SUPREME COURT'S SCHOOL CHOICE DECISION AND CONGRESS' AUTHORITY TO ENACT CHOICE PROGRAMS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

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SUPREME COURT'S SCHOOL CHOICE DECISION AND CONGRESS' AUTHORITY TO ENACT CHOICE PROGRAMS

TUESDAY, SEPTEMBER 17, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:05 p.m., in Room 2237, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommittee] presiding.

Mr. CHABOT. The Subcommittee on the Constitution will come to order. I am Steve Chabot, the Chairman.

Every child in America deserves a high-quality education, regardless of family income, ability or background. If children are not learning and schools do not improve, parents should have options, including sending children to better public schools, charter schools or private or parochial schools. On June 27, 2002, the United States Supreme Court upheld Ohio's school choice program giving families nationwide more options in providing their children with a high caliber education.

The purpose of this hearing here this afternoon is to examine how the Supreme Court decision clarifies Congress' authority to enact choice programs in which Government aid, through the free choice of individual citizens, can be used to allow citizens access to the very best educational and social service services our Nation has to offer.

In *Zelman* v. *Simmons-Harris*, the Supreme Court summarized its prior precedents and stated, "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. 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 the benefits."

The Supreme Court held that the Ohio school choice program, "is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and

private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause."

Indeed, Ohio's school choice program was upheld even though 96 percent of the students participating in the program enrolled in religious schools.

Justice O'Connor wrote a concurring opinion in which she backed the majority opinion fully, criticized the dissent at length and characterized the dissent's claims as "alarmist." In his concurring opinion, Justice Thomas emphasized the uniquely liberating nature of education by noting the words of Frederick Douglass, who wrote as follows: Education means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free. Douglass also observed that "no greater benefit can be bestowed upon a long benighted people than giving to them, as we are here earnestly this day endeavoring to do, the means of an education."

It is now the law of the Land that Government has the authority to empower individuals who seek excellence through educational and social services provided by the Nation's people of faith. Government aid through vouchers and other forms of indirect assistance is not only constitutional but also a most promising means toward empowering the most desperate in our Nation to choose the best educational and social services available, including services provided by people of faith.

The *Zelman* decision has been widely hailed. As the Washington Post wrote in a lead editorial, and I will quote from that, "in fact, our quarrel with the Cleveland program would be that the vouchers are too small. Imagine how much competition might be generated and with what respect poor parents might be treated if they were given an $8,000 voucher for each child and public schools really had to prove they were worth what society now spends on them."

And that was the quote from *The Washington Post*.

And as the Secretary of Education has written, "It is difficult to overstate the importance of the Supreme Court's decision yesterday in *Zelman* v. *Simmons-Harris*. It adds momentum to two of President Bush's policy preferences: increasing education choices and options for parents, and leveling the playing field for faith-based organizations to compete for Federal dollars to run educational and community service programs."

H.R. 7, the Community Solutions Act, passed the House last year but remains stalled in the Senate. H.R. 7 contains provisions authorizing the administration of a wide array of Federal programs through vouchers and other forms of indirect assistance. H.R. 7 defines indirect assistance as assistance in which an organization receiving funds through a voucher, certificate or other form of disbursement receives such funding only as the result of the private choices of individual beneficiaries. The Supreme Court has now reaffirmed the constitutionality of precisely those forms of Government assistance in which aid is directed to religious organizations as a result of private choice.

It is up to Congress to fulfill the promise of the Supreme Court's decision. This hearing will start a discussion of Congress's ability to do so.

Before closing, I would like you to listen now to some prophetic words. "Regardless of family financial status, education should be open to every boy or girl in America. New methods of financial aid must be explored, including the channeling of Federally collected revenues to all levels of education and, to the extent permitted by the Constitution, to all schools."

Those words were penned by social scientist and Democratic Senator Daniel Patrick Moynihan. They were also part of the 1964 Democratic Party platform.

I look forward to working with Members of both parties to enact true choice programs, including those provided for in H.R. 7, the Community Solutions Act; and I now yield to Mr. Frank, the Ranking Member today on the Subcommittee.

Mr. FRANK. Thank you, Mr. Chairman.

This hearing is very interesting, not from the standpoint of constitutional law, the Supreme Court having already given its decision, but institutionally it is the oddest hearing I have been at in 22 years because I have no idea what we are doing. The Chairman of the Subcommittee said it is to begin a discussion of the issue. We should be clear that this Subcommittee and indeed this Committee has zero jurisdiction over the subject at hand.

It is true that the Supreme Court made a decision. The notion of us doing oversight on at Supreme Court decision is a very interesting one. If we were in fact to be unhappy with the Supreme Court decision, I am unsure as to what we could do, short of wanting a constitutional amendment. But assuming that the Supreme Court will be reassured to know that this Subcommittee stamps their approval on their 5 to 4 decision, the question is what is this hearing about.

The Committee on Workforce and Education—it used to be the Committee on Education and Labor before Republican political correctness excised the word "labor" from the official lexicon and substituted "workforce," suggesting, I think, a more quiescent group of workers—and it is up to that Subcommittee to do this. So we have a zero institutional role in whether or not there is such a program. So we have no jurisdiction to overturn the Supreme Court, although the majority does not want to do that. We have no jurisdiction to act under the authority the Supreme Court has provided.

So we are here, quote, to begin a discussion. I find that an interesting function for a congressional Subcommittee—to run a seminar, apparently, that is what we are doing. And it is, I suppose, as pleasant a way to pass a Tuesday afternoon as many others that might have occurred to people. But no one should confuse it with any official piece of legislative business.

Secondly, though, I did want to make one substantive contribution to this seminar; and the Chairman did allude to references to wouldn't it be nice if there was more money, et cetera. My view is this: I have been opposed to the voucher program. If it were, in fact, to be an entitlement program, I would think differently of it. My problem with it is in part at every level I have seen it is funded for a scarce number of people. It is motivated in part by the notion

that the public schools are not doing a very good job and then, due to fiscal constraints, fund enough vouchers for a fairly small number of people to leave those schools.

If in fact the voucher concept has merit and if in fact one believes in equality of education, then every voucher program ought to be an entitlement for every student in those grades. The problem, of course, is that that would cost money. And money means taxes. And so we have this dilemma where those who promote the voucher system, it seems to me, are in fact talking about what it would be, if it were carried out conscientiously, a quite expensive program. The resources aren't there.

So a voucher program which entitled a few who are picked and chosen to leave and leaves the rest behind strikes me even on its own terms as likely to do more harm than good, and a voucher program that lived up to what some of its ardent proponents say would be an interesting one.

I have yet to see anybody propose that level of financing. Maybe there are some local communities which have thoroughly done it. It is certainly not the case that the Federal Government has been prepared to do that.

So, with that, I will now return to the original point which is I do think this is a very interesting idea, but, again, I don't want anyone to be misled and no one should think that any legislation whatsoever will or could come from this afternoon's hearing. But I must say, given some of the legislative hearings of this Committee which I have attended, that is probably very good news.

Mr. CHABOT. Thank you, Mr. Frank—I think.

Our first witness is H. Douglas Laycock. Professor Laycock holds the Alice McKeon Young Regents Chair in Law, and he is Associate Dean for Research at the University of Texas School of Law at Austin. Professor Laycock is a leading scholar on the law of religious liberty. He has argued many cases on religious liberty, including cases before the United States Supreme Court.

Professor Laycock is also a member of the American Law Institute and an elected fellow of the American Academy of Arts and Sciences recently a coauthor of a joint statement of church-state scholars on school vouchers and the Constitution for the Pew Forum on Religion and Public Life.

We welcome you here this afternoon.

