 U.S. at 386.

[185] Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481, 482 (1986). Although *Regan* also involved a transfer of cash rather than in-kind items, those funds were earmarked for the costs of performing state-mandated tasks. 444 U.S. at 657.

[186] Agostini, 521 U.S. at 209; Zobrest, 509 U.S. at 8.

[187] *Mitchell v. Helms*, 530 U.S. 793, 802 (2000); *Agostini*, 521 U.S. at 209; *Regan*, 444 U.S. at 650-52; *Tilton*, 403 U.S. at 615.

[188] *Mitchell*, 530 U.S. at 827-28; *Agostini*, 521 U.S. at 228-29; *Zobrest*, 509 U.S. at 10-11; *Regan*, 444 U.S. at 657-58; *Tilton*, 403 U.S. at 675; *Wolman v. Walter*, 433 U.S. 229 (1977); *Bd. of Educ. v. Allen*, 392 U.S. 236, 245-48 (1968).

[189] *Agostini*, 521 U.S. at 228-29; see also *Zobrest*, 509 U.S. at 12 (stressing that public programs that take over "a substantial portion of [a religious school's] responsibility for teaching secular subjects" amounts to "direct aid ... [which] is indistinguishable from the provision of a direct cash subsidy to the religious school.").

[190] See *Everson v. Bd. Of Educ*., 330 U.S. 1, 17-18 (1947).

[191] See *Allen*, 392 U.S. at 238; *Wolman*, 433 U.S. at 255; *Mitchell*, 530 U.S. at 803.

therapy,[195] and special education services[196] conducted by public employees, but struck down grants for building construction and maintenance[197] or that supplanted the teaching of secular subjects.[198]

In *Mitchell*, the Court reaffirmed that its holdings "provide no precedent for the use of public funds to finance religious activities."[199] The Court took great care to note that under the programs it had approved no "[public] funds ever reached the coffers of religious schools."[200] The Court agreed that there are "special Establishment Clause dangers ... when money is given to religious schools."[201] This principle held true even when the government program provided aid alike to public and private religious and nonreligious entities.[202]

Voucher opponents view this decision as a shift in the Court's position on governmental support of religion. In deciding the case, the majority relied on the distinction between government programs that provide direct aid to religious schools, and those providing indirect

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[192] See *Regan*, 444 U.S. at 657-58; *Wolman*, 433 U.S. at 240-41.

[193] *Wolman*, 433 U.S. at 242.

[194] See *id*.

[195] *Id.* at 248.

[196] See Agostini, 521 U.S. at 234.

[197] See Nyquist, 413 U.S. at 779-80.

[198] See *Ball*, 473 U.S. at 377-78; *Wolman*, 433 U.S. at 248-51.

[199] See *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring in the judgment) (quoting *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

[200] *Agostini*, 521 U.S. at 228; *Zobrest*, 509 U.S. at 10.

[201] *Mitchell*, 530 U.S. at 818-19 (plurality opinion) (quoting *Rosenberger*, 515 U.S. at 842.

[202] *Rosenberger*, 515 U.S. at 842; *Bowen*, 487 U.S. at 614-15; *Roemer v.Maryland Pulic. Works Bd.*, 426 U.S. 736, 747 (1976) ("The Court has taken the view that a secular purpose and facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, end even though it makes its aid available to secular and religious institutions alike.").

aid. The Court was clear that they were deciding this case as part of the line of cases approving indirect aid.

Presently, two new appointments have been made to the U. S. Supreme Court, but the internal dynamics of the Court have not changed greatly.[203] At their confirmation hearings, both Chief Justice John Roberts (who replaced William Rehnquist) and Justice Samuel Alito (who replaced Sandra Day O'Connor) were seen by supporters and detractors as conservatives. Several Justices are seventy or older and their tenure on the Court may be transitory. Any additional membership changes on the Court, could substantially shift alliances on such issues as the constitutionality of school voucher programs that permit religious school participation. For instance, if Justice Stevens, who maintains a strict separationists view of the Establishment Clause, should retire and be replaced by a Justice who favors government accommodation toward religious schools, the constitutionality of voucher programs and other public aid to religious schools will be assured. The next decade may dramatically affect the permissible line between church and state.

[203] *See* Edward Lazarus. "Assessing the Supreme Court at the Close of Its Current Term: New Justices, Public Critiques, and the Law Clerk Issue. *FindLaw Writ* Thursday, July 6, 2006. Available at http://writ.news.findlaw.com/lazarus/20060706.html

CHAPTER 5
SUMMARY, CONCLUSIONS, IMPLICATIONS, AND RECOMMENDATIONS

The primary units of analysis for this study were investigations of the constitutionality of school vouchers that provide public aid to religious schools into case law and legislative record. In addition, scholarly commentary about school vouchers in terms of public policy was also used as a source of analysis. The literature review of this study provided a theoretical framework from which to interpret the observations of school voucher interest groups and their role in the legislative policy formation process.

On September 25, 2001, the U. S. Supreme Court agreed to review a U. S. Sixth Circuit Court of Appeals' ruling, which held that Ohio's Pilot Scholarship Program violated the Establishment Clause of the First Amendment.[1] The Sixth Circuit Court based the decision on precedent from the U. S. Supreme Court's *Committee for Public Education v. Nyquist*,[2] which held a New York tuition subsidy for low-income students in private schools unconstitutional. The U. S. Supreme Court had previously declined to hear appeals arising from other school choice programs.[3] Considerable attention was focused on *Zelman v. Simmons-Harris*[4] because the Court's rationale would have significant implications for other states considering any type of state aid which might result in financial assistance to religious schools. If, in reaching the *Zelman* decision, the Court had concluded that the Ohio voucher plan unconstitutionally advances religion, the national school voucher movement might have been severely stalled. Alternately, if

[1] *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

[2] 413 U.S. 756 (1973).

[3] *See Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998); *Bagley v. Raymond Sch. Dept.*, 728 A.2d 127 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999); and *Chittenden Town School District v. Vermont Department of Education* (97-275); 169 Vt. 310; 738 A.2d 539 (1999).

[4] 536 U.S. 639 (2002).

the Court had upheld the Ohio plan, as it has, other states may be encouraged to experiment with various types of voucher systems.

In *Zelman,* the Court held that the Cleveland Scholarship and Tutoring Program (CSTP) did not violate the Establishment Clause of the U. S. Constitution.[5] The Court found that the program was enacted for a valid secular purpose[6] and was one of true private choice.[7] The Court held that the program is neutral in all respects toward religion,[8] permits participation of *all* types of schools,[9] and provides educational assistance directly to a broad class of citizens who,[10] as a result of their independent and private choice, direct aid to religious schools.[11]

The U. S. Supreme Court in *Zelman* found school voucher plans that allow the participation of religious schools to be constitutional at the federal level. Apart from Ohio's enactment of a statewide voucher program in 2005,[12] proposals for voucher programs have had little success in state legislatures since *Zelman*. The constitutionality of school voucher legislation must be determined by state constitutional provisions. At this time, it appears that state provisions prohibiting funding of religious schools will survive state constitutional challenge.

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[5] *Zelman* at 663.

[6] *Id*. at 649.

[7] *Id*. at 653.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] Educational Choice Scholarship Pilot Program, Ohio Rev. Code Ann. 3310.01 – 3310.17 Available at http://www.legislature.state.oh.us/BillText126/126_HB_66_EN1_N.html (last visited Feb. 20, 2007).

Summary

This study traced the school voucher movement in the United States, specifically examining the Ohio Pilot Project Scholarship Program and subsequent legal challenges that culminated in the U. S. Supreme Court's *Zelman v. Simmons-Harris* decision. First, the study highlighted parental choice as a policy trend the Court found persuasive in *Zelman*. Secondly, this research summarized the U. S. Supreme Court Establishment Clause standards with regard to direct public aid for religious schools, traced the shift in U. S. Supreme Court Establishment Clause doctrine, summarized indirect public aid for religious schools, and described pertinent judicial decisions the Court found applicable in *Zelman*. Third, a review of litigation was presented pertaining to the Cleveland Voucher Program and culminating with the U. S. Supreme Court decision in *Zelman v. Simmons-Harris*. Finally, this study briefly reviewed school voucher legislation at the federal and state level since the *Zelman* decision.

Parent's Rights, a Persuasive Policy School Voucher Argument

In the 1990s, a resurging interest in parental choice as an essential policy came to the forefront of the school voucher debate. From a historical perspective, the federal government's efforts to promote various school policies have led, in part, to the increased interest in school vouchers as a public policy tool. Trends in school reform generally occur in response to a particular societal need. During the 1990s, interest in Milton Friedman's school voucher concept was renewed. He recommended that families be given subsidies in the form of educational vouchers to purchase educational services for their children at government approved schools, in much the same way people buy any necessary commodity.[13] He advocated freedom for families to spend the voucher amount, and any additional amount, at the educational institution of their

[13] Milton Friedman. "The Role of Government in Education." In *Economics and the Public Interest.* Robert A. Solow, ed. New Brunswick, N.J.: Rutgers University Press, 1955, 123-144.

choice. From his point of view, the government's role should be restricted to upholding minimum standards of approval of educational institutions.[14]

Voucher proponents argue that low-income parents should have the liberty to choose any public or private school for their children, with public funding supporting all or a portion of the costs. The parental right to choose the appropriate educational setting for their children is meaningless if poor families cannot exercise true private choice because of financial and/or residential constraints.

According to education historians, the question of whether state interests take precedence over parental interests has been a fundamental controversy within education policy from the beginning of public education in America.

> Over the long perspective of the last century, …compulsory school attendance may be seen as part of significant shifts in the functions of families and the status of children and youth…Advocates of compulsory schooling often argued that families - or at least some families, like those of the poor and foreign-born were failing to carry out their traditional functions of moral and vocational training…Much of the drive for compulsory schooling reflected an animus against parents considered incompetent to train their children. Often combining fear of social unrest with humanitarian zeal, reformers used the powers of the state to intervene in families and to create alternative institutions of socialization.[15]

Public school vouchers involve the question of control. *Who is primarily responsible for America's children's future, their parents or the state?* State compulsory school attendance laws highlight the fact that education is tremendously important to individuals and to society. The answer from state courts, which have interpreted their own constitutions and statutes, concludes that the state is concurrently responsible with parents for providing a basic public education for children. The state must ensure that children are minimally educated citizens and parents have the right to direct the education of their children within the bounds of reasonable state control.

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[14] *Id*. at 127.

[15] David Tyack. "Ways of Seeing: An Essay on the History of Compulsory Schooling." 46 *Harv. Educ. Rev*. 355, 363, 1976.

Historically, the U. S. Supreme Court has recognized the "…traditional concepts of parental control over the religious upbringing and education of children under their control."[16] In *Meyer v. Nebraska*, the U. S. Supreme Court addressed the constitutional right and duty of parents to provide their children with an education "…suitable to their station in life."[17] In *Pierce v. Society of Sisters*, the U. S. Supreme Court unanimously held that the Compulsory Education Act[18] requiring all children to attend public schools was unconstitutional.[19] The Court acknowledged the "liberty of parents and guardians to direct the upbringing and education of children under their control."[20]

In *Zelman v. Simmons-Harris,* the U. S. Supreme Court "strongly emphasized parental freedom of choice."[21] The Court held that public funds in the form of a scholarship (voucher) could be used at religious schools as long as parents and not the state made the decision. Chief Justice Rehnquist, wrote in the opinion: "We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional."[22]

U. S. Supreme Court Establishment Clause Standards in Zelman

Prior to *Zelman*, the U. S. Supreme Court's Establishment Clause jurisprudence has resulted in "often confusing, even contradictory decisions concerning public aid to religious

[16] *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972).

[17] 262 U.S. 390, 400 (1923).

[18] Ore. Gen. Laws, ch. 1, p.9 (1923).

[19] 268 U.S. 510, 534-35 (1925).

[20] *Pierce*, 268 U.S. at 535.

[21] *See* Clive Belfield and Henry Levin. "Does the Supreme Court Ruling on Vouchers in Cleveland Really Matter for Education Reform?" *TCRecord*, 2002. Available at http://www.tcrecord.org/PrintContent.asp?ContentID=10952

[22] *Zelman* at 653.

schools."[23] The early court cases focused on the content or nature of the aid provided, and simply inquired whether secular activities and education, as opposed to religious indoctrination, was being funded. In the 1970s and 1980s the Court moved away from this approach. The new focus was on whether the aid was secular and whether there was some potential or possibility of "advancing religion" or of creating the appearance of a government "endorsement" of religion. During this period, the three-part *Lemon* test detailed the requirements for legislation concerning aid to children in religious schools.[24]

Starting in the late 1980s, the Court increasingly focused on the role of independent, private choice as a means of guaranteeing that the government does not "establish" a religion. In these cases, the Court moved from examining the content of the aid program to evaluating the means by which the aid reaches religious schools. Recent decisions have upheld programs that provide benefits to individuals under secular neutral criteria, even if those individuals then use those benefits to support or attend religious schools. The constitutional key has been the concept of independent, private choice. Some legal scholars even wondered whether the *Lemon* test was antiquated and should be abandoned in Establishment Clause cases.[25]

The question presented to the U. S. Supreme Court in *Zelman* was whether the Cleveland voucher program offended the Establishment Clause of the U. S. Constitution.[26] In order to answer that question, the Court drew an important "… distinction between government programs

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[23] *See* Nathan Lewin. "How School Vouchers Can Win In the Supreme Court-Distinguishing 'What' From 'How' in Aid to Religious Schools." *Jewish Law Articles*. Available at http://www.jlaw.com/Articles/SchoolVouchers3.html#6.b (last visited Feb. 9, 2007).

[24] *Lemon v. Kurtzman* 403 U.S. 602 (1971).

[25] *See* Michael Stokes Paulsen. "Lemon Is Dead," Symposium: Religion and the Public Schools After *Lee v. Weisman, 43 Case W. Rev. 795* (Spring, 1993). Paulsen contended that the Court in *Weisman* replaced the *Lemon* test with a new "coercion" test).

[26] *Zelman*, 536 U.S. at 649.

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 genuine and independent choices of private individuals."[27] The Court affirmed that "…[i]f numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment."[28] In *Zelman*, Chief Justice Rehnquist distinguished public aid programs that provide assistance directly and indirectly to religious schools. He explained that over the past two decades U. S. Supreme Court jurisprudence had "changed significantly" in terms of direct aid programs, but the Court's "jurisprudence with respect to true private choice programs has remained consistent."[29]

Direct Aid to Religious Schools

In direct aid to religious schools' cases, the U. S. Supreme Court generally ruled the Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[30] Following that reasoning, the Court has held that public aid to religious schools must be "secular, neutral, and nonideological..."[31] Routinely, the Court applied the tripartite test to determine whether an aid program violated the Establishment Clause. The three prongs were clearly defined in Lemon v. Kurtzman as follows: "First, the statute must have a secular legislative purpose; second, its

[27] *Id.*

[28] *Id.* at 652-53 (quoting *Mitchell*, 530 U.S. at 810 (plurality opinion)).

[29] *Zelman*, 536 U.S. at 649.

[30] *See Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985).