Our second witness is Richard D. Komer. Mr. Komer serves as a senior litigation attorney at the Institute for Justice. He has litigated school choice cases in both Federal and State courts. Prior to his work at the Institute, Mr. Komer worked as a civil rights lawyer for the Federal Government, working at the Departments of Education and Justice as well as at the Equal Employment Opportunity Commission as a special assistant to the Chairman, Clarence Thomas. His most recent Government employment was as Deputy Assistant Secretary for Civil Rights at the Department of Education.

We welcome you here this afternoon.

Our third witness is Reverend Timothy McDonald III, a pastor at the First Iconium Baptist Church in Atlanta, Georgia. Reverend McDonald joined People for the American Way Foundation's Board of Directors in May, 1995. In 1997, he became Chair of the Founda-

tion's African American Ministers Leadership Council. He is also President of Concerned Black Clergy. Reverend McDonald has been honored by the United Negro College Fund and the American Cancer Society for exceptional volunteerism, and he was named Humanitarian of the Year by the Citizen Coalition for Growth.

We welcome you here this afternoon, Reverend.

Our fourth and final witness is Cleaster Whitehurst-Mims. Ms. Whitehurst-Mims has dedicated her life to public service for more than 40 years. Ms. Whitehurst-Mims founded a private school in 1990 in the basement of a Silverton church with 43 students. In 1993, it moved to the former Cincinnati Hebrew Day School in Roselawn with enrollment of 120 students. Today, the school has more than 200 students in grade pre-K through 8th grade.

On a personal note, I might note that I have personally visited the school several times, have spoken to the kids and have been greatly impressed by the great work that Ms. Mims has done there with the kids. Having been a schoolteacher myself for a few years and taught in an urban school, I was most appreciative of seeing the great job that she has done with these children.

Prior to that, Ms. Whitehurst-Mims taught in the Cincinnati public school system from 1970 to 1991, 21 years. She has also been a professor at Xavier University also in Cincinnati. She was the author of several publications, including *'A Black Mother's Agony* in 1981 and *A Man with a Purpose: Martin Luther King* in 1983. Ms. Whitehurst-Mims has received numerous awards, including the Cincinnati Inquirer's 1990 Woman of the Year award; and she was recognized as one of President George Bush's Thousand Points of Light for outstanding work in the community. She was also awarded the President's Service Award in 2000.

Thank you again all for being here with us this afternoon. I would ask that you please try to summarize your testimony in 5 minutes or less; and, without objection, your written statement will be made a part of the permanent hearing record. Also without objection Members may submit additional materials for inclusion in the hearing record within 7 legislative days. We look forward to hearing from all the witnesses here this afternoon.

I might make a note we have a lighting system. When 4 minutes are up, the yellow light will come on, which means you have 1 minute to hopefully wrap up. When the red light comes on, we would appreciate if you would bring your testimony to a close shortly thereafter.

Mr. CHABOT. We will start with Mr. Laycock.

STATEMENT OF DOUGLAS LAYCOCK, ASSOCIATE DEAN FOR RESEARCH AND ALICE McKEAN YOUNG REGENTS CHAIR IN LAW, THE UNIVERSITY OF TEXAS SCHOOL OF LAW, AUSTIN, TX

Mr. LAYCOCK. Thank you, Mr. Chairman. I have submitted a brief personal statement and also the joint statement of eight different scholars on the meaning and what comes next after the Supreme Court's voucher decision, and I should be clear that neither the University of Texas nor the Pew Forum on Religion and Public Life endorses either of those statements or takes any position. These are the statements of the eight scholars who wrote them.

The decision in *Zelman* I think is a substantial consolidating win for the pro-voucher side in the sense that the opinion is clear. It has five votes. The fifth vote does not write a separate opinion with reservations and qualifications, as has happened often in the past. The opinion is a clear answer to the one issue before the Court about the structure of voucher programs for schools under the Federal Establishment Clause. It is not an answer to many other questions that may face the Congress and State legislatures down the road.

The Court has said a school voucher plan is constitutional federally if it is religiously neutral, and they define religious neutrality as meaning the beneficiaries have to be picked without regard to religion. The schools or other institutions that take the vouchers have to be picked without regard to religion, and there cannot be any incentives in the structure of the program that encourage parents to choose through religious option rather than the secular option. The schools of choice has to be left to the individual parents, and there have to be genuine secular choices available. That is the blueprint for writing school voucher plans.

Given the structure of the public school system, it should be possible in most jurisdictions for a legislature who wants to conform to that blueprint to do so.

Down the road there are a large set of State constitutional issues about these programs that will affect State programs. Because of the Supremacy Clause they do not affect congressional programs. You are not subject to State constitutional limits.

Also down the road there will be continuing debate and undoubtedly litigation about the issue of conditions that are attached to vouchers, regulations imposed on the schools or other charities that accept vouchers. Can they be required, for example—an example very familiar to the Congress—to surrender their right to prefer of their own faith in their hiring decisions and so forth?

Zelman doesn't say anything about that case, those issues. It was not before the Court. And the eight of us who wrote about it obviously could not agree on that. Some of us think that Congress has no power to require charities to surrender the constitutional rights as a condition of receiving money, and others think just as strongly that Congress must impose those kinds of nondiscrimination conditions.

Zelman is not an answer to that very important question, and undoubtedly there will be more litigation.

Zelman is written in the context of schools. I believe its principles are fully applicable to other charities, to the kinds of social service programs that are at issue in H.R. 7. Some of the eight of us had some doubts about that, but I think principally those doubts went to facts rather than law.

The structure of other charitable and social service programs is often rather different from the structure of schools. In the school situation, every State guarantees that it will provide an education for every child. It may do it well, it may do it badly, but it doesn't turn kids away because the school is full.

With most other Government-funded social services we do turn people away because the program is full. We have not undertaken to guarantee universal access to other kinds of social service agen-

cies, and that means it is somewhat more difficult to comply with the requirement that there be a genuine choice of secular or religious providers. If there is a shortage of beds for drug addiction treatment already and if people are on long waiting lists and if people are turned away, then it is all that more difficult to guarantee that an addict who is seeking treatment has a genuine free choice of religious or secular provider.

So making *Zelman* work in the context of other social services may require some expansion of the number of providers and the number of seats available in those programs. So *Zelman* is a very important win on the Federal constitutional issue for supporters of vouchers, but it leaves many questions remaining down the road that Congress has debated and that undoubtedly the courts will eventually be asked to pass on.

Mr. CHABOT. Thank you very much, Professor.

[The prepared statement of Mr. Laycock follows:]

House Judiciary Subcommittee on the Constitution
Congressional Authority to Enact Choice Programs
September 17, 2002

Testimony of Douglas Laycock
University of Texas Law School

Thank you for the opportunity to testify on the questions presented to legislatures in the wake of the Supreme Court's decision *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002). This statement is submitted in my personal capacity as a scholar. I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin, but of course The University takes no position on any issue before the Committee.

Before the Chairman invited me to testify, I had participated in the drafting of a joint statement, by constitutional scholars from across the political spectrum, for the very purpose of giving a fair explanation of the *Zelman* decision to legislators and policy makers. Rather than prepare a new statement of my own, I think it far better to submit this consensus statement.

I am honored to submit the *Joint Statement of Church-State Scholars on School Vouchers and the Constitution: What the United States Supreme Court Has Settled, What Remains Disputed.* The *Joint Statement* is the collaborative product of eight professors of constitutional law, each with a respected record of accomplishment in the field of religious liberty and church-state relations. The eight include strong opponents of vouchers, strong supporters of vouchers, and a wide range and variety of positions in between. Professor Thomas Berg, of the University of St. Thomas Law School in Minneapolis, carried the laboring oar in drafting the *Joint Statement*. He had a difficult task; each of his seven colleagues jealously reviewed every sentence he wrote for any hint of a tilt toward his personal position or away from someone else's. He patiently took account

of every criticism and every cavil. He did not paper over any disagreement; rather, whenever we could not agree, he put the point in terms of what each side would argue in future debates.

The result is a document that both sides of the aisle can rely on with confidence. When the *Joint Statement* says that something is settled, you can take it as settled. When the *Joint Statement* says that voucher supporters will argue such and such, and opponents will respond so and so, you can take it as a brief but sophisticated summary of the best foreseeable arguments for each side.

The Pew Forum on Religion and Public Life brought the eight of us together and published the *Joint Statement.* The statement is available on line at the Pew Forum's website, *<http://pewforum.org>*. It is important for me to emphasize that the Pew Forum, like The University of Texas, takes no position on any question before the Committee. The Pew Forum and The University, each in its own way, facilitate and support the work of independent scholars without taking positions on the substance of that work.

Part I of the *Joint Statement* summarizes the broad rule in *Zelman v. Simmons-Harris*. All eight of us agree that under *Zelman*, an educational voucher program is constitutional if it is neutral toward religion (which requires that it disburse funds to a class of beneficiaries defined without regard to religion, for use at a class of schools defined without regard to religion, and that it be structured in such a way that it gives no financial or other incentive to choose religious schools), if all moneys flowing to religious schools flow through the independent decisions of individuals rather than as direct payments from the government, and if the program offers genuine secular options to the beneficiaries.

The *Joint Statement* notes that "*Zelman* may have implications for the constitutionality of vouchers in other contexts, such as the provision of social services," but it does not address those implications. Some of the eight authors thought that other social services were sufficiently different from education that *Zelman* could not be straightforwardly applied to other services. Our agreement as to the current rules on schools does not necessarily imply agreement as to other social services.

Speaking for myself for a minute and not for my seven colleagues, my personal view is that *Zelman*'s principles apply to other social services, but that the structure of these programs will vary in ways that may affect the application of the principles. Most important, every school district in every state undertakes to provide a free and continuous public education to every child within the jurisdiction; if the school population increases, schools adapt to admit them all. It is thus relatively easy to structure a school voucher program in ways that meet the tests of religious neutrality, private decision making, and genuine choice.

Many other government-funded social services are offered on a much less inclusive basis. Places are often limited; potential clients are turned away or put on waiting lists; some programs come and go; there is no credible commitment to serve all in need. Until and unless these limitations in social service programs are corrected, it will be more difficult to guarantee genuine secular choices in every program. But assuming that *Zelman* applies to other social services -- and I personally believe that it does -- genuine secular choices are essential to the constitutionality of voucher programs.

I should also emphasize the second *Zelman* principle: that funds flow to religious institutions through private decision makers and not by direct governmental grants. This means that *Zelman* has not overruled earlier cases placing tighter restrictions on direct grants of aid. The law on direct grants of aid remains

more restrictive, less settled, and subject to more fine distinctions, than the law on voucher plans.

Part II of the *Joint Statement* discusses constitutional issues after *Zelman* -- issues about the implementation of any voucher programs that are enacted. Part II.A deals with state constitutional limits. These limits do not apply to federal programs, although it is imaginable that state constitutional limits would prevent some states from participating in cooperative voucher programs designed to be federally funded but state implemented.

Part II.B discusses potential regulation of schools that accept vouchers. Here the *Joint Statement* replicates the debate that has divided Congress over the last two years. Some of the eight believe that some regulations -- those that require the schools that accept vouchers to surrender constitutional rights to speech, association, or free exercise of religion -- would be unconstitutional conditions. Some of the eight believe that all or most such conditions are at least unobjectionable, and that they may be constitutionally required. My own view is that this debate is not limited to education, but is fully applicable to vouchers for other social services.

The *Joint Statement* does not address any question whether vouchers are good policy. And it anticipates new constitutional questions about the way voucher programs are implemented. But eight scholars from across the spectrum were able to agree that the Supreme Court has given a reasonably clear answer to the most basic constitutional questions about voucher programs. Vouchers can be consistent with the federal Establishment Clause, and the Court has given reasonably clear guidance about how to design voucher programs so that they will be consistent with the federal Establishment Clause.

ADDENDUM

The U.S. Supreme Court's recent decision in the Cleveland school voucher case ended some longstanding debates and opened new chapters in others. Because the Court has settled a key federal constitutional issue in the school voucher debate, we believed it would be helpful to provide an expert and nonpartisan assessment of where the law currently stands. We also believed that a presentation of contrasting arguments on educational policy would help to clarify the issues in dispute. What follows are two documents commissioned by the Pew Forum on Religion and Public Life that serve these purposes.

The first document is a joint statement by leading law professors explaining the constitutional principles announced by the Court in *Zelman v. Simmons-Harris* and providing an overview of the next rounds of constitutional debate in the wake of the Court's decision. Drafters of the statement include those who argued strongly that the Cleveland voucher plan was constitutional, those who argued strongly that the plan was unconstitutional and those who fell somewhere in between. In this document, these scholars come together to provide nonpartisan description and analysis of the Court's resolution of this issue. They discuss the elements of the Cleveland voucher plan that led the Court to uphold it and consider some potential applications of the Court's opinion. The professors also provide a brief and balanced description of major arguments on two important constitutional issues the Court did not resolve the applicability and validity of state constitutional provisions governing aid to religious schools and questions surrounding regulatory conditions that may accompany voucher funds.

Because the group is comprised of those who differ on whether the Court correctly decided *Zelman* and on the proper outcome of the debates ahead, the document takes no side on these issues. Furthermore, the statement expresses no views on whether educational vouchers are good policy. Drafters of this joint statement are Thomas Berg of The University of St. Thomas Law School (Minneapolis), Alan E. Brownstein of the University of California Davis School of Law, Erwin Chemerinsky of the University of Southern California Law School, John Garvey of Boston College Law School, Douglas Laycock of the University of Texas Law School, Ira C. Lupu of the George Washington University Law School, William Marshall of the University of North Carolina School of Law and Robert Tuttle of the George Washington University Law School. Thomas Berg served as the principal draftsperson of the statement.

The second document is a set of contrasting essays by top educational experts addressing the educational policy issues at stake in this debate. The first, written by Paul Peterson, Harvard Professor of Government and Director of the Program on Education Policy and Governance, urges the adoption of citywide pilot voucher programs. Peterson says that such programs, if properly designed, hold out the possibility of decreasing the education gap between black and white Americans. The second, written by Stanford Professor of Education and Economics Martin Carnoy, argues that close examination of several existing voucher programs in the United States and abroad reveals that the academic gains for struggling students and schools are marginal at best, and often simply non-existent.

The Forum provides these materials as part of our mission to serve as both a town hall and a clearinghouse of information. The Forum takes no position on these or other constitutional or policy issues but brings together diverse points of view for discussion of issues at the intersection of religion and public affairs. The Forum's co-chairs are Jean Bethke Elshtain and E.J. Dionne, Jr., and it is supported by a grant from The Pew Charitable Trusts to Georgetown University.

We hope that these materials will be useful to you as you face important decisions regarding law and policy.

Melissa Rogers
Executive Director, The Pew Forum on Religion and Public Life

Joint Statement of Church-State Scholars on School Vouchers and the Constitution:

What the United States Supreme Court Has Settled, What Remains Disputed

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Joint Statement of Church-State Scholars on School Vouchers and the Constitution

What the United States Supreme Court Has Settled, What Remains Disputed

In *Zelman v. Simmons-Harris*,[1] the United States Supreme Court upheld the constitutionality of a program that allows parents to use state-funded vouchers to send their children to religiously affiliated elementary and secondary schools. The decision is significant because for many years there were questions about whether the inclusion of religious schools in such a 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 in many circumstances.

But in opening the Establishment Clause door for vouchers, *Zelman* also invites a new set of constitutional questions. This statement explains the *Zelman* decision and briefly summarizes the likely upcoming rounds of constitutional questions. We are constitutional law scholars, and we express no views here on whether voucher programs are good policy. Moreover, our purpose here is to describe and analyze the constitutional principles that the courts apply concerning vouchers – not to assert what those principles ought to be. We disagree among ourselves on whether *Zelman* was a proper interpretation of the Establishment Clause, and on how the constitutional issues that remain should be resolved. On those remaining questions, we can only provide a brief overview of the competing arguments that are likely to be made in future litigation and public debate.