[31] *Committee for Public Education v. Nyquist*, 413 U.S. 756, 780 (1973).

principal or primary effect must be one that neither advances nor inhibits religion…; finally, the statute must not foster an excessive entanglement with religion."[32]

Rarely has the secular purpose prong of the Lemon test been an obstacle for public aid to religious schools, but the primary effect and entanglement prongs have proved to be problematic. At best, meeting the constitutional requirements of the second and third prongs was a difficult balancing act. The possibility existed that when legislators met the requirement of one prong it may possibly cause the other prong to be violated.

Direct aid statutes that benefited religious schools and were not limited to secular use have been found to violate the primary effect test. Since this aid can be used to advance the schools' religious mission, it has been found unconstitutional. However, a direct aid program, although limited to secular use, has often still been held unconstitutional on the excessive entanglement prong. The U. S. Supreme Court held that the government's monitoring of the secular use restriction interfered too much into the affairs of the religious schools. Chief Justice Rehnquist, dissenting in Wallace v. Jaffree wrote, "One of the difficulties with the entanglement prong is that, …it creates an 'insoluble paradox' in school aid case: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement."[33]

Shift in Establishment Clause Doctrine

In the late 1990s, the Court became sharply divided on the utility and applicability of the tripartite test and changed the primary effect and entanglement tests. The change was first demonstrated in *Agostini v. Felton*,[34] when the Court held that providing compensatory

[32] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[33] 472 U.S. 38 (1985).

[34] *Agostini v. Felton*, 521 U.S. 203 (1997).

instruction on the premises of religious schools by public school teachers was not in violation of the Establishment Clause, since the benefits were provided without regard to the sectarian-nonsectarian, or public-private, nature of the institutions. In *Mitchell v. Helms*,[35] the constitutionality of a program providing aid to both public and religious schools in the form of educational equipment, including books and computers, was upheld by the Court. These decisions expanded the definition of permissible government aid for religious schools under the Establishment Clause. Additionally, these decisions paved the way for the continuing shift that culminated in *Zelman.* Currently, the primary requirements are that the public aid itself be secular in nature, that it be distributed on a religiously neutral basis, that it not subsidize religious indoctrination, and that it not lead to excessive entanglement.[36]

Indirect Aid to Religious Schools

Prior to *Zelman,* the significant distinguishing elements of indirect assistance programs held constitutional under the Establishment Clause have been that the purpose of the programs was not to provide aid to religious schools, that the initial recipients of the vouchers or other benefits were selected on a religiously neutral basis, and that a genuine choice for families existed as to the use of vouchers or other assistance at religious or secular schools. The Court has held unconstitutional government aid programs that selected initial beneficiaries on the basis of a religious criterion (i.e., enrollment in private, religious schools). In addition, if the universe of choices available to the beneficiaries was dominated by religious schools (primary effect of advancing religion), this, too, was found unconstitutional. Only if initial beneficiaries of a government aid program included public and private students, and if eligible families had a

[35] 120 S. Ct. 2530 (2000).

[36] *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

genuine choice among religious and secular schools, has the Court held the program to not have had an unconstitutional primary effect of advancing religion. The Court held this decision in spite of the fact that religious schools sometimes disproportionately benefited.[37] In *Zelman*, the Court held the Cleveland voucher program constitutional even though most of the participating private schools were religious. In *Zelman*, the majority of the Court considered the universe of choices available to voucher recipients to include private schools, public schools, charter schools, and tutoring options.

Applicable Judicial Decisions

In *Mueller v. Allen*[38] the Court upheld a Minnesota tax deduction program for expenses incurred in providing tuition, textbooks, and transportation for students in public or private schools. The majority ruled that the program did not violate the Establishment Clause because the benefit was available to "*all* parents" whether they used it for public or private school expenses.[39] Parents with "… children [who] attend nonsectarian private schools or sectarian private schools,"[40] were eligible to participate in the program. Therefore the program was "not readily subject to challenge under the Establishment Clause."[41] The Court emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children."[42]

[37] *See Mitchell v. Helms*, supra.

[38] 463 U.S. 388 (1983).

[39] *Id.* at 397.

[40] *Id.* at 397-399.

[41] *Id.*, at 399 (citing *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.")

[42] *Id.* at 399-400.

The Court found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools.[43]

In *Witters v. Washington Department of Services for the Blind*[44] the Court unanimously upheld a vocational rehabilitation program which provided benefits directly to qualifying individuals regardless of the nature of the institution benefited. The use of public funds by a student who is blind at a Bible college does not violate the Establishment Clause.[45]

In *Zobrest v. Catalina Foothills School District*[46] the Court applied the reasoning from decisions in *Mueller* and *Witters* to hold that the Establishment Clause does not prevent a school district from furnishing a student with a sign language interpreter. The Court examined the intent of the Individuals with Disabilities Education Act (IDEA),[47] and found that it "distribute[d] benefits neutrally to any child qualifying as 'disabled.'"[48] The Court found that parents select the school their children attend and therefore "a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents."[49] Most importantly, the Court emphasized that with parental choice the "circuit between government and religion was broken, and the Establishment Clause was not implicated."[50]

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[43] *Id*. at 401.

[44] 474 U.S. 481 (1986).

[45] *Id*. at 489-90.

[46] 509 U. S. 1 (1993).

[47] *Id*. at 3; 20 U.S.C. §§ 1400-91 (2000). The Arizona counterpart of the IDEA is codified at Ariz. Rev. Stat. Ann. § 15-761 to -774 (West 2002).

[48] *Zobrest*, 509 U.S. at 10.

[49] *Id*. at 10-11.

[50] *Zelman*, 536 U.S. at 652. (referring to the *Witters* decision).

Cleveland School Voucher Program Litigation

The U. S. Supreme Court decision in Zelman v. Simmons-Harris was based on a review of litigation pertaining to the Cleveland Voucher Program. On June 30, 1995, the Ohio General Assembly enacted the Pilot Project Scholarship Program,51 making Ohio the first state to pass a publicly funded private school choice program that included religious schools.52 The statewide program provided financial assistance to families in any Ohio school district that was or had been "under federal court order requiring supervision and operational management of the district by the state superintendent."53 The Cleveland City School District was the only district that met the program requirement. The Cleveland Scholarship and Tutoring Program (CSTP) was designed to provide low-income students in the critically low-performing Cleveland City School District with a wider range of educational options.[54]

In 1996, the Ohio voucher program was challenged in state court on state and federal grounds. In May 1999, the Ohio Supreme Court held that the voucher program violated a provision in the Ohio state constitution, Art. II, § 15D, that requires each bill to address only one subject but rejected the claim that the program violated the Establishment Clause in either the Ohio or the U. S. Constitution.[55] In June 1999, in response to the court's ruling, the Ohio General Assembly reinstated the voucher program as part of the state's education budget so as to satisfy the court's objection and the program continued.[56]

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[51] Ohio Rev. Code Ann. § 3313.974-.979.

[52] Milwaukee Parental Choice Program was the country's first voucher program but it did not originally include religious schools.

[53] Ohio Rev. Code Ann. § 3313.975(A).

[54] *Zelman* at 643-644.

[55] *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 8-9, 711 N.E. 2d 203, 211 (1999).

[56] *Zelman*, 536 U.S. at 648.

In July 1999, school voucher opponents filed suit in U. S. District Court seeking to enjoin the reenacted voucher legislation, claiming the Cleveland voucher program violated the Establishment Clause of the U. S. Constitution. In August 1999, the District Court issued a preliminary injunction barring further implementation of the program.[57] The U. S. Supreme Court stayed the preliminary injunction pending review by the Court of Appeals.[58] In December 1999, the District Court granted summary judgment, finding the Cleveland voucher program violated the Establishment Clause.[59] In December 2000, a divided panel, (2-1), of the Court of Appeals affirmed the judgment of the District Court, finding the Cleveland program had the "primary effect" of advancing religion in violation of the Establishment Clause.[60] The Court of Appeals stayed its mandate pending the U. S. Supreme Court decision.[61] The U. S. Supreme Court granted *certiorari* on September 25, 2001.[62] The U. S. Supreme Court upheld as constitutional the Ohio Pilot Scholarship Program which provides low-income students in failing schools the opportunity to attend private, religious schools.[63] The program was found to have a secular purpose, to be neutral between religious and secular organizations, and to provide for genuine and independent choice between providers.

In Zelman, the key question before the U. S. Supreme Court was whether the Cleveland voucher program constituted indirect aid. To make this determination, the Court identified three

[57] *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725 (N.D. Ohio 1999).

[58] *Simmons-Harris v. Zelman*, 528 U.S. 983 (1999).

[59] *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. 1999).

[60] *Simmons-Harris v. Zelman*, 234 F.3d 945 (CA6 2000).

[61] App. To Pet. For Cert. in No. 00-1779, 151 (May 23,2001).

[62] 533 U.S. 976 (2001).

[63] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

criteria present in earlier indirect aid cases.[64] First, as a threshold requirement, the program must be "neutral in all respects toward religion."[65] The Court was concerned with formal neutrality meaning that the classes of both participating schools and eligible students must be defined in nonreligious terms. In Zelman, this criterion was satisfied because the Cleveland program was open to any private school in the district or any public school in the adjacent districts, and the only preferred students were those who came from lower income families.[66]

Second, the majority determined whether the program provided aid "directly to a broad class of individuals, defined without reference to religion."[67] This criterion was originated in Mueller[68] to ensure formal neutrality does not, in fact, represent an unfair manipulation in favor of a particular religious group. The Cleveland program met this criterion since it was open to all parents "of a school-age child who resides in the Cleveland City School District."[69]

The third criterion dealt with whether or not program recipients could direct the aid to schools of their own choosing. The Court determined that the Cleveland program made available to families and students a "…range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a private nonreligious school, enroll in a community school, or enroll in a magnet school."[70]

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[64] *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U. S. 1 (1993).

[65] *Zelman* at 653.

[66] *Id.* at 653.

[67] *Id.*

[68] 463 U.S. 388, 397 (1983).

[69] *Zelman* at 653.

[70] *Id.* at 655.

Zelman v. Simmons-Harris was hailed as a landmark case by voucher proponents[71] because the U. S. Supreme Court clearly defined what is permissible under federal law. The Court made clear that a voucher program that includes a full range of educational choices may be found constitutional even if most of the private schools are religious. Chief Justice Rehnquist explained, "The constitutionality of a neutral educational aid program simply does not turn on whether and why…most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[72]

The lower federal courts in *Zelman* had held that the Cleveland voucher program did not provide parents a genuine choice between secular and religious schools. The majority decision was based on the key determination that enrollment in religious schools was the result of "true private choice."[73] The Court determined that the state had made available to families a range of other secular alternatives to the failing Cleveland City Public Schools. The existence of "true private choice" is a question of fact on which courts could reach different conclusions under different voucher programs or even under the Ohio program in the future. In both, Chief Justice Rehnquist's majority opinion and Justice O'Connor's concurring opinion, the Ohio program was being judged in its infancy and litigation had impeded the development of the program.

School Voucher Legislation after *Zelman*

Prior to *Zelman*, school voucher battles were contested at the federal and state level simultaneously, solely in state courts, and/or in the U. S. Congress and various state legislatures. After the *Zelman* decision, the voucher battles primarily shifted to state legislatures.

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[71] *See* Richard W. Garnett. "Yes to Vouchers: The Supreme Court gets it right." *Commonweal: A Review of Religion, Politics, and Culture*. August 16, 2002. Volume CXXIX, Number 14. Available at http://www.commonwealmagazine.org/print_format.php?id_article=552 (last visited Feb. 9, 2007).

[72] *Zelman* at 658.

[73] *Zelman* at 662.

Before *Zelman*, school voucher battles were contested on three legal fronts. The first arena involved courts at both the federal and state level where the question was asked whether voucher programs violate the Establishment Clause of the U. S. Constitution, thus prohibiting government action "respecting an establishment of religion."[74] The second arena consisted solely of state courts, where the question raised was whether voucher programs comply with state constitutions. The third arena involved the U.S Congress and the various state legislatures with whether voucher programs were sound public policy.[75] Before the U. S. Supreme Court's decision in *Zelman*, several states and lower federal courts reached conflicting decisions about the constitutionality of school voucher and voucher-related programs. These decisions involved the Establishment Clause of the U. S. Constitution as well as questions of state constitutionality.[76] At the federal district court level, school vouchers were found to violate the Establishment Clause.[77] Three separate state supreme courts upheld the validity of school vouchers, or similar programs, in the face of Establishment Clause challenges.[78] The U. S. Supreme Court's decision in *Zelman v. Simmons-Harris* removed the major federal constitutional

[74] U. S. Const., amend I ("Congress shall make no law respecting an establishment of religion,,,.").

[75] Benjamin Dowling-Sendor. "A Victory for Voucher." *American School Board Journal*, January 1999. The author was referring to Wisconsin's *Jackson v. Benson* but his points continued to be relevant in terms of *Zelman v. Simmons-Harris*.

[76] *See Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998); *Bagley v. Raymond Sch. Dept*., 728 A.2d 127 (Me. 1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Chittenden Town School District v. Vermont Department of Education* (97-275); 169 Vt. 310; 738 A.2d 539 (1999); *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (Ariz. 1999), *cert. denied* 528 U.S. 810 (1999); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999).

[77] See *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 730, 741-42 (N.D. Ohio 1999), *stay granted*, 528 U.S. 983 (1999); *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 864-65 (N.D. 1999), *aff'd*, 234 F.3d 945, 961 (6th Cir. 2000), *reh'g and reh'g en banc denied*, Nos. 00-3055, -3060, -3063, 2001 U.S. App. LEXIS 3344, at *1 (6th Cir. Feb. 28, 2001); *Miller v. Benson*, 878 F. Supp. 1209, 1216 (E.D. Wis. 1995), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995); *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999), *cert denied*, 528 U.S. 931 (1999).

[78] See *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211, 214 (Ohio 1999); *Kotterman v. Killian*, 972 P.2d 606, 616 (Ariz. 1999), *cert. denied*, 528 U.S. 810 (1999), and *cert. denied*, 528 U.S. 921 (1999).

obstacle to public aid for private religious schools.[79] With the support of President George W. Bush, Congress approved two federally funded voucher programs that allow the participation of private religious schools.[80] These programs are not subject to legal challenges because they were enacted within the standards set forth by the Court in *Zelman*.

After the definitive *Zelman* decision, the voucher battles primarily shifted to state legislatures where the constitutionality of school voucher and voucher-related programs under the church-state provisions of state constitutions are the important factors since many of these provisions are more restrictive than the Establishment Clause of the U. S. Constitution. If a voucher program is found unconstitutional consideration may be needed to ensure that there is no violation of the Free Exercise and/or the Equal Protection clauses of the U. S. Constitution.[81]

Zelman outlined the guidelines for permissible school voucher programs in terms of the U.S. Constitution. The Tenth Amendment provides that "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[82] This has been interpreted as granting power over education to the states. States have primary authority over public education. Every state constitution specifies, in varying degrees of detail, the state's responsibility for providing an education to its citizens. Based on *Zelman*, states face uncertainty about whether state constitutional provisions will permit voucher plans to include religious schools.

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[79] 536 U.S. 639, 122 S.Ct. 2460 (2002).