I. *ZELMAN* AND VOUCHERS UNDER THE ESTABLISHMENT CLAUSE

A. The Cleveland Program

The Cleveland voucher program was a response to the failure of Cleveland's public schools, which have ranked among the worst performing in the nation – in 1996 only one in 10 ninth graders passed a basic proficiency examination, and in 1995 a federal judge placed the district under state control.[2] The Ohio legislature in 1999 enacted a package of assistance to Cleveland students. A student could remain in the public schools and receive state-reimbursed tutorial sessions, or attend a private school or certain other public schools and receive a tuition grant – essentially a voucher – of up to $2,250. Parents could choose any private school in Cleveland, or any public school district adjacent to Cleveland, that decided to participate in the program. An adjacent public school that participated would receive the $2,250 payment from the state in addition to the state's ordinary share of per-pupil funding for each voucher student; if a parent chose a private school, the state would send a check, payable to the parents, to the school and the parents would endorse it over to the school.

B. The Supreme Court Decision

The Supreme Court, by a 5-4 vote, held that Ohio's was "a program of true private choice," one "in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[3] Such a program, the Court said, does not

violate the Establishment Clause prohibition on government "advancing religion" because the decision to use the funds at a religious school "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."[4] If a voucher program leaves parents with a genuine choice of schools where they can use the benefit, it is constitutional.

The key to *Zelman*, then, is to understand what features make a program one of "true private choice." The Court emphasized three criteria:

- The program was **neutral toward religion**;
- Any monies flowing to religious schools flowed through the **decisions of individuals** rather than as direct payments from the state; and
- The program offered parents **genuine secular options** for their children's schooling.

1. Neutrality. The Court first emphasized that the Ohio program was "neutral in all respects toward religion."[5] Both the class of beneficiaries – children in Cleveland public schools – 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 more favorable terms for religious schools than for other schools – indeed, several terms gave more favorable treatment to public schools than to private schools. Adjacent public schools participating would receive from the state not only the voucher amount, but also the state's ordinary per-pupil contribution; and parents could choose community schools (Cleveland's term for charter schools) or magnet schools in the Cleveland public system and still receive free tuition, while at private schools all parents would have to make at least some co-payment.[6] (We will say more about the relevance of community and magnet schools shortly.)

Neutrality in this sense – the same terms for religious recipients as for secular recipients – should be fairly easy for a voucher program to satisfy. The program should simply avoid terms that formally give aid in greater amounts, or under more favorable criteria, to religious entities. Neutrality is related to parental choice, in the Court's view, because "where the aid is made available on the basis of neutral, secular criteria," then it generally does not " 'create [any] financial incentives for parents to choose a sectarian school.' "

As noted above, the Ohio 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 anywhere from $4,167 to more than $6,000 in state funding per student for the public options. The *Zelman* majority pointed to this to bolster the conclusion that the program did not skew incentives toward religion, but it added that "such features of the program are not necessary to its constitutionality."[7] It appears that while the state may provide less money per student to religious schools than to others, it may also provide an equal amount – at least up to the per-pupil cost in religious schools.

2. Decisions by Individuals. Although the point is not at issue in *Zelman*, it is important to emphasize that the majority's approval extends only to programs in which aid reaches schools because of the "independent choices of private individuals" as opposed to "programs that provide aid directly [from the government] to religious schools."[8] In referring to this distinction, *Zelman* cited an earlier Supreme Court decision 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 non-religious alike.[9] Vouchers for private-school tuition typically contain no such restriction on use, and therefore to be valid under the federal Constitution they must channel aid through some mechanism of individual choice for example, the Cleveland arrangement under which parents choosing a private school endorsed their state check over to the school. Nor will it suffice under current law for the state to allocate direct aid to private schools based on a per-student formula.[10]

3. Genuine Secular Options. Finally, *Zelman* emphasized that the program "provide[d] genuine opportunities for Cleveland parents to select secular educational options" – that it "permits [them] to exercise genuine choice among options public and private, secular and religious."[11] Parents could choose to send their children to nonreligious private schools; they could choose community schools and magnet public schools; they could choose any adjacent suburban public school district that agreed to accept voucher students (although none of those districts had actually agreed to do so by 2002); and finally, they could elect to keep their children in a regular Cleveland public school while availing themselves of publicly funded tutorial aid.

The *Zelman* analysis suggests several points about how to determine whether choice and options are genuine. First, the actual percentage of aid that ends up at religious institutions usually will be irrelevant to whether other options are deemed genuine. The challengers in *Zelman* objected that 46 of 56 participating private schools (82 percent) were religious, and that in the litigation year 96 percent of the voucher aid was used at religious schools. But the Court responded that because 81 percent of private schools in Ohio are religious – virtually 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.[12] It added that basing a standard of constitutionality on the actual percentages of aid used could not provide "certainty" or "principled standards," because the statistics would vary from year to year and location to location.[13]

In this respect, 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.

Second, the universe of relevant options includes schools outside the voucher program itself – including, potentially, the regular public schools. The question 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."[14] Thus the universe of relevant options included the community and magnet schools and even the tutoring offered in regular Cleveland public schools – since all of these options were available to parents. When the community and magnet schools were counted as options, the percentage of children who chose religious schools was less than 20 percent.[15]

Third, there may be future arguments over the quality of secular educational options as part of determining whether they are "genuine" – although the Court is not likely to be highly demanding in evaluating the quality of secular educational options. The majority appeared to place the burden of proof on those challenging the genuineness of the options – finding "no evidence that the program fails to provide [secular] opportunities."[16] Justice O'Connor, writing on this at more length, stated that nonreligious alternatives "need not be superior to religious schools in every respect" but "need only be adequate substitutes for religious schools in the eyes of parents," and she criticized the dissent for adopting too narrow a view of what features would make a school a reasonable alternative.[17]

How do these principles apply to voucher plans in particular contexts? Consider first the context of the Cleveland plan itself: vouchers as a response to failing public school systems. In such cases, the government should usually be able to offer a range of options. Since many failing systems are in large cities, there will often be charter or magnet schools, which *Zelman* declares to be relevant choices, assuming they are "adequate." Indeed, the *Zelman* majority indicates that the regular public schools with additional tutorial assistance count as an option. It would be more questionable whether the state could offer private-school vouchers as the only alternative to a failing public system, without any reforms or supplements to the public system like Cleveland's community and magnet schools and tutorial assistance. If the state relied on such unreformed public schools as a genuine option, challengers could reply that the very premise of the legislation was that the public schools were inadequate.

Next, consider vouchers outside the context of a failing public system: imagine, most dramatically, that a state offers all parents a choice between free public schools and a voucher for private schools. This broader program also finds support in the logic of *Zelman*. Many areas of the state will not offer community or magnet schools, but in many or most areas the regular public schools will be adequate – unlike the case of the failing public system – and therefore may count as a genuine option. And if the regular public schools count, their enrollment will almost always dwarf that of private schools, thus ensuring sufficient secular options.

However, the broader hypothetical program does bring up an ambiguity in *Zelman*. The Court stopped short of overruling one of its decisions from the early 1970s that had struck down a tuition grant program similar in many respects to the Cleveland vouchers.[18] Instead the majority distinguished the earlier program on the ground that, unlike Ohio's, it was not neutral with respect to religion because it did not itself include any public schools and its purpose was to " 'offe[r] . . . an incentive to parents to send their children to sectarian schools.' "[19] These distinctions might be used to challenge a statewide voucher program that simply covered private schools as an alternative to traditional public schools; such a program, viewed in isolation, might be seen as primarily aiding religious schools, rather than low-income parents as the Ohio program did. On the other hand, these factual distinctions as to which programs are

"neutral" might not survive if they become the subject of future litigation. Voucher proponents could argue that the distinctions are at odds with the general thrust of *Zelman* – that in determining whether the state has maintained neutrality, the court must consider "*all* [genuine] options [the state] provides [to] schoolchildren," including those outside the specific program such as the charter, magnet, and even regular public schools (if they are adequate).