[80] *See* District of Columbia School Choice Incentive Act of 2003, Title III, of Division C of the Consolidated Appropriations Act, 2004, 20 U.S.C. 6316 (Pub.L. 108-199, January 30, 2004, 118 Stat. 3 § 301 et seq. Available at http://www.ed.gov/programs/dcchoice/legislation.html; Hurricane Education Recovery Act, Title IV, Subtitle A – Elementary and Secondary Education Hurricane Relief (Robert T. Stafford Disaster Relief and Emergency Assistance Act), 42 U.S.C. 5170. Available at http://www.ed.gov/policy/elsec/guid/secletter/051230Bill.pdf

[81] *See Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307 (2004); *Wirzburger v. Galvin*, 412 F.3d 271 (C.A.1-Mass. 2005).

[82] U.S. CONST. art. X.

Legal challenges will now involve the interpretation of state constitutional restrictions pertaining to school vouchers.[83] "More than two-thirds of the states have constitutional provisions that restrict aid to religious organizations more explicitly than does the Establishment Clause."[84] Though the state restrictions vary in language, and therefore have varying interpretations, state constitutions may be grouped into categories.[85] The first category of provisions "… says government funds may not be used for any private school … or that all schools supported by public funds must be under the exclusive control of public authorities." This type of provision excludes secular as well as religious private schools. The second category of provisions "… prohibits the expenditure of public funds 'in aid of,' or to 'support or benefit' any 'sectarian' school or school controlled by a 'religious denomination.'"[86] This type restricts aid to religious schools but not to secular private schools. The third category pertains to "…provisions that forbid the 'compelled support of [religious] worship or instruction,' or forbid state money to be 'appropriated for or applied to religious worship or instruction.'"[87] These provisions may permit aid to religious schools as long as the aid can be segregated from aid used for religious teaching.

School voucher proponents are most concerned about the second category of provisions, known as the Blaine Amendment. A once obscure amendment enacted in many states during the

[83] *School Vouchers: Settled Questions, Continuing Disputes*. The Pew Forum on Religion and Public Life, Washington, D.C., Aug. 2002. Available at http://pewforum.org/issues/files/VoucherPackage.pdf

[84] *Id*.

[85] *Id*.

[86] *Id*.

[87] *Id*. at 8-9.

late 1800s has recently come to the forefront within the school voucher controversy.[88] In December 1875, Speaker of the House of Representatives James G. Blaine (R. ME) proposed, with the support of President Ulysses S. Grant, the following:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect: nor shall any money raised or lands so devoted be divided among religious sects or denominations.[89]

The Blaine Amendment to the U. S. Constitution would have prohibited states from using tax money or property raised for public schools to be used for religious schools. Although the Blaine Amendment passed the House, it failed to pass the Senate, forcing supporters to concentrate on individual state constitutions, where they were much more successful.[90] The failed amendment became the model for state provisions. Territories seeking to become states either voluntarily adopted similar "Blaine Amendments" to their state constitutions,[91] or "were forced by Congress to enact such articles as a condition of their admittance into the Union."[92]

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[88] Joseph P. Viteritti. "School Choice and State Constitutional Law." In *Learning from School Choice*. Paul E. Peterson and Bryan C. Hassel, eds. Washington, D.C., Brookings Institution Press, 1998. 409-27; L. Cohen and B.C. Gray. "School Vouchers After Zelman." Paper presented at the conference, What's Next for School Vouchers? 2002. Available at http://www.ksg.harvard.edu/pepg/WNConfPapers.htm.

[89] 4 CONG. REC. 205 (1875).

[90] *See* Richard W. Garnett. "Brown's Promise, Blaine's Legacy" 17 *CONST. COMMENT.* 651, 674 (2000); Joseph P. Viteritti. "Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law" 21 *Harv. J.L. & Pub. Pol'y* 657 (1998).

[91] *See, e.g.*, N.Y. CONST. Art. XI § 3 (adopted 1894); DEL. CONST. Art. X § 3 (adopted 1897); KY.CONST. § 189 (adopted 1891); MO. CONST. Art. IX § 8 (adopted 1875).

[92] Eric Treene. "The Grand Finale Is Just the Beginning: School Choice and the Coming Battle over Blaine Amendments." Available at http://blaineamendments.org/scholarship/FedSocBlaineWP.html.pdf. Treene states that at least six states were required to include a Blaine Amendment. *See e.g.,* Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling legislation for South Dakota, North Dakota, Montana and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling legislation for New Mexico and Arizona); Act of July 3, 1890, 26 Stat. L. 215 § 8, ch. 656 (1890) (enabling legislation for Idaho); S.D. CONST. art. VIII § 16: N.D. CONST. art. 8 § 5; MONT. CONST. art X § 6; WASH. CONST. art. IX § 4, art. I § 11; ARIZ. CONST. art. IX § 10; IDAHO CONST. art. X § 5.

In *State Constitutions and School Vouchers*, [93] nineteen states have the potential to uphold a school voucher program that meets federal guidelines since case law or a "supportive legal climate" exists. Sixteen states are listed as having a restrictive orientation toward school voucher programs[94] and fourteen states are identified as having an uncertain orientation toward school voucher programs.[95] Restrictive provisions in state constitutions to voucher programs are but one determining factor. These provisions are subject to interpretation by state supreme courts.[96] The few decisions that have been decided have varied outcomes. The supreme courts in Wisconsin and Ohio focused on the use of public funds at religious schools, while in Florida the uniformity clause was the constitutional emphasis.

The Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program (MPCP) despite restrictive constitutional provisions in the Wisconsin state constitution.[97] When considering the state establishment clause, the Wisconsin Supreme Court found the amended

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[93] The states thought to have a permissive orientation toward school voucher programs are as follows: Alabama, Arizona, Arkansas, Illinois, Maine, Maryland, Mississippi, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, West Virginia, and Wisconsin. *See* Frank Kemerer. "State Constitutions and School Vouchers." *West's Education Law Reporter* 120 (2002): 38-40; Frank Kemerer. "The U. S. Supreme Court's Decision in the Cleveland Voucher Case: Where Do We Go from Here?" New York: Teachers College, National Center for the Study of Privatization in Education, 2002. Available at http://www.ncspe.org/publications_files/538_OCCP51.pdf

[94] The sixteen states that can be viewed as restrictive are as follows: Alaska, California, Delaware, Hawaii, Idaho, Kansas, Kentucky, Massachusetts, Michigan, Missouri, North Dakota, Oklahoma, South Dakota, Virginia, Washington, and Wyoming. *Id*.

[95] The fourteen states that have an uncertain orientation towards school voucher programs are as follows: Colorado, Connecticut, Florida (In 2002, A+ Opportuntity Scholarship Program litigation was still pending), Georgia, Indiana, Louisiana, Minnesota, Montana, Nevada, New Hampshire, New Mexico, Oregon, Tennessee, and Texas. Frank Kemerer. "The U. S. Supreme Court's Decision in the Cleveland Voucher Case: Where Do We Go from Here?" New York: Teachers College, National Center for the Study of Privatization in Education, 2002. Available at http://www.ncspe.org/publications_files/538_OCCP51.pdf

[96] Frank Kemerer. "The U. S. Supreme Court's Decision in the Cleveland Voucher Case: Where Do We Go from Here?" New York: Teachers College, National Center for the Study of Privatization in Education, 2002. Available at http://www.ncspe.org/publications_files/538_OCCP51.pdf

[97] *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S.Ct. 466 (1998).

MPCP does not violate the "benefits clause"[98] or the "compelled support clause"[99] of the Wisconsin Constitution. The decision was appealed to the U. S. Supreme Court but the Court declined to review.

In 1999, the Ohio Supreme Court held the Ohio Pilot Project Scholarship Program did not violate the Establishment Clause.[100] The Ohio Supreme Court interpreted two relevant provisions in the Ohio state constitution and in terms of this case found them to be an approximate equivalent of the Establishment Clause of the First Amendment to the U. S. Constitution. The first provision provided that "No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society."[101] The second provision states that "…no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of the state."[102]

Additionally, the Ohio Supreme Court held that the voucher program does not violate the state constitution's uniformity clause which requires a uniform system of education statewide.[103] First, the court determined that the school voucher program was of a general nature. Secondly, the court determined the voucher program operates uniformly throughout the state since the statutory limitation was amended and does not prohibit similarly situated school districts from

[98] Wis. Const. art. I, § 18 (Wisconsin's equivalent of the Establishment Clause of the First Amendment) provides: "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

[99] Wis. Const. art. I, § 18 provides "nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent…"

[100] *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999).

[101] Ohio Const., art. I, § 7.

[102] Ohio Const., art. VI, § 2

[103] Ohio Const., art. II, § 26. The Uniformity Clause states that "[a]ll laws of a general nature, shall have a uniform operation throughout the State …."

inclusion in the school voucher program in the future.[104] The current Ohio R.C. 3313.975(A) states that the school voucher program is limited to "school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent."[105]

In contrast, the Florida Supreme Court ruled that school vouchers violate the uniformity clause of Florida's Constitution.[106] The inference was that uniform, government-run schools must be the only public education program adopted in Florida.

Unless state restrictive provisions are found to violate the U. S. Constitution, state constitutional provisions will likely be a formidable obstacle between state aid and religious schools. At this time it seems unlikely that the U. S. Supreme Court would be willing to grant *certiorari*. The justices have been mindful of the concept of federalism and do not want to intrude upon state authority.[107] A prime example was the U. S. Supreme Court decision in *Witters v. Washington*.[108] The Court, after finding no violation of Establishment Clause remanded the case to the Washington State Supreme Court stating the court was "free to consider the 'far stricter' dictates of the Washington State Constitution."[109] The Washington State

[104] In the former version of Ohio R. C. 3313.975(A) the school voucher program was limited to "one school district that, as of March 1995, was under a federal court order requiring supervision and operational management of the district by the state superintendent."

[105] Ohio R. C. 3313.975(A) available at http://onlinedocs.andersonpublishing.com/oh/lpExt.dll?=templates&fn=main-h.htm&cp=PORC.

[106] *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

[107] Frank R. Kemerer. "The U. S. Supreme Court's Decision in the Cleveland Voucher Case: Where to from Here?" New York: Teachers College, National Center for the Study of Privatization in Education, 2002. Available at http://www.ncspe.org/publications_files/538_OCCP51.pdf.

[108] 474 U.S. 481 (1986).

[109] *Witters*, at 489.

Supreme Court found the program unconstitutional.[110] In a more recent decision, the U. S. Supreme Court acknowledged the freedom of states to bar voucher programs under state anti-establishment provisions.[111] The Court held that Washington's exclusion of theology degrees from its scholarship aid program does not violate the Free Exercise Clauses. These state rulings may deter legislatures from enacting voucher programs that permit religious school participation and thwart many school voucher proponents who hoped state provisions would no longer be a barrier to school choice.

At the state level, school voucher proponents have proceeded either by direct legislation or ballot initiative to create school voucher plans.[112] Direct legislation with the support of the state's governor and the legislature has been the most successful of the approaches. Of the nine state ballot initiatives attempted, not one has created a statewide voucher program.[113]

Conclusion

The U. S. Supreme Court in *Zelman v. Simmons-Harris* held that the Establishment Clause permits Ohio to include religious schools in the Cleveland Scholarship and Tutoring Program.[114] The decision is significant in that a longstanding debate had existed as to whether such a voucher program would survive a constitutional challenge under the Establishment Clause of the First Amendment to the U. S. Constitution.

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[110] *Witters v. State Commission for the Blind*, 771 P.2d 1119 (Wash.) (*en banc*), *cert. denied*, 493 U.S. 850 (1989).

[111] *Locke v. Davey*, 540 U.S. 712 (2004).

[112] *See* Vouchers: Who's Behind It All? American Association of School Administrators. Available at https://www.aasa.org/edissues/content.cfm?ItemNumber=964 (last visited Feb. 14, 2007).

[113] The two most recent statewide voucher referenda occurred in 2000 with California and Michigan voters defeating the measure.

[114] 536 U.S. 639, 122 S. CT. 2460 (2002).

Following *Zelman*, it seems clear that the Establishment Clause will permit voucher programs to include religious schools pursuant to certain criteria outlined in the *Zelman* opinion. The *Zelman* decision sets forth a specific standard for indirect aid, allowing public funds to be used in religious schools provided that the funds arrive at the school solely as the result of "true private choice."[115] The Court drew a distinction between "… government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of genuine and independent choices of private individuals."[116]

The U. S. Supreme Court held that school vouchers to religious schools are constitutional, but have quite appropriately left policymakers the challenge of deciding whether vouchers are policy that is "efficient, effective, wise, or just."[117] State courts will reach different conclusions since states' constitutions are worded differently and differing perspectives exist about the relationship between state and religion.

The *Zelman* decision has been likened to the 1954 *Brown v. Board of Education*[118] for its implications for public schools.[119] It marks a shift in the voucher debates from being centered primarily on church and state legal issues to education policy and practices. "The fate of public,

[115] *Id*. at 662.

[116] *Id*. at 649.

[117] *See* Richard W. Garnett. Yes to Vouchers: The Supreme Court Gets it Right. Commonweal Magazine. August 16, 2002. Volume CXXIX, Number 14. http://www.commonwealmagazine.org/article.php?id_article=552

[118] 347 U.S. 483, 74 S. Ct. 686 (1954).

[119] Amy Stuart Wells. Reactions to the Supreme Court Ruling on Vouchers: Introduction to an Online Special Issue. http://www.tcrecord.org/Content.asp?ContentID=10949

private and religious education will rest more squarely in the hands of the American public and the policymakers they elect."[120]

From an education policy viewpoint, the Brown decision is an example of the use of mandates as policy mechanism, whereas the Zelman decision is an example of incentives as policy mechanism.[121] Brown mandated desegregation while Zelman held that the use of vouchers as an incentive to expand the choices of parents is permissible. The decision to participate in a voucher program rests with the families and private schools, since neither is obligated to participate.

Another difference is that "unlike mandates, incentives are not intended to produce uniformity of behavior."[122] Therefore, the likely consequences of *Zelman* hinge on the mix of incentives built into a particular voucher program by policymakers.[123] The following policy considerations are at the core of any voucher plan:

- Student eligibility for vouchers (i.e., will vouchers be available to eligible families even if their children are already enrolled in private schools?).
- Access (i.e., the number of private schools willing to accept vouchers).
- Money/Cost (i.e., what if the voucher isn't enough to cover tuition at the school of a family's choice? Should parents be responsible for paying the remainder? Who is going to make up the difference in public school dollars?).
- Equal opportunity (i.e., what will be the impact of vouchers on all students and all schools? How will that impact affect our society?).

[120] Amy Stuart Wells. Reactions to the Supreme Court Ruling on Vouchers: Introduction to an Online Special Issue. http://www.tcrecord.org/Content.asp?ContentID=10949

[121] See Aaron Pallas. Don't Believe the Hype: A Commentary on *Zelman*. Available at http://www.tcrecord.org/Content.asp?ContentID=10969.

[122] *Id.*

[123] *Id.*

- Private school accountability measures (i.e., will state standardized tests be required?).[124]

Policymakers must address the fact that "without societal attention to wider inequalities in social and economic opportunities, it is unrealistic to expect that schools alone, will be able to overcome serious disadvantages that affect the capacity of many children to gain full benefit from what education has to offer."[125] Schools are not the utopian cure-all for America's larger social and economic problems.