II. THE NEXT ROUNDS: CONSTITUTIONAL ISSUES AFTER *ZELMAN*

As mentioned above, by largely resolving the basic Establishment Clause challenge, *Zelman* opens the door for new sets of constitutional issues concerning vouchers. The following questions will likely become central in the next few years. But *Zelman* says little or nothing directly about these questions, and even lower courts have made only a few rulings on them in voucher cases. The questions therefore remain largely open – and the signers of this statement have significant disagreements on how they should be resolved. For these reasons, this statement can only touch briefly on these issues and on the main arguments that the contending sides are likely to present.

A. State Constitutional Restrictions on Vouchers

Resolving a key Establishment Clause issue eliminates only one source of constitutional challenges to the inclusion of religious schools in voucher programs. More than two-thirds of the states have constitutional provisions that restrict aid to religious organizations more explicitly than does the Establishment Clause. These provisions, mostly dating from the late 1800s and early 1900s, will play a significant role in the voucher debates in state legislatures, and will form the basis for legal challenges to voucher plans that are enacted. The state restrictions vary in their language, however, and can be interpreted in varying ways. Moreover, they will in turn be challenged under the federal Constitution.

1. Interpretation of State Provisions. Although the state restrictions might be analyzed in a number of ways, it is helpful to group them into three categories. Each state provision, of course, will generate its own distinct set of textual, historical, and precedent-based arguments.[20]

A few provisions say that government funds may not be used for any private school – or in the language of some provisions, that all schools supported by public funds must be under the "exclusive control" of public authorities. Such language, if applied to vouchers, would exclude secular as well as religious private schools.

A second large 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." In all the textual variations, these provisions restrict aid to religious, but not to secular, private schools. The phrases in these provisions tend to be strong in forbidding aid, but different state courts have interpreted such provisions differently, some permitting voucher style programs and some forbidding them.[21]

In a third category are 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." Even if such phrasing were interpreted to forbid voucher aid to the religious teaching in a religious school, it might nevertheless allow the state to support a distinct or separable secular education component. If that is so, the questions would be whether the state court views religious schools as having such a separable secular component, and whether tuition vouchers could be so limited — whether by restricting their size, requiring the school to segregate accounts, or requiring the school to separate tax-funded activities from religious ones.

2. Federal Challenges to State Provisions. If a state enacts a voucher program and excludes religious schools from participation (whether because of a state constitutional provision or a policy judgment), the exclusion is likely to be challenged under several federal constitutional provisions. The federal argument then would be that religious schools are not merely permitted, but have a right, to participate in the program if secular private schools are included.

Two lines of argument are likely to be prominent in the federal challenges to state restrictions. The first is that the exclusion of religious schools from a voucher program discriminates against religion and so violates the Free Exercise Clause, the Free Speech Clause (as a form of "viewpoint discrimination" against religion), and/or the Equal Protection Clause.[22] The challengers will argue that once the government offers benefits for private education, to withhold such benefits for those who choose schools with religious viewpoints — including benefits for the secular educational value those schools provide — is to penalize the exercise of constitutional rights.[23]

Those defending the state restrictions are likely to make a number of counterarguments. In particular, they will rely on several decisions holding that the state need not subsidize the exercise of constitutional rights (here, the choice of a religious education)[24] even if it subsidizes alternative conduct (here, the choice of a secular education).[25] They will argue that excluding religious schools does not unconstitutionally penalize that choice, because government may refuse to fund programs that choose to merge conduct the state does not intend to subsidize (the practice of religion) with activities the state has an interest in subsidizing (the provision of a secular education).[26]

The second likely argument challenging state anti-aid provisions is that many of them are constitutionally tainted because their enactment was substantially motivated by 19th-century Protestant and nativist hostility toward the growing Catholic population and Catholic school system. Four current Supreme Court justices have joined an opinion reviewing the history and have concluded in strong terms that bans on aid to sectarian schools have often reflected anti-Catholic animus.[27] Those defending the state restrictions will likely make several counterarguments, including, first, that some of the state restrictions predate the 19th-century anti-Catholic movement and thus are not tainted by it; second, that determining the original motive of an enactment is a difficult and problematic inquiry, and that courts often refuse to accept evidence of bad motive as the basis for invalidating an otherwise constitutional law; and third, that even those state provisions originally affected by anti-Catholicism also rest on legitimate rationales for separating church and state that have the support of many people who are not anti-Catholic or anti-religious.

In general, the issues concerning state restrictions will involve a tension and require a resolution between different principles that all have some importance for the current Supreme Court. On one hand is the commitment to treating religious persons, activities, and organizations no worse than others that are similarly situated in terms of their access to government funds. On the other hand is a commitment to allowing the government some discretion in how it spends its resources to provide educational opportunities for children, and a commitment to states' rights – in this case, discretion for a state to separate church and state more strictly than the federal Constitution requires.

B. Regulations Accompanying Vouchers

If the inclusion of religious schools in a voucher plan survives both federal and state constitutional challenges, the next round of litigation is likely to center on the regulations that accompany the receipt of voucher funds. The Cleveland plan in *Zelman* forbade participating schools to discriminate on the basis of race, ethnicity, or religion, or to teach unlawful behavior or "hatred of any person or group" based on race, ethnicity, or religion.[28] Justice Souter's dissent argued that these conditions on religious schools' autonomy were a reason to invalidate the program,[29] but the majority ignored the point, suggesting the possibility that taxpayers challenging voucher programs (as distinguished from direct funding programs) will not have standing to assert that such regulations create the danger of "excessive entanglement" between the state and religious schools. Rather, the two emerging categories of constitutional questions concerning regulation appear to be:

- If the state imposes conditions on vouchers that would affect the autonomy of a participating religious school, may the school (or a parent wishing to use a voucher at the school) challenge the condition as constitutionally forbidden?

- If the state exempts only religious schools from conditions on vouchers, is the *exemption* constitutionally forbidden?

1. Constitutional Objections to Conditions. On the first question, an objecting school might raise arguments similar to those mentioned in part II-A: that a condition on what a school receiving vouchers may teach is a form of viewpoint discrimination in the distribution of state benefits, and that under the doctrine of "unconstitutional conditions" the state may not require a voucher recipient or participating school to give up constitutional rights of expression, association, and religious exercise as the price of participating in a state benefit program.

Again, the state will likely rely on several Supreme Court decisions that give the government substantial power to place conditions on persons or organizations that it subsidizes. For example, *Rust v. Sullivan*[30] permitted the government, under a program funding family planning, to prohibit projects receiving funds from discussing abortion, on the ground that the government could choose the policy it favored without having to fund the alternative. The state will likely analogize a voucher program to *Rust*, arguing that, because the state is funding the education of children, it may determine the content of the educational program it chooses to subsidize.[31]

The objecting school or individual will likely respond by analogizing vouchers to the funding program in *Rosenberger v. Rector of Univ. of Virginia*,[32] which held that it was unconstitutional for a state university to exclude a student publication, because of its viewpoint, from a benefit available to a wide range of student expressive organizations. The religious school would likely claim that vouchers are analogous because they are redeemable at a wide range of schools and because they place educational decisions in the hands of parents rather than the state – both features that *Zelman* emphasized. The state would likely reply by arguing that *Rosenberger* is a limited decision involving an unusual case – a university's policy of funding a wide range of student speech without general concern for its content – that is unlike a state's decision to pursue educational goals through an elementary and secondary-school voucher program.