In turn, public school leaders must not shift their responsibility for failing schools to the American society as a whole and leave themselves blameless and impotent to find a solution to the problem.[126] Public school districts will need to focus on improving the educational performance of their students by hiring better teachers, promoting best teaching practices, implementing effective pre-school programs, and providing strong educational support services for students and families, especially for students who are immigrants, minorities, or children living in poverty.[127]

Implications

The major implication of *Zelman v. Simmons Harris*, as revealed by this research, goes beyond the constitutionality of school vouchers and appears to be a victory for states' rights and local control. The future of school vouchers now focuses for the most part on state constitutional

[124] *See* Levin, H. (1998). Educational vouchers: Effectiveness, choice, and costs, *Journal of Policy Analysis and Management*, 17; Levin, H. (1990). The theory of choice applied to education. In W. Clune & J. Witte (Eds.), *Choice and control in American education, Vol. III: The practice of choice, decentralization, and school restructuring*, pp. 285-318. New York: Falmer Press; Levin, H. & Driver, C. (1996). Estimating the costs of an educational voucher system. In William J. Fowler, Jr. (Ed.), *Selected Papers in School Finance* 1994, pp. 63-88. Washington, DC: U. S. Department of Education, National Center for Educational Statistics.

[125] Helen F. Ladd and Janet S. Hansen. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999, 1-2.

[126] K.B. Clark. "Critical issues in minority education: A policy program for the future." Pp. 121-134 In *When the Marching Stopped.* New York: National Urban League, 1973.

[127] *See* Clive R. Belfield and Henry M. Levin. "What Does the Supreme Court Ruling on Vouchers Mean for School Superintendents?" Available at: http://www.ncspe.org/publications_files/914_AASAfinal.pdf

battles. The *Bush v. Holmes* and *Locke v. Davey* decisions confirm that no-aid provisions in state constitutions, whether or not they are referred to as Blaine Amendments, are formidable obstacles to the implementation of voucher programs.

The U. S. Supreme Court's *Zelman* decision seems to resolve most of the federal questions concerning the constitutionality of school voucher programs under the Establishment Clause. The Court shifts the constitutional issue back to the states, where state supreme courts will determine whether school vouchers violate state constitutions.[128] Voucher programs will now be examined in terms of the various state constitutions with respect to the effect of church-state provisions of some state constitutions, and whether those state limitations are consistent with either the Free Exercise or Equal Protection Clauses of the U. S. Constitution.[129] The decision did not determine whether vouchers make good policy in school districts across the nation. There continues to be room for vigorous debate over vouchers as public policy.

Despite the fanfare surrounding *Zelman*, most states have shown no desire, or states that have been interested have not been successful, in implementing school voucher proposals. State legislatures with similar education provisions in the state constitution were expected to mirror the language of the Ohio law, which was narrowly focused on high poverty areas with failing schools. Policymakers need to keep in mind the unique circumstances that existed in Ohio. There was a state legislative determination and a federal court decision documenting the unsatisfactory educational conditions of the Cleveland Public Schools. There is, however, no certainty that a future U. S. Supreme Court, with a changed composition, will view *Zelman* similarly, or view it

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[128] *See School Vouchers: Settled Questions, Continuing Disputes* (The Pew Forum on Religion and Public Life, Washington, D.C.), Aug. 2002, Available at http://pewforum.org/issues/files/VoucherPackage.pdf (stating that in opening the Establishment Clause door for vouchers, *Zelman* also invites a new set of constitutional questions).

[129] *See Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307 (2004); *Wirzburger v. Galvin*, 412 F.3d 271 (C.A.1-Mass. 2005).

as controlling in the context of broader voucher programs instead of specific emergency cases such as existed in Cleveland.

The interpretation by state supreme courts is as important as the wording of state constitutional provisions. The state courts' rulings have varied, leaving both advocates and opponents of school vouchers uncertain of the constitutionality of such schemes. The Cleveland voucher program provides a prime example. Ohio's constitution contains two seemingly restrictive constitutional provisions. Yet, the Ohio Supreme Court interpreted state provisions to be consistent with the Establishment Clause of the First Amendment.

Despite the *Zelman v. Simmons-Harris* ruling making school vouchers constitutional, the controversial school-choice option has been slow to spread. The constitutional challenges merely shifted from the U. S. Constitution to state constitutions.[130] Colorado, Florida, and Maine are three examples of recent constitutional rulings by state supreme courts.

Colorado

In April 2003, Colorado became the first state to enact a school voucher law after the U. S. Supreme Court Zelman decision in June 2002. The Colorado Opportunity Contract Pilot Program[131] was drafted to directly incorporate the standards set forth by the U. S. Supreme Court in Zelman.[132]

Opponents of the voucher program filed suit claiming eight state constitutional violations.[133] The trial court held that the program was constitutional in terms of prohibition against special legislation, unconstitutional in terms of the local control requirement, and ruled

[130] See *Owens v. Colorado Cong. Of Parents*, 92 P.3d 933 (Colo. 2004); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

[131] Colo. Rev. Stat. §§ 22-56-101, et.seq. (2003).

[132] *Id*. at § 22-56-101(2)(c) (2003).

[133] See *Owens v. Colo. Congress of Parents, Teachers, and Students,* No. 03CV3734, *unreported,* at 4-5 (2003).

the other six arguments as moot.[134] In December 2003, the Denver District Court enjoined the implementation of the program.

On June 28, 2004, the Colorado State Supreme Court upheld a lower court's decision that the state's newly enacted program violates the local control provisions of Article IX, section 15 of the Colorado Constitution.[135] The court concluded the voucher program to be unconstitutional since the program required districts to pay local tax revenues to parents participating in the program.[136] The court did note that the state could implement an education program without local control but the state must pay for such programs entirely from the state controlled Public School Fund.[137] The court stated, "If the General Assembly wants to change this fundamental structure, it must either seek to amend the constitution or enact legislation that satisfies the mandates of the Colorado Constitution."[138] The court outlined how to implement a revised program to meet the local control constitutional issue. However, it is likely that if the state should attempt to reenact a voucher program the other constitutional issues raised at trial court would be re-raised also.

Florida

In August 2002, after the *Zelman* decision, a Leon County Circuit Court judge ruled Florida's Opportunity Scholarship Program (OSP) unconstitutional, citing Florida's constitutional prohibition against direct or indirect public funding of a religious institution,

[134] *Id.* at 15.

[135] *Owens v. Colorado Congress of Parents, Teachers, and Students,* 92 P.3d 933, 3 (Colo. 2004).

[136] *Id.,* citing Colo. Rev. Stat. §§ 22-56-108(3) and (4)(a) (2003).

[137] *Id.,* citing *Craig v. People ex rel. Hazzard,* 89 Colo. 139, 148, 299 P. 1064, 1067 (1931).

[138] *Owens,* at 6.

referred to as the "no-aid" provision.[139] The state appealed the ruling to the First District Court of Appeals. The decision was stayed but the program was allowed to continue during appeal. In August 2004, the First District Court of Appeal upheld the circuit court's ruling that the Opportunity Scholarship Program violated the 'no-aid' provision in a 2-1 decision.[140] The state moved for a rehearing of the case by the full appellate court.

In November 2004, the full First District Court of Appeal in an 8-5-1 decision held that the Opportunity Scholarships Program violated the 'no-aid' provision of the Florida Constitution.[141] The court concluded that the Florida Constitution is more restrictive than the Establishment Clause in the U. S. Constitution.[142] Therefore, even if the Florida voucher program were constitutional under the Establishment Clause as interpreted in *Zelman,* it conflicts with Florida's constitutional ban against using public money to aid religious institution.[143] The court reviewed the legislative history of Florida's constitution and stated that the legislative intent was to impose greater restrictions than the Establishment Clause.[144]

The court's majority acknowledged that the Opportunity Scholarships are "a popular program with a worthy purpose"[145] but emphasized that "courts do not have the authority to

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[139] *Holmes v. Bush*, No. CV99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002).

[140] *Bush v. Holmes*, 29 Fla. L. Weekly D1877 (Fla. 1st DCA Aug. 16, 2004).

[141] *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004) (Holmes II).

[142] *Id.*, at 346-47 and footnotes 7 and 8 at 67-68 (discussing the history of "Blaine Amendments" in state constitutions, which provide greater restrictions than the Establishment Clause; "The primary purpose of these amendments to the various state constitutions was to bar the use of public funds to support religious schools" also noting that Florida's "no-aid" provision is more restrictive than most states' Blaine Amendments).

[143] *Id.*

[144] *Id.*, at 349-10.

[145] *Id.*

ignore the clear language of the Constitution."[146] In conclusion, Judge William Van Nortwick, writing for the majority, stated that "If Floridians wish to remove or lessen the restrictions of the no-aid provision, they can do so by constitutional amendment."[147] As required by law, the court certified the constitutional question for further review by the Florida Supreme Court as one involving a question of "great public importance."[148]

The state appealed to the Florida Supreme Court. On June 7, 2005, the court heard oral arguments on the constitutionality. On January 5, 2006, the Florida Supreme Court held the Opportunity Scholarship Program (OSP) violates the language under Article IX of the Florida Constitution, the state's "uniformity" clause.[149]

Maine

In *Eulitt v. Maine Dept. of Educ.*,[150] the First Circuit Court of Appeals rejected an Equal Protection challenge to a Maine voucher program that specifically excluded sectarian schools from participation. The appellate court held that "state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so."[151] Additionally, "states are not required to go to the brink of what the Establishment Clause permits,"[152] and "it would be illogical to impose upon government entities a presumption of hostility whenever they take into

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[146] *Id.*

[147] *Id.*

[148] *Holmes II*, 886 So. 2d at 344.

[149] *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (Holmes III).

[150] 386 F.3d 344 (1st Cir. 2004).

[151] *Id*. at 355.

[152] *Id*.

account plausible entanglement concerns in making decisions in areas that fall within the figurative space between the Religion Clauses."[153]

The apparent effects of the *Zelman* decision seem to align with the political climate that has existed since the late 1990s. This landmark decision, supported by free market principles, brings school voucher issues to the doorstep of each state. Now, each state has the opportunity to address the needs of its own failing public schools. The inherent appeal of school vouchers is the promise to improve educational options and performance for low-income students. Whether vouchers can achieve these goals depends on the design and implementation of the specific voucher plan.[154] One point is certain: school vouchers will continue to be a topic of public debate over the next few years as states wrestle with ways to improve education for all students.

Recommendations for Further Research

Zelman does not change the likelihood that the majority of students will continue to be educated in conventional public schools. For the most part, middle-class families are satisfied with their public schools.[155] A major concern still remains in regards to the grave inequalities that exist between public schools and the unfairness of the facilities and resources of public schools that serve poor children.[156] One reform tool to address the dire needs of low-income students is targeted choice programs.[157] The competitive capacity of voucher schools is limited

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[153] *Id*.

[154] *See* Isabel V. Sawhill and Shannon L. Smith. August 5, 1998. Vouchers for Elementary and Secondary Education. Retrieved August 12, 2003, from http://www.brookings.edu/dybdocroot/views/papers/bdp/bdp004/bdp004.pdf

[155] *See* Lowell C. Rose and Alec M. Gallup, The 36th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools, Phi Delta Kappan, Sept. 2004, at 41, 42. Available at http://pdkintl.org/kappan/k0409pol.htm. The poll found that 61 percent of parents give the schools in their community an A or a B.

[156] Jonathan Kozol. *Savage Inequalities: Children in America's Schools*. New York, NY: Crown Publishers, 1991.

[157] *See* John E. Coons and Stephen D. Sugarman. *Education by Choice: The Case for Family Control*. Berkeley, CA: University of California Press, 1978, 31; Henry M. Levin. "Educational Choice and the Pains of Democracy." In

by the legislative design of the reform measures. The existing voucher programs are small initiatives designed to provide more educational options to students in low performing schools. For example, the District of Columbia offers private school scholarships to approximately 1,700 students,[158] while Milwaukee's Parental Choice Program, which is the largest voucher program, provides vouchers for close to 15,000 students.[159] Most voucher programs are funded at a lower level than the per-pupil amount received by local school districts. The low funding levels do not encourage the opening of new schools or the expansion of existing private schools.[160]

Further study in the following areas may augment the understanding of the application and implementation of school vouchers.

- Investigate whether states with constitutional provisions that explicitly prohibit direct and indirect funding of religious instruction, could exclude, consistent with the Free Exercise Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment, religious schools otherwise eligible to participate in a voucher program.
- Analyze state constitutional principles that courts apply concerning public aid to religious schools.
- Investigate whether the federal No Child Left Behind Act[161] should be revised to enable more low-income students to attend academically successful middle-class public schools.[162]
- Examine how school voucher programs influence issues, such as local financing, facing public school systems.

Thomas James and Henry M. Levin, eds. *Public Dollars for Private Schools: The Case for Tuition Tax Credits*. Philadelphia, PA: Temple University

[158] V.D. Haynes. "Voucher lottery gets stronger responses." *Washington, 1983.n Post*, April 16, 2005, p. B2.

[159] A. J. Borsuk. "171 apply for voucher program." *Milwaukee Sentinel*, March 10, 2005, 1.

[160] Frederick M. Hess. 2002, p. 46. Revolution at the Margins: the impact of competition on urban school systems. Washington, D.C.: The Brookings Institution.

[161] No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 501, 115 Stat. 1425 (codified as amended at 20 U.S.C. §§ 7201-7283g (2002)). Available at http://www.whitehouse.gov/news/reports/no-child-left-behind.html

[162] Richard D. Kahlenberg. "Helping Children Move from Bad Schools to Good Ones." New York: The Century Foundation, June 2006. Online brief is available at http://www.tcf.org/Publications/Education/kahlenbergsoa6-15-06.pdf

- Investigate the possibility of school choice for students in small rural school districts.

APPENDIX
CITED CONSTITUTIONS, STATUTES, REGULATIONS, AND CASES

United States

U. S. Constitution
- Article I § 8 cl.1
- Article III
- Amendment I
  - Establishment Clause
  - Free Exercise Clause
  - Free Speech Clause
- Amendment XIV
  - Equal Protection Clause

Statutes

Bilingual Education Act of 1968, 20 U.S.C. § 7401 (Pub. L. 90-247).

Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. Sec. 3801 *et seq*. (Pub. L. 97-35, Aug. 13, 1981, 95 Stat. 469).

Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9801 et seq. (Pub. L. 104-193, title VI, Aug. 22, 1996, 110 Stat. 2278).

Civil Rights Act of 1964, 42 U.S.C. 2000a et seq. (Pub. L.88-352, July 2, 1964, 78 Stat. 241).

Civil Rights Act of 1875, 18 Stat. 335 (Act of Mar. 1, 1875).

Civil Rights Act of 1866, 42 U.S.C. §1981 (April 9, 1866, ch.31, 14 Stat. 27-30)

Department of Education Organization Act of 1979, 20 U.S.C. 3401 et seq (Pub. L. 96-88, Oct. 17, 1979, 93 Stat. 668).

District of Columbia School Choice Incentive Act of 2003, Title III, of Division C of the Consolidated Appropriations Act, 2004, 20 U.S.C. 6316 (Pub.L. 108-199, January 30, 2004, 118 Stat. 3 et seq. Available at http://www.ed.gov/programs/dcchoice/legislation.html

Economic Opportunity Act of 1964, 42 U.S.C. 2701 et seq. (Pub. L. 88-452, Aug. 20, 1964, 78 Stat. 508).

Education Consolidation and Improvement Act of 1981, 20 U.S.C. Sec. 3801 *et seq*. (Pub. L. 97-35, title V, subtitle D (§5551 et seq.), Aug. 13, 1981, 95 Stat. 463).

Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400 *et seq*. (Pub. L. 94-192, Nov. 29, 1975, 89 Stat. 773.

Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 et seq. (Pub. L. 89-10, Apr. 11, 1965, 79 Stat. 27).

Fair Housing Act of 1968, 42 U.S.C. 3601 et seq. (Pub. L. 90-284, title VIII, Apr. 11, 1968, 82 Stat. 81).

Family Education Rights to Privacy Act, 20 U.S.C. § 1232g.

Food Stamp Act of 1977, 7 U.S.C. 2011 et seq. (Pub. L. 88-525, Aug. 31, 1964, 78 Stat. 703).

Goals 2000: Educate America Act, 20 U.S.C. 5801 et seq. (Pub. L. 103-227, Mar. 31, 1994, 108 Stat. 125-191, 200-211, 265-280).

Head Start Act, 42 U.S.C. 9831 et seq. (Pub. L. 97-35, title VI, subtitle A, ch. 8, subch. B(§635 et seq.), Aug. 13, 1981, 95 Stat. 499).

Housing Act of 1937, 42 U.S.C. §§ 1437 et seq. (Sept. 1, 1937, ch. 896, 50 Stat. 888).

Hurricane Education Recovery Act, Title IV, Subtitle A – Elementary and Secondary Education Hurricane Relief (Robert T. Stafford Disaster Relief and Emergency Assistance Act), 42 U.S.C. 5170.

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq.

Morrill Act, 7 U.S.C. §§ 301 *et seq*. (July 2, 1862, ch. 130, 12 Stat. 503).

National Defense Act of 1958, 20 U.S.C. 401 *et seq*. (Pub. L. 85-864, Sept. 2, 1958, 72 Stat. 1580).

National Labor Relations Act, 29 U.S.C. §§ 151-169.

No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 *et seq*. (Pub. L. 107-110, Jan. 8, 2002, 115 Stat. 1425).

Northwest Ordinance, July 13, 1787, 1 Stat. 51 (1787). (National Archives Microfilm Publication M332, roll 9); Miscellaneous Papers of the Continental Congress, 1774-1789; Records of the Continental and Confederation Congresses and the Constitutional Convention, 1774-1789, Record Group 360; National Archives. Available at http://ourdocuments.gov/doc.php?flash=false&doc=8#.

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 USC 1305 et seq. (Pub. L. 104-193, Aug. 22, 1996, 110 Stat. 2105).

Temporary Assistance for Needy Families, 42 U.S.C. § 601 *et seq*. (Pub. L. 104-193).

Title I of the *Elementary and Secondary Education Act of 1965,* 20 U.S.C. 6301 *et seq*. (Pub. L. No. 89-10, title I, § 1001).

Title IV of the *Civil Rights Act* of 1964, 42 U.S.C. 2000c (Pub. L. 88-352, July 2, 1964, 78 Stat. 241).

Title VII of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 7424.

Title IX, Education Amendments of 1972, 20 U.S.C. 1681, 34 CFR, Part 106.

Voting Rights Act of 1965, 42 U.S.C. 1971, 1973 et seq. (Pub. L. 89-110, Aug.6, 1965, 79 Stat. 437).

Cases

Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d. 844 (1963).

Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1977, 138 L. Ed. 2d 391 (1997).

Aguilar v. Felton, 473 U.S. 402, 105 S.Ct.3232, 87 L.Ed. 2d 290 (1985).

Andrews v. Vermont Department of Education, 120 S.Ct. 626 (1999).

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466 (1936).

Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968).

Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954).

Board of Education of the Westside Community School v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990).

Bowen v. Kendrick, 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d. 520 (1988).

Cantwell v. Connecticut, 310 U.S. 296 (1940).

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

Cochran v. Louisiana State Board of Education, 281 U.S. 270 (1930).

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d. 948 (1973).

Committee for Public Education and Religious Liberty ("PEARL") v. Regan, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980).

Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962).

Everson v. Board of Education of Ewing Township, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed.2d. 711 (1947).

Green v. County School Board of New Kent County, VA et al, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968).

Griffin v. County School Board of Prince Edward County, 377 US 218, 84 S. Ct. 1226, 12 L.Ed.2d 256 (1964).

Good News Club v. Milford Central School, 533 U.S. 98 (2001), 202 F.3d. 502, *reversed and remanded.*

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d. (1993).

Lau v. Nichols, 414 U.S. 563 (1974).

Lee v. Weisman, 505 U.S. 577 (1992).

Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 30 L.Ed.2d. 123 (1971).

Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472, 93 S.Ct. 2814, 37 L.Ed.2d. 736 (1973).

Locke v. Davey, 540 U.S. 712, 124 S.Ct. 1307 (2004), 299 F. 3d 748, reversed.

Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d. 604 (1984).

McCulloch v. Maryland, 17 U.S. 316 (1819).

McDaniel v. Paty, 435 US 618 (1978).

McDonald v. School Bd. Of Yankton Indep. Sch. Dist., 246 N.W.2d 113, 117 (S.D. 1985).

Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d. 217 (1975).

Meyer v. Nebraska, 262 U.S. 390 (1923).

Mitchell v. Helms, 530 U.S. 793 (2000).

Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d. 721 (1983).

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

Plessy v. Ferguson, 163 U.S. 537 (1896).

Reynolds v. United States, 98 U.S. 145 (1878).

Roemer v. Maryland Public Works Bd., 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d. 179 (1976).

Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d. 700 (1995).

School Committee of Burlington v. Department of Education of Massachusetts, 471 U.S. 358 (1985).

School District of the City of Grand Rapids v. Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d. 267 (1985).

Sloan v. Lemon, 413 U.S. 825, 93 S. Ct. 2982, 38 L.Ed.2d. 128 (1973).

Tilton v. Richardson, 403 U.S. 672, 91 S. Ct. 2091, 29 L.Ed.2d. 790 (1971).

Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479, 86 L.Ed.2d. 26 (1985).

Walz v. Tax Commission of the City of New York, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d. 697 (1970).

Widmar v. Vincent, 454 U.S. 263, (1981).

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986).

Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d. 714 (1977).

Zelman v. Simmons-Harris, 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed. 2d 604 (2002).

Zobrest v. Catalina Foothills School District, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d. 1 (1993).

Arizona

Arizona Constitution

Article II, § 12. See § 22
Article IX, § 7. See § 23

Arizona Revised Statute § 43-1089

Cases

Kotterman v. Killian, 193 Ariz. 273, 972 P.2d 606 (Ariz. 1999), cert. denied, 528 U.S. 810 (1999).

California

Statutes

California Constitution Article IX, § 8

California Constitution Article XVI, § 5

California Education § 60044

Cases

California Teachers Association v. Riles, 176 Cal.Rptr. 300, 29 Cal.3d 794, 632 P.2d 953 (Cal. 1981).

Serrano v. Priest, 487 P. 2d 1241 (Cal. 1971).

Serrano v. Priest, 226 Cal.Rptr. 584 (Cal. App. 1986) (Serrano III).

Colorado

Statutes

Colo. Constitution Article IX, § 7

Colorado Revised Statute §§ 22-56-101, et.seq. (2003).
§ 22-56-101(2)(c) (2003).
§ 22-56-103(10)(a)(I) (2003)
§ 22-56-104(1)(b)(2003)
§§ 22-56-104(2)(a),(b).
§§ 22-56-104(5)(a)(I)-(IV)
§ 22-56-106 (2003)
§§ 22-56-106(b) and (c)(2003)

Cases

Craig v. People ex rel. Hazzard, 89 Colo. 139, 148, 299 P. 1064, 1067 (1931).

Owens v. Colorado Cong. Of Parents, Teachers, and Students, 92 P.3d 933 (Colo. 2004).

Owens v. Colo. Congress of Parents, Teachers, and Students, No. 03CV3734, *unreported*, (Colo. 2003).

District of Columbia

Statutes

DC School Choice Incentive Act of 2003, Pub. L. No. 108-199 of 2003, Title III, Sec. 302(4) [January 30, 2004]

Cases

Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C.1972).

Florida

Florida Constitution

Article I, § 3
Article IX, § 1
Article IX, § 6

Florida Statute Annotated

§ 220. 187
§ 229.0537 (1999)
§ 229.0537(1)
§ 240. 402
§ 1002.38 (2005)
§ 1002.38(3)(b) (2004)
§ 1002.38(4) (2004)
§ 1002.38(4)© (2004)
§ 1002.38(4)(e) (2004)
§ 1002.38(4)(J)
§ 1002.39 (John M. McKay Program for Students with Disabilities)
§ 1002.39(4) (2004)
§ 1002.39(4)© (2004)
§ 1002.39(4)(e) (2004)
§ 1002.51-1002.79 (2004)
§ 1008.33 (2005)
§ 1008.34 (2005)

Cases:

Bush v. Holmes, 919 So. 2d 392 (Fla. 2006) (Holmes III).

Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004) (Holmes II)

Bush v. Holmes, 29 Fla. L. Weekly D1877 (Fla. 1st DCA Aug. 16, 2004).

Holmes v. Bush, No. CV99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002).

Holmes v. Bush, 790 So. 2d 1104 (Fla. 2001).

Bush v. Holmes, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000). (Holmes I)

Holmes v. Bush, 2000 WL 527694 (Fla. Cir. Ct.)

Idaho

Epeldi v. Engelking, 488 P.2d 860 (Idaho 1971), *cert. denied*, 406 U.S. 957 (1972).

Illinois

35 ILCS 5/201 (m) (Education expense credit)

Toney v. Bower

Iowa

§ 422.12(2) (Deductions from computed tax)

Maine

Statutes

Maine Revised Statute Annotated Title 20, §§ 2951(2), 5204(4). See §§ 14-18

Maine Revised Statute Annotated Title 20-A 117 § 2951.

Maine Revised Statute Annotated Title 20-A 219 § 5804.

Maine Revised Statute Annotated Title 20-A 219 § 5806.

Maine Revised Statute Annotated Title 20-A, § 5810(2) (West 2002).

Cases:

Bagley v. Raymond School Dept., 728 A.2d 127 (Me. 1999), cert. denied, 528 U.S. 947 (1999).

Eulitt v. Maine Dept. of Ed., 386 F.3d 344 (1st Cir. 2004).

Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *cert denied*, 528 U.S. 931 (1999).

Massachusetts

Massachusetts Constitution

Amendment Article XVIII § 2.
Amendment Article 48

Cases

Boyette v. Galvin, 311 F. Supp. 2d 237 (D. Mass. 2004).

Wirzburger v. Galvin, 412 F.3d 271 (C.A.1-Mass. 2005).

Michigan

Michigan Constitution

Article 1, § 4
Article 8 § 2

Minnesota

Minnesota Constitution

Article 1, § 16
Article 13, § 2

Minnesota Statute

§ 290.0674 (2005).
§ 290.09, subd. 22 (1982).

North Carolina

Hobbs v. County of Moore, 267 N.C. 665, 149 S.E.2d 1 (1966).

Ohio

Ohio Constitution

Article I, § 7.
Article II
Article II § 15(D)
Article II, § 26.
Article VI, § 2.

Ohio Revised Code Annotated (Anderson):

§§ 3313.974-3313.979 (1999 & Supp. 2000)
§ 3313.975(A) (1999 & Supp. 2000)
§ 3313.975(B) (1999 & Supp. 2000)
§ 3313.975(C)(1) (1999 & Supp. 2000)
§ 3313.976
§ 3313.976(A)(1)
§ 3313.976(A)(3)
§ 3313.976(A)(4)
§ 3313.976(A)(6)
§ 3313.976(A)(8)
§ 3313.976(C)
§ 3313.977(A)
§ 3313.978(A)
§ 3313.978(B)
§ 3313.978(C)(1)
§ 3313.978(C)(3)
§ 3313.979
§ 3317.03(I)(1)

Cases

Kosydar v. Wolman, 353 F. Supp. 744 (applying Ohio law)--§§ 20[b], 21

Reed v. Rhodes, 179 F.3d 453 (6th Cir. 1999).

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *rev'd,* 536 U.S. 639 (2002).

Simmons-Harris v. Goff, 684 N.E.2d 705 (Ohio App. 1997).

Simmons-Harris v. Goff, 86 Ohio St.3d 1, 711 N.E.2d 203 (Ohio 1999).

Simmons-Harris v. Zelman, 54 F. Supp. 2d 725, (N.D. Ohio 1999), *stay granted*, 528 U.S. 983 (1999).

Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. 1999), *aff'd*, 234 F.3d 945 (CA6 2000), *reh'g and reh'g en banc denied*, Nos. 00-3055, -3060, -3063, 2001 U.S. App. LEXIS 3344, at *1 (6th Cir. Feb. 28, 2001).

Gatton v. Goff, Nos. 96 CVH-01-198, 96 CVH-01-721, 1996 WL 466-499 (Ohio Com.Pl., Franklin Cnty.St July 31, 1996).

Pennsylvania

Pennsylvania Constitution, Article I Sec. 3

Pennsylvania Statute Annotated

24 P.S. § 20-2001 (A).
24 P.S. § 20-2003 (A) (1).
24 P.S. § 20-2003 (B) (C) (1-3).
24 P.S § 20-2005-B
24 P.S § 20-2006-B
24 P.S § 20-2007-B

Cases

Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F.Supp. 1257 (E.D.Pa. 1071).

Vermont

Statutes

Vermont Constitution Chapter I., article 3. See §§ 4, 6[b]

Vermont Statute Annotated Title 16, § 822(a)(1). See § 3[a]

Vermont Statute Annotated Title 16, §§ 822(a)(1), 824. See § 4

Vermont Statute Annotated Title 16, §§ 822, 824. See § 6[b]

Vermont Statute Annotated Title 16, Part 2, Chapter 21, § 822

Cases

Swart v. South Burlington Sch. Dist., 122 Vt. 177, 167 A.2d 514 (1961).

Campbell v. Manchester Board of School Directors, 161 Vt. 441, 641 A.2d 352 (Vt. 1994).

Chittenden Town School Dist. v. Department of Educ., 738 A.2d 539 (Vermont 1999). 8

Chittenden Town School District v. Vermont Department of Education (97-275); 169 Vt. 310; 738 A.2d 539 (1999).

Virginia

Virginia Constitution Article. IX, § 140 (1902).
Virginia Code §§ 22-251 to 22-275.
Acts, 1959 Ex. Sess., c.53.

Washington

Washington Constitution Article 1, § 11

Washington Revised Code (2002):
§ 28B.10.814
§ 28B.119.005
§ 28B.119.010(1)(b)
§ 28B.119.010(8)
§ 28B.92.100 (2004)

Cases

Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (2003), *rev.* 124 S. Ct. 1307 (2004).

Witters v. Comm'n for the Blind, 689 P.2d 53 (Wash. 1984).

Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash.) (*en banc*), *cert. denied*, 493 U.S. 850 (1989).

Wisconsin

Wisconsin Constitution
Art. I, § 1
Art. I, § 18
Art. IV, § 18
Art. X, § 3

Wisconsin Act 27, §§ 4002-4009

Wisconsin Statute
§ 119.23
§ 119.23(2)(a)

§ 119.23(2)(a)(1)
§ 119.23(2)(a)(2)
§ 119.23(7)(c)
§ 119.23. See §§ 3[a], 5, 6[a], 10, 12[a], 13
§ 119.23. See §§ 8, 15, 16

Cases

Davis v. Grover, 166 Wis.2d 501, 480 N.W.2d 460 (1992).