Even if a religious school is able to assert constitutional rights against voucher conditions, the question is just what those constitutional rights would be. Could a participating school challenge the Cleveland condition that it not teach "hatred of any person or group" based on ethnicity or religion? Could a religious pacifist high school challenge a condition that no participating school teach students to refuse to serve in the military? Could a participating religious school that opposes homosexual behavior refuse to hire an openly gay person as a principal – or a teacher – or refuse to admit an openly gay student if the voucher program has a condition prohibiting sexual-orientation discrimination?[33] Future rounds of litigation may feature questions like these.

The other condition in the Cleveland program – that participating schools not discriminate on the basis of religion – raises one of the issues that divides the signers of this statement. Some of us believe, and courts may hold, that a religious school that prefers members of its faith as employees is exercising not a special right, but the same right that other ideological organizations have to ensure that their employees are committed to the organization's mission. Under this view, a religious school should retain this right even when it participates in a voucher program. Others of us believe, and courts may hold, that as to non-leadership positions, discrimination on the basis of religion, like discrimination on the basis of race, gender, ethnicity, and other characteristics recognized by civil rights laws, is a practice of concern to society because of its potential to limit the opportunities of members of minority groups. Under this view, the state may (or even must) impose a general condition limiting such preferences by schools that benefit from state funds, including religious schools. A third possibility is that a court may rule that an anti-discrimination prohibition is appropriate or even necessary vis-à-vis employees teaching secular subjects and yet find that such a prohibition should not apply to leadership positions and those teaching religious subjects.

2. Constitutional Objections to Exemption. If a state itself exempts religious schools from a certain condition on a voucher program, the question then becomes whether the statutory exemption is forbidden by any constitutional provision. If an exemption is given to religious schools but not secular private schools, a challenger will likely argue that this violates the Establishment Clause as interpreted in *Zelman*, since one of the prime features in upholding the Cleveland program was its neutrality – that it had the same terms for religious as for nonreligious schools.[34] The challengers may also claim that the exemption violates the same free speech principles of viewpoint neutrality cited by voucher proponents challenging state constitutional limits on aid to religious schools. In response, defenders of religious exemptions

will likely argue that the overriding criterion in *Zelman* is not neutrality in the sense of the same facial terms, but rather whether the program skews the choices of individuals toward religious schools and then argue that a particular exemption for religious schools does not so skew the choices.

CONCLUSION

The Court has announced well-defined criteria for measuring whether a program of elementary and secondary school vouchers satisfies the Establishment Clause. Although there may be litigation over what constitutes a "genuine" secular alternative, for the most part state and local officials who choose to create voucher programs can look to *Zelman* for guideposts on how to draft a valid program that includes religious schools as participants. But on the other issues we have identified state constitutional restrictions on educational aid and questions concerning the conditions accompanying voucher programs – *Zelman* says little or nothing. It will likely take years to resolve these issues in various courts and, as to the remaining federal constitutional issues, perhaps ultimately in the Supreme Court again.

ENDNOTES

1. 122 S. Ct. 2460 (2002). *Zelman* may have implications for the constitutionality of vouchers in other contexts, such as the provision of social services. *See, e.g.*, Freedom From Religion Foundation v. McCallum, 2002 U.S. Dist. LEXIS 14177 (W.D. Wisc. 2002) (upholding beneficiary choice program, which includes faith-intensive provider as well as secular options, for drug offenders under control of Wisconsin Department of Corrections). In this document, however, we confine our analysis to issues specific to vouchers for primary and secondary education.
2. *Zelman*, 122 S. Ct. at 2463.
3. *Id.* at 2467, 2465.
4. *Id.* at 2467.
5. *Id.*
6. *Id.* at 2468.
7. *Id.*
8. *Id.* at 2465.
9. *See* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., joined by Breyer, J., concurring in the judgment). This concurrence provided the crucial votes for *Mitchell*'s result, on the narrowest ground supporting the result, and therefore operates as the holding of the Court for that case. *See, e.g.*, Marks v. United States, 430 U.S. 188, 193 (1977).
10. Justice O'Connor in *Mitchell* rejected the argument that such a mechanism mirrors parental choice – in part, she said, because under the formula parents who chose a private school would not have the option of declining the aid attributable to their child. 530 U.S. at 842.
11. *Zelman*, 122 S. Ct. 2469, 2473.
12. *Id.* at 2469-71.
13. *Id.* at 2470.
14. *Id.* at 2469 (emphasis in original).
15. *Id.* at 2471.
16. *Id.* at 2469 (O'Connor, J., concurring).
17. *Id.* at 2477.
18. The decision, Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), struck down New York's program giving tuition grants of $50 to $100 to parents of private school students, most of them in religious schools. *Nyquist*, the leading precedent against voucher programs before *Zelman*, was decided at the height of the Court's "no aid" period in the 1970s; many of its theoretical foundations have been rejected in later decisions, including in *Zelman* itself.
19. *Zelman*, 122 S. Ct. at 2472 (brackets and ellipses in original) (quoting *Nyquist*, 413 U.S. at 786).
20. For more detailed analysis, *see, e.g.*, Toby Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117 (2000); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 681-99 (1998); Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 West s Educ. L. Rep. 1, 20-39 (1997); Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing the Separation of Church and State Through State Constitutional Provisions*, 71 Va. L. Rev. 625, 638-42 (1985).
21. Some courts have held that voucher-type programs are permissible because they "aid" or "support" students rather than religious schools. But some state provisions forbid aiding sectarian schools "directly or indirectly," which would make that argument more difficult.
22. *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); Rosenberger v. Rector of Univ. of Virginia, 515 U.S. 819 (1995).
23. The state provisions that prohibit government aid to all private schools, secular as well as religious, would be less subject to the charge of discriminating against religion.
24. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
25. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Maher v. Roe, 432 U.S. 464 (1977).
26. *See Rust*, 500 U.S. 173.
27. *Mitchell*, 530 U.S. at 828-29 (plurality opinion of Thomas, J.).
28. *Zelman*, 122 S. Ct. at 2463.
29. *Id.* at 2499-2500 (Souter, J., dissenting).
30. 500 U.S. 173.

31. *See also Maher*, 432 U.S. 464; National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).
32. 515 U.S. 819.
33. *Cf.* Boy Scouts of America v. Dale, 530 U.S. 640 (2000). Such a claim would raise questions about whether the associational right in *Dale*, which involved a direct prohibition on sexual-orientation discrimination in leadership positions, extends to the selection of teachers and others. It is also unclear whether the associational right in Dale extends to anti discrimination conditions attached to funding. Contrast *Dale* with Grove City College v. Bell, 465 U.S. 555, 575-76 (1984) (upholding conditions against First Amendment challenge).
34. *See supra* part I-B-1.

Mr. CHABOT. Mr. Komer.

STATEMENT OF RICHARD KOMER, SENIOR LITIGATION ATTORNEY, THE INSTITUTE FOR JUSTICE, WASHINGTON, DC

Mr. KOMER. Thank you, and thank you for inviting me to be here today.

I approach this in a slightly different perspective than Professor Laycock since I am not an academic. I am a practitioner and have spent much of the past 10 years defending school choice programs or trying to expand existing school choice programs, to return religious options to those programs.

For us, *Zelman* was, of course, an enormous relief. We had 4,400 kids who had escaped failing public schools and were faced with the prospect that they would have to return to those schools if the Sixth Circuit decision was left standing.

I would like to emphasize three points. These are all in my testimony.

The first is that the *Zelman* decision is not a big departure from past precedents of the Supreme Court. There has been a series of decisions from the Supreme Court spanning at least 15 years that have led to the *Zelman* decision. There is probably not a single concept or principle espoused in this decision that is not, in fact, taken from one of those prior cases. In fact, the original decision that the other side uses to argue that *Zelman* is a departure contains a specific reservation in footnote 38. This is the Nyquist decision which reserved the question that was at issue in *Zelman*. So, we don't believe the *Zelman* decision, contrary to some of the storm from the other side, represented any sort of major departure from the past Establishment Clause precedent.