Jackson v. Benson, 218 Wis.2d 835, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466, 525 U.S. 997 (1998).

Miller v. Benson, 878 F. Supp. 1209 (E.D. Wis. 1995), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995).

State ex rel. Thompson v. Jackson, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (1996) (per curiam).

LIST OF REFERENCES

Alexander, Kern and M. David Alexander. *American Public School Law*. 3rd ed. St. Paul, MN:West Publishing Company, 1992.

Alt, Robert. "Cleveland's School Voucher Program: The Politics and the Law." *On Principle*, (1998). Vol. 6, No. 1

Alvarez, Lizette." Senate Approves Legislation to Penalize Failing Schools," *New York Times*, June 15, 2001. Retrieved October 1, 2002 from http://www.nytimes.com/2001/06/15/politics/15EDUC.html

_____. "House Democrats Block Voucher Provision," *New York Times*, May 3, 2001. Retrieved October 1, 2002 from http://www.nytimes.com/2001/05/03/politics/03EDUC.html

American Association of School Administrators. "Vouchers: Who's Behind It All?" Arlington, VA: American Association of School Administrators, 2005. Available at http://www.aasa.org/edissues/content.cfm?ItemNumber=964

Anti-Defamation League. "School Vouchers: The Wrong Choice for Public Education." Washington, DC: Anti-Defamation League, 2005. Available at http://adl.org/vouchers/vouchers_constit_suspect.asp

Archer, Glenn L. "Parochiaid? No!" Educational Leadership, November 1971, 105-107.

Areen, Judith and Christopher Jencks. "Education Vouchers: A Proposal for Diversity and Choice," *Teachers College Record*, February 1971, 72: 327-335.

Ascher, Carol, Norm Fruchter, and Robert Beme, *Hard Lessons*. New York: Twentieth Century Fund Press, 1996.

Auster, E. "Cleveland Voucher Case Poses Complex Issues for Justices." The Plain Dealer, February 20, 2002. Available at http://www.cleveland.com/education/index.ssf?/xml/story.ssf/html_standard.xsl?/base/news/10142010988040272.xml

Barber, Benjamin, "America Skips School," *Harper's Magazine*, November 1993.

Barker, Pierce, Tora K. Bikson, Jackie Kimbrough, and Carol Frost. *A Study in Alternatives in American Education, Vol. V, Diversity in the Classroom*. Santa Monica, CA: Rand Corporation, 1981.

Belfield, Clive and Henry Levin. "Does the Supreme Court Ruling on Vouchers in Cleveland Really Matter for Education Reform?" New York, NY: TCRecord, 2002. Available at: http://www.tcrecord.org/PrintContent.asp?ContentID=10952

Berliner, David and Benjamin J. Biddle. *The Manufactured Crisis: Myths, Fraud, and the Attack on America's Public Schools*. Reading, MA: Addison-Wesley, 1995.

Berne, Robert and Leanna Stiefek, "Concepts of School Finance Equity: 1970 to the Present" in *National Research Council, Equity and Adequacy in Education Finance* 7-24 (1999).

Bierlein, Louann A. *Controversial Issues in Educational Policy.* Newbury Park, CA: Sage Publications, 1993.

Biskupic, Joan, and Tamara Henry. "Church, State Wall Is Lowered in Schools." *USA Today* (June 28, 2002).

Black, Henry Campbell. *Black's Law Dictionary*, 8th ed. St. Paul, MN: West Pub. Co., 2004.

The Bluebook: A Uniform System of Citation. (17th ed. Cambridge, MA: Harvard Law Review Association, 2000.

Bolick, Clint. "High Court Hands Vouchers a Victory." Washington, DC: CATO Institute, August 10, 2002. Available at http://www.cato.org/current/school-choice/pubs/bolick-020627.html

Borman, Geoffrey D., Robert E. Slavin, Alan Cheung, Anne Chamberlain, Nancy Madden, and Bette Chambers. "The National Randomized Field Trial of Success for All: Second-Year Outcomes." American Educational Research Journal 42 (4), 673-696. (April, 2005). Available at http://www.successforall.org/_images/pdfs/SFA_RE_Year2_Outcomes.doc

Bracey, Gerald, "Are U.S. Students Behind?" *American Prospect*, vol. 37 (March-April 1998).

Brandl, J.E., "Governance and educational quality." In *Learning from School Choice*, Washington, DC: Brookings Institution Press, 1998, 55-81.

Brighouse, Harry. *School Choice and Social Justice.* New York: Oxford University Press, 2000.

Brouillette, Matthew J., *The Case for Choice in Schooling: Restoring Parental Control of Education*; Midland, MI.: Mackinac Center for Public Policy, 2001.

Burtless, Gary, ed. Does Money Matter? The Effect of School Resources on Student Achievement and Adult Success. Washington, DC: Brookings Institution Press, 1996.

Capell, F. J. and L. Dosher, *A Study of Alternatives in American Education: Vol. VI, Student Outcomes at Alum Rock 1974-1976*. Santa Monica, CA: RAND, 1981.

Carpenter, Dick M. III. "Ronald Reagan and the Redefinition of the 'Education

President.'" *Texas Education Review*. Winter 2003-04, available at http://www.educationreview.homestead.com/2003ReaganEducation.html

Chamey, Michael. "High Court Takes up Vouchers." *Rethinking Schools Online.* Volume 16, No. 2-Winter 2001/2002, available at http://www.rethinkingschools.org/special_reports/voucher_report/v_high162.shtml.

Choper, Jesse H. "The Establishment Clause and Aid to Parochial Schools – An Update," 75 *Cal. L. Rev.* 5, 1987.

Chubb, John E. and Eric A. Hanushek, "Reforming Educational Reform." In *Setting National Priorities: Policy for the Nineties*, edited by Henry J. Aaron, 213-48. Washington, D.C.: Brookings, 1990.

Chubb, John E. and Terry M. Moe. *Politics, Markets, and America's Schools.* Washington, D.C.: Brookings Institution, 1990.

Clinton, William Jefferson. *Between Hope and History*: *Meeting America's Challenges for the 21st Century*. New York: Random House, 1996.

_____. "Address Before a Joint Session of the Congress on the State of the Union, 1997." *The American Presidency Project*. Santa Barbara, CA: University of California. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=53358.

CNN Time, All Politics: The State of the Union, 1997. Atlanta: Time Warner Company. Available at http://www.cnn.com/ALLPOLITICS/1996/resources/sotu/transcripts/index5.html

Cohen, L. and B.C. Gray. "School Vouchers After Zelman." Paper presented at the conference, What's Next for School Vouchers? Cambridge, MA: Harvard University, 2002. http://www.ksg.harvard.edu/pepg/WNConfPapers.htm

Cohn, Elchanan, *The Economics of Education*. Cambridge, Mass.: Ballinger Publishing Company, 1979.

Coleman, James S. "The Concept of Equality of Educational Opportunity," 38 *Harv. Educ. Rev.*7 (1968).

_____."Schools and the Communities They Serve." *Phi Delta Kappan*, April 1985: 527-532.

_____."Public Schools, Private Schools, and the Public Interest." *The Public Interest* No. 64 (Summer 1981).

Coleman, James S., Thomas Hoffer, and Sally Kilgore. *High School Achievement: Public, Catholic, Private Schools Compared*. New York, NY: Basic Books, 1982.

Coleman, James S., Ernest Q. Campbell, Carl J. Hobson, James McPartland, Alexander M. Mood, Frederic D. Weinfeld, and Robert L. York. *Equality of Educational Opportunity*. Washington, DC: U. S. Government Printing Office, 1966.

Congressional Republicans propose school-voucher plan, Associate Press, July 19, 2006, at http://www.firstamendmentcenter.org/news.aspx?id=17176.

Cookson, Peter W., Jr. and Kristina Berger. *Expect Miracles: Charter Schools and the Politics of Hope and Despair*. Boulder: Westview Press, 2002.

Cookson, Peter W. Jr. *School Choice: The Struggle for the Soul of American Education*. New Haven, CT: Yale University Press, 1994.

Cookson, Peter W., Jr. and Sonali M. Shroff, "School Choice and Urban School Reform," Columbia University, Teachers College, ERIC Clearinghouse on Urban Education Institute for Urban and Minority Education, Urban Diversity Series No. 110, December 1997.

Coons, John E. and Stephen D. Sugarman, "Family Choice in Education: A Model State System for Vouchers." *California Law Review*. 59: 321-438, 1971.

_____. *Education by Choice: The Case for Family Control*. Berkeley, CA: University of California Press, 1978.

_____. *Scholarships for Children*. Berkeley, CA: Institute of Governmental Studies Press, 1992.

Coons, John E., William H. Clune, and Stephen D. Sugarman. *Private Wealth and Public Education*. Cambridge, Mass. : The Belknap Press of Harvard University Press, 1970.

Cord, Robert L. *Separation of Church and State: Historical Fact and Current Fiction*. New York: Lambeth Press, 1982.

Coulson, Andrew J. *Market Education: The Unknown History*. New Brunswick, NJ: Social Philosophy and Policy Center and Transaction Publishers, 1999.

Cremin, Lawrence A., ed., *The Republic and the School: Horace Mann on the Education of Free Men*. New York: Teachers College Press, 1957.

Crisafulli, Sara J. *Zelman v. Simmons-Harris: Is the Supreme Court's Latest Word on School Voucher Programs Really the Last Word?*, 71 *Fordam L. Rev.*, 2227-2281 (2003).

Cubberely, Ellwood P., ed. *Reading in Public Education in the United States*. Boston: Houghton Mifflin Co., 1934.

Department of Education. "What Really Matters in American Education." White paper prepared

for U. S. Secretary of Education Richard Riley for speech at the National Press Club, Washington, D.C, September 23, 1997. Washington, DC: U. S. Department of Education, 1997. Available at http://www.ed.gov/Speeches/09- 1997/index.html

Dewar, Helen. " Senate Passes Major Revamp of Education," *Washington Post*, June 15, 2001. Retrieved October 1, 2002 from http://washingtonpost.com/ac2/wp-dyn/A3404-2001Jun14?language

District of Columbia Mayors Office. "Mayor Williams Hails Passage of DC School Choice Bill." January 22, 2004. Available at http://dc.gov/mayor/news/release.asp?id=561&mon=200401

Dowling-Sendor, Benjamin "A victory for voucher." *American School Board Journal*, January 1999.

Education Commission of the States. "Legislative Activities Involving Open Enrollment (Choice)." *Clearinghouse Notes.* December 1994.

Education Finance Task Force White Paper, American Institutes of Research Draft Handbook Update Project. Washington, DC: National Center for Education Statistics, 12/19/00. Available at http://nces.ed.gov/forum/pdf/finance_voucher.pdf

Egan, Marcus. *Keep Public Education Public: Why Vouchers Are a Bad Idea*. Alexandria, VA: National School Boards Association, 2003. Available at http://www.nsba.org/site/docs/33800/33736.pdf

Elmore, Richard F. and Milbrey W. McLaughlin. *Steady Work: Policy, Practice, and the Reform of American Education.* Santa Monica, CA: RAND, 1988.

Engel, Michael. (2000). *The Struggle for Control of Public Education: Market Ideology Vs. Democratic Values.* Philadelphia: Temple University Press.

Epstein, Lee and Thomas G. Walker. *Religion: Exercise and Establishment in Constitutional Law for a Changing America: A Short Course*, 2nd. Ed. Washington, D.C.: CQ Press, 2000.

Esbeck, Carl H. "A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?" 70 *Notre Dame L. Rev.* 581 (1995).

Fashola, O. and R. Slavin, (1998). "Schoolwide reform models: What works?" *Phi Delta Kappan*, 79(5), 370-379.

Ferguson, R. F. 1991. "Paying for Public Education: New Evidence on How and Why Money Matters." *Harvard Journal on Legislation*. 28 (Summer): 465-98.

Finn, Chester F., Jr. "The Original Education President: Reagan's ABCs." National Review

Online, June 9, 2004. Available at http://www.nationalreview.com/comment/finn200406090839.asp

Fiske, Edward B. and Helen F. Ladd. *The Voucher Debate after Zelman v. Simmons-Harris: The Need to Focus on Core Education Issues*, V2, N1, 2002 Center for Child and Family Policy Education Reform . Available at http://www.pubpol.duke.edu/centers/child/briefs/Vouchers%20after%20Zelman.pdf

Fletcher, Michael A. "High Court Joins Battle Over School Vouchers: Church State Divide at Issue in Ohio Court." Washington Post (February 20, 2002): A06.

Fossey, Richard and Robert LeBlanc. "Vouchers for Sectarian Schools after Zelman: Will the First Circuit Expose Anti-Catholic Bigotry in the Massachusetts Constitution?" 193 Education Law Reporter, 343-63, 2005. Available at http://www.blaineamendments.org/scholarship/Fossey-LeBlanc-ELA-Nov%2022%202004.pdf

Fowler, Frances C., Policy Studies for Educational Leaders. New York: Prentice-Hall Inc., 2000.

Fox, Jonathan "Sending Public School Students to Private Schools." *Policy Review*. No. 93. January-February, 1999.

Frankel, Charles. "Equality of Opportunity." Ethics, Vol. 81, No.3, 1971.

Fridy, Matthew D. "What Wall? Government Neutrality and the Cleveland Voucher Program" 31 *Cumb. L. Rev*. 709 (2001).

Friedelbaum, S. H., *The Religion Clauses: Perennial Themes, Unsettled Directions in The Rehnquist Court: In Pursuit of Judicial Conservatism*. Westport, CT: Greenwood Press, 1994.

Friedman, Milton, "The Role of Government in Education." In *Economics and the Public Interest.* Robert A. Solo, ed. New Brunswick, N.J.: Rutgers University Press, 1955: 123-144.

_____. *Capitalism and Freedom.* Chicago, IL: University of Chicago Press, 1962.

_____. *Bright Promises, Dismal Performance: An Economist's Protest*. William R. Allen, Editor. New York: Harvest/Harcourt Brace Jovanovich, 1983.

Friedman, Milton and Rose Friedman, *Free to Choose: A Personal Statement*. Orlando, FL.: Harcourt, Inc, 1980.

Friesen, J. State Constitutional Law: Litigating Individual Rights, Claims and Defenses. (1992).

Fritzberg, Gregory J. “Equality of Educational Opportunity versus ‘Excellence’: Keeping the Pressure on Goliath.” *Educational Foundations*. Spring 2000, available at http://www.findarticles.com/p/articles/mi_qa3971/is_200004/ai_n8889074.

Fritzberg, Gregory J. “Equality of Educational Opportunity versus ‘Excellence’: Keeping the Pressure on Goliath.” *Educational Foundations*. Spring 2000. Vol. 14, No. 2. Available at http://www.findarticles.com/p/articles/mi_qa3971/is_200004/ai_n8889074

Fuller, Bruce and Richard F. Elmore, eds. *Who Chooses? Who Loses? Culture, Institutions, and the Unequal Effects of School Choice*. New York, NY: Teachers College Press, 1996.

Garnett, Richard W. *Brown’s Promise, Blaine’s Legacy*, 17 CONST. COMMENT. 651, 674 (2000).

_____. “Yes to Vouchers: The Supreme Court gets it right. Commonweal: A Review of Religion, Politics, and Culture. August 16, 2002. Volume CXXIX, Number 14. Available at http://www.commonwealmagazine.org/print_format.php?id_article=552

Gearan, Anne. “High Court Considers School Vouchers,” *The Miami Herald*, September 25, 2001.

Gill, Brian P., P. Michael Timpane, Karen E. Ross, and Dominic J. Brewer, *Rhetoric Versus Reality: What We Know and What We Need to Know About Vouchers and Charter Schools.* Santa Monica, CA: RAND, 2001. Available at http://rand.org/publications/MR/MR1118/MR1118.ch1.pdf

Glenn, Charles. “Parent Choice and American Values in Public Schools by Choice: Expanding Opportunities for Parents, Students, and Teachers.” In *Public Schools by Choice*. Joe Nathan, ed. St. Paul, MN: The Institute for Learning and Teaching, 1988.

_____. “Does School Choice Harm Children?” *Focus on Social Issues*. February 6, 2004). Available at Available at http://www.family.org/cforum/fosi/education/sc/a0030426.cfm

_____. “Challenge of Diversity and Choice.” In *Educational Horizons*. Volume 83, Number 2, Winter 2005, 101-109.

Gooler, D.D. 1986., May. Educating educators for their policy making roles. Thresholds in Education, XII(2), 37-40.

Graham, Grace. "Can the Public School Survive Another Ten Years?" Educational Leadership, May 1970, pp. 800-803.

Green, Constance McLaughlin and Milton Lomask. Vanguard: A History. Washington, DC: Smithsonian Institution Press, 1971. Available at http://www.hq.nasa.gov/office/pao/History/sputnik/toc.html

Green, Steven K. The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992).

_____. "Private School Vouchers and the Confusion over "Direct" Aid." 10 *GEO. MASON U. CIVIL R. LAW J*. 47, 50 (2000).

_____. "Blaming Blaine": Understanding the Blaine Amendment and the "No-funding" Principle" 2 *FIRST AMENDMENT LAW REVIEW*, 108 (2004).

Greenhouse, Linda. *White House Asks Justices for a Ruling on Vouchers*, New York Times, July 8, 2001, available at http://nytimes.com/2001/07/08/politics/08SCOT.html.

_____. *Supreme Court Agrees to Look at Vouchers*, New York Times, September 26, 2001, available at http://nytimes.com/2001/09/26/national/26SCOT.html?todaysheadlines.

Gunn, Erik. "Vouchers and Public Accountability." Rethinking Schools Online. Available at http://www.rethinkingschools.org/special_reports/voucher_report/vvouc141.shtml (Updated on May 12, 2003).

Gutmann, Amy. *Democratic Education*. Princeton, NJ: Princeton University Press, 1987.

Halchin, E. "And this parent went to market: Education as public versus private good." *In School Choice in the Real World*. Ed. R. Maranto, S. Milliman, F. Hess, & A. Gresham. Boulder: Westview Press,1999, 19-38.

Halstead, Ted and Michael Lind, "Taking Charge: Why we need to fund education federally and how we can do it." *Washington Monthly*. April 2001, at http://www.washingtonmonthly.com/features/2001/0104.halstead.lind.html

Hanushek, Eric A. "The Economics of Schooling: Production and Efficiency in Public Schools." *Journal of Economic Literature*, 24 (3), 1141-77, 1986.

_____. "The Productivity Collapse in Schools," W. Allen Wallis Institute of Political Economy Working Paper #8. Rochester, N.Y.: University of Rochester, 1996. Available at http://nces.ed.gov/pubs97/97535/97535k.asp

_____. "Conclusions and Controversies about the Effectiveness of School Resources," *Economic Policy Review*, vol. 4 (March 1998).

Hanushek, E. A., and S. G. Rivkin, "Understanding the 20th Century Explosion in U. S. School Costs." Working paper 388. University of Rochester: Rochester Center for Economic Research, 1994.

Hedges, L.V., R.D. Laine, and R. Greenwald. "Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes." *Educational Researcher*. 23(3), 5-14, 1994.

Hendrie, Caroline. "Federal plan for vouchers clears Senate." *Education Week on the Web* (January 28, 2004). Available at http://www.edweek.org/ew/ew_printstory.cfm?slug=20Vouch.h23

Henig, Jeffrey R. *Rethinking School Choice: Limits of the Market Metaphor*. Princeton, NJ: Princeton University Press, 1994.

Hess, Frederick M. *Spinning Wheels: the Politics of Urban School Reform*. Washington, D.C.: Brookings Institution Press, 1999.

_____. *Revolution at the Margins: the impact of competition on urban school systems*. Washington, D.C.: The Brookings Institution, 2002.

Hess, Fredrick M. and Patrick J. McGuinn, "Muffled by the Din: The Competitive Noneffects of the Cleveland Voucher Program." Available at http://www.tcrecord.org/Content.asp?ContentID=10896

Heytens, Toby J. Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117 (2000).

Hill, Paul T., Lawrence C. Pierce, and James W. Guthrie, *Reinventing Public Education: How Contracting Can Transform America's Schools.* Chicago, IL: University of Chicago Press, 1997.

Hoxby, Caroline Minter, "Are Efficiency and Equity in School Finance Substitutes or Complements?"*Journal of Economic Perspectives*, 1996, 10:4, 51-72.

Hoxby, Caroline Minter. "School Choice and School Productivity, or Could School Choice Be a Tide That Lifts All Boats?" in Caroline Hoxby, ed., *Economics of School Choice*. Chicago: University of Chicago Press for the National Bureau of Economic Research, 2001.

John C. Jefferies, Jr. and James E. Ryan, "A Political History of the Establishment Clause." 100 *MICH. L. REV.* 279, (2001).

Jencks, Christopher. "Is the public school obsolete?" *The Public Interest* 2 (Winter), 1966, 18-27.

Jencks, Christopher. "Education Vouchers: A Report on Financing Education by Payments to Parents." Cambridge, MA: Center for the Study of Public Policy, 1970.

Jencks, Christopher, "Giving Parents Money to Pay for Schooling: Education Vouchers,"

New Republic, July 4, 1970.

Jennings, John F. (Jack). "Title I: Its Legislative History and Its Promise." *Phi Delta Kappan*. Vol. 81, No. 7 (March 2000), p. 516-522.

_____. "An Education Agenda for the Congress and the New Administration" in *The Future of the Federal Role in Elementary & Secondary Education*. Washington, D.C.: Center on Education Policy, 2001.

Johnson, Lyndon B. "Proposal for a Nationwide War on the Sources of Poverty: Lyndon B. Johnson's Special Message to Congress, March 16, 1964." *Public Papers of U. S. Presidents, Lyndon B. Johnson, 1963-1964*. Washington: G.P.O., 1965, 1, pp. 375-380. Available at http://www.fordham.edu/halsall/mod/1964johnson-warpoverty.html

Jorgenson, Lloyd P. "The Birth of a Tradition," Phi Delta Kappan, June 1963, p.411.

Just, Richard. "Voucher Nation? Why School Choice Could Demolish National Unity." *The American Prospect Online Edition*. Jul 11, 2002. Available at http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=790 (last visited Jan. 27, 2007).

Kahlenberg, Richard D. "Helping Children Move from Bad Schools to Good Ones." New York: The Century Foundation, June 2006. Online brief is available at http://www.tcf.org/Publications/Education/kahlenbergsoa6-15-06.pdf

Kaestle, Carl F. "The American Religious Experience: Public Education." *Encyclopedia of American Social History, Volume 3*, Ed. Mary Kupiec Cayton, Elliott J. Gorn, and Peter W. Williams. New York: Scribner, 1993. Available http://are.as.wvu.edu/scopedu.htm

Klarman, Michael J. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press, 2004.

Kava, Russ. "Milwaukee Parental Choice Program: Informational Paper 29." Madison, WI: Wisconsin Legislative Fiscal Bureau, 2005. Available at http://www.legis.state.wi.us/lfb/Informationalpapers/29.pdf

Kemerer, Frank R. "State Constitutions and School Vouchers." *West's Education Law Reporter* 120 (1997): 1-42.

_____. "The Constitutional Dimension of School Vouchers." *3 Tex. Forum on Civil Liberties & Civil Rights*, 1998, 137-185.

_____. "The U. S. Supreme Court's Decision in the Cleveland Voucher Case: Where Do We Go

from Here?" New York: Teachers College, National Center for the Study of Privatization in Education, 2002. Available at http://www.ncspe.org/publications_files/538_OCCP51.pdf

Kennedy, Sheila Suess. "Privatizing Education: The Politics of Vouchers." Phi Delta Kappan, 82,6. (Feb 2001): 450-456. Available at http://www.pdkintl.org/kappan/kken0102.htm

Kirkpatrick, David W. *Choice in Schooling: A Case for Tuition Vouchers*. Baltimore, MD: Loyola University Press, 1990.

Kozol, Jonathan. *Savage Inequalities: Children in America's Schools.* New York: Crown Publishers, 1991.

Kozol, Jonathan. "I dislike the idea of choice, and I want to tell you why." *Educational Leadership*, 50 (3), 90-92.

Krauthammer, Charles. "Race and Classrooms," *The Washington Post*, May 23, 1997, p. A29.

Krueger, Carl and Todd Ziebarth, "No Child Left Behind Policy Brief: School Choice." Denver, CO: Education Commission of the States, April 2002. Available at http://www.ecs.org/clearinghouse/35/21/3521.pdf

Kunz, C. L., D. Schmedemann, M. Downs, and A. Bateson, *The Process of Legal Research: Successful Strategies* 4th ed. Aspen Publishers, 1996.

Ladd, Helen F. and Janet S. Hansen, eds. *Making Money Matter: Financing America's Schools*. Washington, D.C.: National Academy Press, 1999.

La Noue, George R. *Educational Vouchers: Concepts and Controversies*, New York, NY: Teachers College Press, 1972.

Labaree, David F. (2000). "Resisting educational standards." *Phi Delta Kappan*, 82 (1), 28-33.

Lazarus, Edward. (2006). "Assessing the Supreme Court at the Close of Its Current Term: New Justices, Public Critiques, and the Law Clerk Issue. *FindLaw Writ* Thursday, July 6, 2006. Available at http://writ.news.findlaw.com/lazarus/20060706.html

Levin, Henry M. "Educational Choice and the Pains of Democracy." In Thomas James and Henry Levin, eds. *Public Dollars for Private Schools: The Case of Tuition Tax Credits*. Philadelphia, PA: Temple University, 1983.

_____. "Education as a public and private good". *Journal of Policy Analysis and Management*, 6, 628-641, 1987.

_____. "Educational Vouchers: Effectiveness, Choice, and Costs." *Journal of Policy Analysis*

and Management, 17, 3 (1998): 373-392.

_____. "The Theory of Choice Applied to Education." In W. Clune & J. Witte (Eds.), *Choice and control in American education, Vol. III: The practice of choice, decentralization, and school restructuring,* pp. 285—318. New York: Falmer Press, 1990.

Levin, Henry M. and Cyrus E. Driver. Estimating the costs of an educational voucher system. In William J. Fowler, Jr. (Ed.), *Selected Papers in School Finance* 1994, pp. 63—88. Washington, DC: U. S. Department of Education, National Center for Educational Statistics, 1996.

_____. "The Costs of an Educational Voucher System." *Educational Economics* 5,3 (December 1997): 265-83.

Levy, Leonard W. *The Establishment Clause: Religion and the First Amendment.* 2nd ed. Chapel Hill, N.C.: University of North Carolina Press, 1994.

Lewin, Nathan. "How School Vouchers Can Win In the Supreme Court-Distinguishing 'What' From 'How' in Aid to Religious Schools." Jewish Law Articles. Available at http://www.jlaw.com/Articles/SchoolVouchers.html

Lieberman, Myron. *Privatization and Educational Choice*. New York: St. Martins Press, 1989.

Lieberman, Myron. *Public Education: An Autopsy*. Cambridge, MA: Harvard University Press, 1993.

Lowe, Bob "The Hollow Promise of School Vouchers." *In Education, Inc. Turning Learning into Business*. Alfie Kohn and Patrick Shannon, eds. Portsmouth, NH: Heinemann, 2002. Available at http://www.rethinkingschools.org/special_reports/voucher_report/v_sosholw.shtml

Lupa, Ira C. and Robert W. Tuttle, *Government Partnerships with Faith-Based Service Providers: State of the Law* 77-129 (Dec. 11, 2002).

Lutzy, Jennifer. "School Vouchers: Necessary Choice or Downfall of Public Education Ideals." *Community Youth Development Journal*. Volume 2, No. 3, Summer 2001. Available at http://www.cydjournal.org/2001Summer/lutzy_0613.html (last visited Jan. 27, 2007).

Lyons, Thomas W. "Parochiaid? Yes!" Educational Leadership, November 1971, 102-104.

Malbin, Michael J. *Religion and Politics: The Intentions of the Authors of the First Amendment.* Washington, D.C.: American Enterprise Institute, 1978.

Mauro, Tony. "Voucher Advocates Plan Next Push to High Court." (08-05-02) Available at

http://www.law.com/jsp/article.jsp?id=1024079086859

_____. "All Eyes on O'Connor during Voucher Arguments." Arlington, VA: Freedom Forum, February 21, 2002. Available at http://www.freedomforum.org/templates/document.asp?documentID=15766&printerfriendly=1

McCarthy, Martha M. "What is the Verdict on School Vouchers?" *Phi Delta Kappan* 81, 5 (January 2000): 371-78.

McCarthy, Rockne, Donald Oppewal, Walfred Peterson, Gordon Spykam, *Society, State and Schools: A Case for Structural Pluralism*, Grand Rapids, MI.: William B. Eerdmans Publishing Co., 1981.

McConnell, Michael W. and Richard A. Posner, "An Economic Approach To Issues of Religious Freedom," 56 U. *Chi. L. Rev.* 1,1989.

McHugh, B. and S. Spath. (1997). "Carter G. Woodson elementary school: The success of a private school curriculum in an urban public school," *Journal of Education for Students Placed At Risk*, 2, 121-135.

McMurtry, John, 'Education and the Market Model'. *Journal of Philosophy of Education,* 25 (1991), 211

Messerli, Jonathan. *Horace Mann: A Biography*. New York: Knopf, 1972.

Metcalf, Kim K. and Polly A. Tait. "Free Market Policies and Public Education: What is the Cost of Choice?" *Phi Delta Kappan*, (81:1) September 1999, 65-75.

Miller, L.S. *An American Imperative: Accelerating Minority Educational Advancement*. New Haven, CT: Yale University Press, 1995.

Miller, Matthew. "A Bold Experiment to Fix City Schools." *Atlantic Monthly* 284, (July 1999): 15-16, 18, 26-28, 30-31.

Miner, Barbara. "Supreme Court Debates Vouchers." Milwaukee, WI: *Rethinking Schools Online*. 2002. Available at http://www.rethinkingschools.org/special_reports/voucher_report/vdeba.shtml
.

Mintrom, Michael. *Policy Entrepreneurs and School Choice.* Washington, D.C.: Georgetown University Press, 2000.

Moe, Terry M. *Schools, Vouchers, and the American Public*. Washington, D.C.: Brookings Institution Press, 2001.

Molnar, Alex. *Giving Kids the Business: The Commercialization of America's Schools*. Boulder,

CO: Westview Press, 1996.

_____. "Educational Issues Series: School Choice," Milwaukee, WI: Wisconsin Education Association Council, 1996. Available at http://www.weac.org/resource/nov96/vouchers.htm.