Secondly, in resolving the Establishment Clause question, *Zelman* allows a new public policy debate over vouchers without the cloud of the alleged constitutionality of vouchers hanging over it. This is an immense improvement in the public policy environment from our point of view, but, as Congressman Frank has so pungently pointed out, that issue is really in a different Committee's jurisdiction, which is are vouchers a good thing, should Congress be supporting vouchers, and is not the question of are vouchers constitutional anymore.

The third point I would like to make is that there are continuing legal and constitutional questions with respect to vouchers, but they involve State constitutions, not the Federal Constitution. As Professor Laycock has pointed out, virtually all State constitutions contain religion clauses, and many State supreme courts or legislatures have interpreted those provisions in an overly broad and overly restrictive fashion, an interpretation that we believe actually infringes upon federally protected constitutional rights, especially under the Religion Clauses, the Equal Protection Clause and the Freedom of Speech Clause.

These overbroad interpretations of State constitutions will ultimately result, in our view, in a second Supreme Court decision which will have to address the extent to which State constitutions can restrict religious liberty more so than the Federal Constitution. We fully anticipate that that process will take a very long time.

We have seen an earlier example of precisely this sort of issue coming up, and the Supreme Court declined to review it. For those of you who may recall, in 1996, in its only unanimous Supreme Court decision on the topic of the Establishment Clause, the Supreme Court held that Mr. Witters from Washington State could use his vocational rehabilitation money to become a minister at a religious college.

The Washington State Supreme Court, on remand from the U.S. Supreme Court, interpreted the State's Blaine amendment to prohibit him from using his voc rehab money to become a minister. The U.S. Supreme Court then declined to review that, and Mr. Witters thus—I believe he did become a minister, but he did it with his own money.

This is an example of what I consider an overbroad interpretation of a State religion clause and one which will ultimately have to be resolved by the Supreme Court of the United States before school choice programs can be implemented or considered without unconstitutional problems or problems of constitutionality throughout the United States.

Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Komer follows:]

PREPARED STATEMENT OF RICHARD D. KOMER

TESTIMONY OF RICHARD D. KOMER

to the

HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

September 17, 2002

First, I would like to thank Chairman Sensenbrenner and the Subcommittee for inviting me to this oversight hearing on the significance of the Supreme Court's school choice decision. As you may know, my colleagues and I at the Institute for Justice represented parents whose children received scholarships through the Cleveland program upheld by the Supreme Court, so the decision in favor of the constitutionality of the program was a source of great personal satisfaction and relief. Our clients' children's educational futures were on the line, along with those of roughly forty-four hundred other children whose families had used the scholarships to escape from some of the worst public schools in the nation. All of our clients, like the vast majority of the other families in the program, could not afford to send their kids to private schools without the help of the scholarships, and faced the prospect of having to return their children to their neighborhood public schools if the Supreme Court did not overturn the decision of the Sixth Circuit. Fortunately, it did, and our clients' children could continue receiving that most vital benefit that society can provide, a decent education.

But you want to hear my views on the broader significance of the Cleveland decision. One interesting question is whether the *Zelman* decision represents a substantial development in the Supreme Court's First Amendment jurisprudence. In my view, the answer is both yes and no. It is "yes" in the sense that it has resolved an open question that was critical to a growing number of cases of great public policy significance. It is "no" in the sense that it's outcome was plainly

foreshadowed by a lengthy string of prior Supreme Court cases that laid down the basic principles that it applied.

The ambivalence in this answer is reflected in the positions of the majority and minority on the Court. The majority opinion , authored by Chief Justice Rehnquist, and joined by Justices Kennedy, O'Connor, Scalia and Thomas, clearly approaches the case as an extension of well-established principles reflected in a string of decisions dating back at least as far as *Mueller v. Allen* from 1983, and including *Witters v. Washington Department of Services for the Blind* from 1986 and *Zobrest v. Catalina Foothills School District* from 1993. The majority views these decisions as establishing a binary principle, namely that where a government sets up a religiously-neutral program that includes religious options and allows individual beneficiaries to make a free and independent choice among those options, the Establishment Clause is satisfied, even if the religious institutions selected by particular beneficiaries receive an indirect and incidental benefit.

Justice O'Connor agrees with this assertion of incrementalism in her separate concurrence, which appears to be written specifically to rebut arguments made by Justice Souter in his dissent to the effect that the majority's position represents a radical break with past precedent. It is important to note that Justice O'Connor joins in all of the Chief Justice's opinion, which makes it an opinion of the Court, unlike her concurrence in *Mitchell v. Helms*, in which she wrote separately without joining Justice Thomas' plurality opinion. Unlike *Mitchell* where she believed the plurality was going too far from past precedents, in *Zelman* she clearly believes the majority's opinion is consistent with past precedent.

It is, of course, the dissenters who argue strenuously, and quite disingenuously, that *Zelman* represents a huge break with past decisions and past principles. They base this

contention primarily on the Court's decision in *Nyquist v. Committee for Separation of Church and State*, a 1973 decision that has been the linchpin of school choice opponents throughout the past twelve years that these cases have been litigated and which was the primary precedent relied upon by the trial and appellate courts below in the *Zelman* litigation. In *Nyquist*, the Court found that a multi-faceted program New York State has passed was in fact "one of the ingenious schemes that periodically reach this Court designed to aid religious schools." At that time, reticent to find that a State acted with a purpose of aiding religion, the first prong of the *Lemon v. Kurtzman* tripartite Establishment Clause test, the Court struck down the program as violative of the second prong as having a "primary effect" of advancing religion.

The program in *Nyquist* had combined three separate components, maintenance grants made directly to religious schools, small grants to low-income individuals for tuition to private schools, and state income tax deductions designed to confer an equal financial benefit on somewhat better-off taxpayers. Well over 90% of the beneficiaries of these latter two components sent their children to parochial schools and this, coupled with the direct nature of the maintenance grant component of the program and the fact the program only provided benefits to families electing to send their children to private schools, led the court to conclude that the intention of the program was to further religious education.

Because the tuition grants and deduction components shared surface similarities with the scholarships provided by school choice programs such as that in Cleveland and a slightly older program in Milwaukee, to say nothing of the more than century old tuition programs in Maine and Vermont, courts have often bought choice opponents' arguments that *Nyquist* controls the scholarship or voucher issue. Proponets of these programs, on the other hand, have consistently sought to distinquish *Nyquist*. If you were paying close attention earlier, you noticed that I said

that the *Zelman* majority found precedential support of choice programs "at least as far back as the *Mueller v. Allen* decision of 1983." *Mueller* addressed a Minnesota state income tax deduction for school expenses, where well over 90% of the deductions were taken for tuition paid to religious schools. And the Mueller majority had to distinquish *Nyquist*, then only ten years old. It did so on the basis of a footnote in *Nyquist* itself, footnote 38, in which the Court expressly reserved for the future the constitutionality of a program like the G.I. Bill or a scholarship program that provides individual beneficiaries with benefits without regard to whether they select a public or private institution. The principle enunciated in that footnote about the provision of individual benefits under a religiously-neutral program are the precise basis on which the *Mueller-Witters-Zobrest* line of cases distinquished *Nyquist*.

Additionally, I would point out that in the very same 1973 term that it decided *Nyquist*, the Court dismissed another case for want of a substantial federal question (which is a type of decision accorded precedential status). This case, *Durham v. McLeod*, involved a South Carolina program of grants to college students that could be used at religious colleges, as well as public and non-religious private colleges. That program was a lot like the Pell Grant Program we are familiar with today, and not even the most committed opponents of school choice programs suggest that it is unconstitutional to permit college students to use their Pell Grants at religious schools. Consequently, it is fair to say that from the moment *Nyquist* was decided in 1973, the court was careful to distinquish religiously-neurtral programs such as that at issue in *Zelman*.