_____. "Educational Vouchers: A Review of the Research." Milwaukee, WI: Center for Education Research, Analysis, and Innovation. -99-21, October 1999. Available at http://www.asu.edu/educ/epsl/EPRU/documents/EdVouchers/educationalvouchers.html#historical

Monk, David H. *Educational Finance: An Economic Approach*. New York: McGraw-Hill Publishing Company, 1990.

_____. "Educational Productivity Research: An Update and Assessment of Its Role in Education Finance Reform." *Educational Evaluation and Policy Analysis* 14(4): 307-32, 1992.

Murray, Charles. Losing Ground: American Social Policy, 1950-1980. New York: Basic Books, 1984.

Nathan, Joe, ed. *Public Schools by Choice*. St. Paul, MN: The Institute for Learning and Teaching, 1988.

_____. *Charter Schools: Creating Hope and Opportunity for American Education.* San Francisco, CA: Jossey-Bass Publishers, 1996.

National Center for Education Statistics. *Findings from the Condition of Education 2002: Private Schools - A Brief Portrait*. Washington, D.C.: U. S. Department of Education. Available at http://nces.ed.gov/pubs2002/2002013.pdf.

National Commission on Excellence in Education. *A Nation at Risk: The Imperative for Educational Reform*. Washington, D.C.: U. S. Government Printing Office, 1983. Available at http://www.ed.gov/pubs/NatAtRisk/risk.html

Odden, Allan R., and Lawrence O. Picus. *School Finance: A Policy Perspective*. 2nd ed. Boston: McGraw-Hill, 2000.

Orfield, Gary. *The Growth of Segregation in American Schools: Changing Patterns of Separation and Poverty since 1968*. Alexandria, Va.: National School Boards Association, 1993.

_____. *Schools More Separate: Consequences of a Decade of Resegregation*. Cambridge, MA: The Civil Rights Project, Harvard University. July 2001. Available at http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf

Ornstein, Allan C. and Daniel U. Levine. *Foundations of Education* (4th ed.) Boston, MA:

Houghton Mifflin Company, 1989.

Pallas, Aaron. “Don’t Believe the Hype: A Commentary on Zelman.” (August 9, 2002) http://www.tcrecord.org/PrintContent.asp?ContentID=10969

Paulsen, Michael Stokes. “Lemon Is Dead,” Symposium: Religion and the Public Schools After *Lee v. Weisman*, 43 Case W. Rev. 795 (Spring, 1993).

Peterson, Paul and William G. Howell. “School Choice: A Civil Rights Issue.” June 12, 2002. Available at http://www.miami.com/mld/miamiherald/news/opinion/3448829.htm. *School Vouchers: Settled Questions, Continuing Disputes,* The Pew Forum on Religion and Public Life, Washington, D.C., Aug. 2002. Available at http://pewforum.org/issues/files/VoucherPackage.pdf

Pew Forum on Religion and Public Life. “School Vouchers: Settled Questions, Continuing Disputes.” Washington, DC: The Pew Forum on Religion and Public Life. November 2002. Available at http://pewforum.org/issues/files/VoucherPackage.pdf

Pietrowiak, Diana M. and Daniel C. Jacobsen. “School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee.” Washington, D.C.: United States General Accounting Office, 2001. Available at http://www.gao.gov/new.items/d01914.pdf

Poterba, James. “Government Intervention in the Markets for Education and Health Care: How and Why?” In Victor Fuchs, eds. *Individual and Social Responsibility: Child Care, Education, Medical Care, and Long-Term Care in America*. Chicago, IL: University of Chicago Press, 1996, 277-304.

Powell, Arthur G. *Lessons from Privilege: The American Prep School Tradition*. Cambridge: Harvard University Press, 1996.

Ravitch, Diane. *The Troubled Crusade: American Education, 1945-1980*. New York: Basic Books, 1983.

_____. “School Reform, Past, Present, and Future.” 51 *Case West. L. Rev*. 187, 189, 2001.

_____. “American Traditions of Education.” In Terry M. Moe (ed). *A Primer on America’s Schools*. Stanford, CA: Hoover Press, 2001. Available at http://www-hoover.stanford.edu/publications/books/fulltext/primer/1.pdf

Ravitch, Diane and Joseph P. Viteritti. *Making Good Citizens: Education and Civil Society*. New Haven: Yale University Press, 2001.

Ravitch, Diane and William A. Galston, "Scholarships for Inner-City School Kids," *The Wall Street Journal*, December 17, 1996.

Rawls, John. *A Theory of Justice.* Cambridge, MA: Harvard University Press, 1971.

Raywid, Mary Anne. "The Mounting Case for Schools of Choice." In *Public Schools by Choice: Expanding Opportunities for Parents, Students, and Teachers*. Joe Nathan, ed., 13-40. St. Paul, MN: The Institute for Learning and Teaching, 1988.

Reagan, Ronald. *Public Papers of the Presidents of the United States*. Washington, DC: Office of the Federal Register, 1983.

Reagan, Ronald. *Public Papers of the Presidents of the United States*. Washington, DC: Office of the Federal Register, 1987.

Ridenour, Caroyn S., Thomas J. Lasley, II, and William L. Bainbridge. "The Impact of Emerging Emerging Market-Based Public Policy on Urban Schools and a Democratic Society." *Education and Urban Society*. Sage Publications Nov 01, 2001 34: 66-83. Available at http://www.schoolmatch.com/articles/EUS1101.htm.

Ritter, Gary W., Rush, Alison, & Rush, Joel. 2002. How Might School Choice Affect Racial Integration in Schools? New Evidence from the ECLS-K. Georgetown Public Policy Review. 7, 2, 125-136.

Rose, Lowell C. & Alec M. Gallup, The 36th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools, Phi Delta Kappan, 86, 41-52, Sept. 2004. Available at http://www.pdkintl.org/kappan/k0409pol.htm

Rotherham, Andrew J. "How Bush Stole Education." *Democratic Leadership Council Blueprint Magazine*. March 25, 2002. Available at http://www.ndol.org/ndol_ci.cfm?kaid=110&subid=181&contentid=250319

_____. "Putting Vouchers in Perspective: Thinking About School Choice after Zelman v. Simmons-Harris." July 2, 2002. Available at http://www.ppionline.org/documents/Ed_vouchers_702.pdf

Rothstein, Richard, *The Way We Were: The Realities of America's Student Achievement* Washington, D.C.: Century Foundation, 1998.

Rothstein, Richard and K.H. Miles. *Where's the Money Gone? Changes in the Level and Composition of Education Spending*. Washington, DC: Economic Policy Institute, 1995.

Rouk, Üllik, Joyce Pollard, and Julia Guzman. "Vouchers: Yea or Nay." *Insights on Education Policy, Practice, and Research*, Austin, TX: Southwest Educational Development Laboratory, Number 12, September 2000. Available at http://www.sedl.org/policy/insights/n12/ (last visited June 9, 2002).

Rudolph, Frederick., ed. *Essays on Education in the Early Republic*. Cambridge, MA: Harvard Press, 1965.

Russo, Charles J. Legal Research: The "Traditional Method," in David Schimmel, ed., *Complimentary Methods for Examining Legal Issues in Education*. Topeka, KS: National Organization on Legal Problems of Education, 1996.

Sawhill, Isabel V. and Shannon L. Smith. August 5, 1998. Vouchers for Elementary and Secondary Education. Retrieved August 12, 2003, from http://www.brookings.edu/dybdocroot/views/papers/bdp/bdp004/bdp004.pdf

Schaeffer, Thomas E. "One More Time: How Do You Get Both Equality and Excellence in Education?" The Journal of Educational Thought. Vol. 24, No. 1, 1990.

Schultz, Stanley K. "Twilight of Liberalism: The Nixon Years." Available at http://us.history.wisc.edu/hist102/lectures/lecture29.html

Shanker, Albert and Bella Rosenberg, "Do Private Schools Outperform Public Schools?" In Peter Cookson, ed., The Choice Controversy. Newbury Park: Corwin Press, 1992.

Sizer, Theodore, "The Case for a Free Market," *Saturday Review*, January 11, 1969.

Sizer, Theodore & Philip Whitten, *A Proposal for a Poor Children's Bill of Rights*, Psychology Today, Aug. 1968.

Smith, Kevin B. and Kenneth J. Meier. *The Case against School Choice: Politics, Markets, and Fools*. Armonk, N.Y.: M. E. Sharpe, 1995.

Snell, Lisa (2001). "School Vouchers as a Legal Sanction." Reason Public Policy Institute Policy Study No. 284 Retrieved October 24, 2004 from http://www.rppi.org/ps284.pdf

Spring, Joel. *The American School: 1642-1996*, Fourth Edition. New York: McGraw-Hill, 1997.

_____. *American Education*, Ninth Edition. New York: McGraw Hill, 2000.

Stedman, James B. and Wayne C. Riddle. *Goals 2000: Educate America Act Implementation Status and Issues*. Congressional Research Service Report 95-502, Washington, D.C.: The Library of Congress, 1998.

_____. *The "Educational Excellence Act of 1989"*: The Administration's Education Proposal. Congressional Research Service Report 89-513-EPW. Washington, D.C.: The Library of Congress, 1989.

Steuerle, C. Eugene, Van Doorn Ooms, George Peterson, and Robert D. Reischauer, eds. *Vouchers and the Provision of Public Services*. Washington, D.C.: The Brookings Institution Press, 2000.

Strayer, George D. and Robert M. Haig. *The Financing of Education in the State of New York.* New York: The Macmillan Co., 1923.

Stringfield, S., Millsap, M., Herman, R., Yoder, N., Brigham, N., Nesselrodt, P., Schaffer, E., Karweit, N., Levin, M., and Stevens, R. *Special strategies studies final report.* Washington, DC: U. S. Department of Education, 1997.

Stringfield, S. *Fourth year evaluation of the Calvert School program at Barclay School*. Baltimore: Johns Hopkins University, Center for Social Organization of Schools, 1994.

Strom, David J. and Stephanie S. Baxter, "From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade." *Journal of Law & Education*. 30, 2 (April 2001): 275-303.

Sundquist, James. L. *Politics and Policy: The Eisenhower, Kennedy and Johnson Years*. Washington, D.C.: The Brookings Institution, 1968.

Timar, Thomas and David Tyack. *The Invisible Hand of Ideology: Perspectives from the History of School Governance.* Denver: Education Commission of the States, 1999, 6.

Treene, Eric. "The Grand Finale Is Just the Beginning: School Choice and the Coming Battle over Blaine Amendments." Available at http://blaineamendments.org/scholarship/FedSocBlaineWP.html.pdf.

Tribe, Laurence H. *American Constitutional Law*. Mineola: The Foundation Press, 1978.

2004 Democratic National Convention Committee, Inc. "Strong at Home, Respected in the World: The 2004 Democratic National Platform for America." July 27, 2004, 34. Available http://www.democrats.org/pdfs/2004platform.pdf (last visited Feb. 2, 2007).

Tyack, David "The Perils of Pluralism: The Background of the Pierce Case," 74 *Amer. Hist. Rev.* 74 (1968).

_____. "Ways of Seeing: An Essay on the History of Compulsory Schooling." 46 *Harv. Educ. Rev*. 355 (1976).

Tyack, David B., Thomas James, Aaron Benavot. *Law and the Shaping of American Public Education: 1785-1954*. Madison, WI: University of Wisconsin Press, 1987.

Tyack, David and Larry Cuban. *Tinkering Toward Utopia: A Century of Public School Reform.* Cambridge, MA: Harvard University Press, 1995.

Underkuffler, Laura S. "Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence." 75 IND. L.J. 167, (2000).

U. S. Commission on Civil Rights. Racial Isolation in the Public Schools. Washington: Government Printing Office, 1967.

U. S. Government Printing Office. Goals 2000: Educate America Act of 1994. Pub. L. No. 103-227. 103rd Congress, 2nd Session.

Urban Institute. "Vouchers: Looking Across the Board." Washington, DC: Urban Institute. Available at http://www.urban.org/pubs/vouchers/intro.html

.

van Geel, Tyll. "Equal Protection and School Finance: Bargained Incoherence." In Deborah A. Verstegen and James G. Ward, eds. *Spheres of Justice in Education: The 1990 American Education Finance Association Yearbook*. New York: Harper Business, 1991, 297-316.

Viteritti, Joseph P. *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harvard Journal of Law and Public Policy 657, 1998.

_____. "School Choice and State Constitutional Law." In *Learning from School Choice*, Paul E. Peterson and Bryan C. Hassel, eds. Washington, D.C., Brookings Institution Press, 1998.

_____. *Choosing Equality: School Choice, the Constitution, and Civil Society*. Washington, D.C., Brookings Institution Press, 1999.

Walsh, Mark "Supreme Court to Hear Pivotal Voucher Case," *Education Week* 21, 5 (October 3, 2001): 1, 32-33. Available at http://www.edweek.org/ew/ew_printstory.cfm?slug=05scotus.h21.

_____. "A School Choice for the Supreme Court," *Education Week* (2/27/02). Available at http://www.edweek.org/ew/newstory.cfm?slug=24vouch.h21.

WEAC Professional Development & Training Paper. "Private School Vouchers." 1996. Available http://www.weac.org/resource/may96/vouchers.htm

Weiler, Daniel. *A Public School Voucher Demonstration: The First Year at Alum Rock, Summary and Conclusions.* Santa Monica, CA: Rand, 1974.

Weir, Margaret W., "American Politics and the Future of Social Policy." In *The Social Divide: Political Parties and the Future of Activist Government*. Ed. Margaret M. Weir. Washington, DC: Brookings Institution Press, 1998, 506-530.

Wells, Amy Stuart. *Time to Choose: America at the Crossroads of School Choice Policy.* New York, NY: Hill and Wang, 1993.

Witte, John. *The Market Approach to Education: An Analysis of America's First Voucher Program*. Princeton, NJ: Princeton University Press, 2000.

Wolf, C., Jr., *Markets or Governments: Choosing between Imperfect Alternatives.*

A RAND Research Study. Cambridge, MA: MIT Press, 1993.

Wood, R.C. "Choice as a Public Policy for American Education," Education Times, Fall, 1996, 3-8.

Woolley, John T. and Gerhard Peters. *The American Presidency Project*. Santa Barbara, CA: University of California, 1992. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=21259.

Yergin, Daniel and Joseph Stanislaw, *The Commanding Heights: The Battle Between Government and the Marketplace that is Remaking the Modern World*. New York: Simon and Schuster, 1998.

Yudof, Mark G., Betsy Levin, and David L. Kirp. *Educational Policy and the Law*, 4th ed. Belmont, CA: Wadsworth Group, 2002.

Zirkel, Perry A. *A Digest of Supreme Court Decisions Affecting Education* (3rd ed.). Bloomington, IN: Phi Delta Kappa, 1995.

BIOGRAPHICAL SKETCH

Kathleen Guzman Sciortino, who prefers to be called Kathy, was born and raised in Indiana. She graduated from Indiana University with a Bachelor of Arts in psychology. Next Kathy received her master's degree in blind rehabilitation teaching from Western Michigan University. After moving to central Florida, she worked in Orange, Seminole, and Osceola school districts at the school level and at the district level. Along the way Kathy received her Education Specialist degree from the University of Florida. She is married to Tom, with five children and two grandsons.