Indeed, for the true cognoscenti among you, it is apparent that from the earliest decisions in which the modern Supreme Court incorporated the federal constitution's religion clauses against state action in the 1940's through the Fourteenth Amendment, the Court has used religious neutrality as a necessary condition for an aid program to include persons choosing

religious schools for their children. In its 1947 *Everson* decision, which first applied the Establishment Clause against the states, the Court upheld New Jersey's provision of transportation subsidies to the families of all its schoolchildren, including those attending parochial schools. The court went so far as to intimate that to exclude the families choosing religious schools would itself violate the constitution. This decision was followed in 1968 by the *Allen* decision upholding against an Establishment Clause challenge New York's program of loaning free secular textbooks to all students' families, including those choosing religious schools for their children's educations. In short, *Zelman* can claim a rich heritage in the modern precedents of the Supreme Court.

In point of fact, I believe that the *Zelman* dissenters really recognize this, and their dissatisfaction is not limited to *Zelman* alone. When I said the dissenters were disingenuous in their claims that *Zelman* represents a radical expansion of Supreme Court precedent, I was referring to the fact that Justice Souter, to take an example, recognized in his dissents in the *Rosenberger* and *Mitchell* cases, which involved forms of institutional (as opposed to individual) aid, that the Court had previously approved religiously-neutral individual aid where any aid reaching religious schools was the result of free and independent individual choices. Rather than acknowledge that in fact the Court's precedents lead inevitably to the outcome in *Zelman*, his dissent really challenges the whole thrust of the Court's Establishment Clause aid cases from *Everson* on. This is an incredibly radical departure from precedent, far more radical in nature and scope than the *Zelman* majority's extension of long-standing and coherent precedent to a slightly new fact pattern.

Nor do the *Zelman* dissenters merely express a desire to overturn 55 years of their Court's precedents. They also boldly state they will not be bound by those precedents, including *Zelman*,

in future cases, and express a yearning for the day that changes in the Court's personnel will allow them to overrule these decisions they abhor. So much for the rule of law. Imagine the public reaction if the Court had overruled *Roe v. Wade*, a decision whose legal underpinnings are vastly weaker than *Everson*'s. Their legal rule seems to be that conservative justices must abide by liberal decisions they detest, but liberal justices are free to disregard conservative precedents they hate. Such double standards are repugnant to any coherent approach to the rule of law and should concern all citizens who purport to believe in a judiciary governed by the rule of law and not men.

Enough about the *Zelman* decision itself, and its significance in constitutional jurisprudence. The majority is clearly correct in viewing it as consistent with an extensive series of cases distinquishing *Nyquist*, and the dissenters clearly incorrect in maintaining it is a radical departure from past precedent. *Zelman*'s real significance lies in its consequences for public policy.

What is radical about *Zelman* is the sort of educational reforms it opens up. The vast majority of Americans have always exercised certain forms of school choice, even after the advent of the free public school system characterized by mandatory assignment to schools. We just aren't accustomed to thinking of it as school choice when a family chooses to buy a home in a particular school district because of the reputation of its schools, or when a family decides to pay to send its children to a private school, but both sorts of families are exercising school choice. And public school districts where many or most of its families can afford to exercise these forms of school choice are quite aware that despite their local monopoly, their clientele does have other options they can pursue if they become dissatisfied enough.

Conversely, however, public school districts where few families have the financial wherewithall to exercise these forms of school choice are also aware that they are serving a captive population whose dissatisfaction will not lead to a decline in usage of their services. Such districts lack a key motivator that districts serving a more affluent clientele have, because they know that no matter how poor the service they provide, they won't lose customers, at least until after the kids exceed the age for compulsory education and they can drop out, which inner city school district kids continue to do in shocking numbers. And *mirabile dictu*, what do we find, but that the poorer the school district's population is, the worst the district's educational performance is.

Please note that I deliberately did not say the less money a district spends on its kids the worse the educational performance. As result of so many school finance equity lawsuits having succeeded in state supreme courts, many states are spending equal, and in some cases dramatically larger, amounts of money in their poorer districts. But oftentimes to no avail. Spending in the 30 poorest districts in New Jersey, for example, which has taken school equity about as far as it can go, is equalized to the very wealthiest districts in that state, not some state average. Approximately $13,000 per student is being spent and student performance remains abysmal.

What *Zelman* makes possible, by removing the constitutional cloud that has always obscured such programs, are voucher-type programs like those in Cleveland and Milwaukee. These programs seek to catalyze educational reform in inner city school districts, which is where our worst problems remain despite decades of failed reform efforts, by empowering families to exercise the same choice wealthier families routinely exercise. In short, to let them choose the school their children will attend, even if it's private, even if it's religious. Faced at last with the

potential loss of significant numbers of its formerly captive clients, the inner city school districts will finally have a reason to become more responsive to their clients' needs.

The developments in Milwaukee, which has the longest-running of the inner city school choice programs, and where the court challenges were resolved in favor of the program's constitutionality in 1998, prove the hypothesis that increased competition from private schools triggers positive responses from the public school district. I'm not an educator, and I won't bore you with the details of that program's success as a catalyst for change. For our purposes, it is enough to know that *Zelman* allows us to argue about the policy merits of these programs in a way that was never possible before, when the opponents of these programs first line of defense was the assertion that these programs couldn't be considered because they were manifestly unconstitutional.

Lest we get too carried away by the prospects of public policy debates over the merits of vouchers, or educational tax credits, the other primary type of program for enhancing parental choice and thus catalyzing educational reform, I have to briefly note that the federal constitutional argument has always been one of two strings to our opponents' legal bow. The other string has always been state constitutions' religion clauses. Our opponents have always preferred to get parental choice programs struck down on state constitutional grounds because the U.S. Supreme Court is much less likely to review such decisions than ones involving the federal religion clauses. Thus in the cases upholding the constitutionality of the Cleveland and Milwaukee choice programs and the tax credit programs in Arizona and Illinois, before we won on the federal religion clause challenges, we had to prevail in state courts on the state constitutions' religion clauses.

Nor have we been uniformly successful in these endeavors. There are two primary sorts of state constitution religion clauses. Approximately 38 states have what are known as Blaine Amendments in their constitutions, which essentially say that state governmental entities cannot appropriate money to aid sectarian institutions. And approximately 29 states have "compelled support" clauses in their constitutions, which say in essence that no one shall be compelled to support a church or religious ministry without his or her consent. Obviously, many states have both types of provisions; only three (Louisiana, Maine, and North Carolina) have neither one. Thus, these provisions represent a potentially major impediment to parental choice programs if they are interpreted broadly to prohibit them. For your information, I've attached to this testimony a map showing which states' constitutions have these sorts of provisions and a representative example of each sort of provision. I've also included some frequently asked questions about these provisions and my responses.

In the course of our school choice litigation over the past twelve years, two supreme courts, one under each type of provision, has held that their constitution prohibits letting parents choose to send their children to a religious school with money from a school choice program. In 1994, the Puerto Rico Supreme Court invalidated an innovative school choice program there based upon the Commonwealth's constitution's Blaine Amendment. And in 1999, the Vermont Supreme Court held that Vermont's compelled support provision prohibited allowing parents to choose a religious school with tuition paid by the towns. Very recently, a trial court in Florida held that Florida's Opportunity Scholarship Program violated the Florida Blaine Amendment by permitting parents to use scholarships to attend religious schools. Fortunately, the Program continues pending the appeals that have been filed and we are cautiously confident that we will get that ruling overturned on appeal.

Fortunately, a number of states with these sorts of provisions do not view them as an impediment to a properly structured school choice program. These states tend to interpret their state religion clauses to parallel the federal religion clauses, so that a program that passes muster under *Zelman* passes muster under the state constitution. But a number of states besides Vermont have in the past interpreted their state language to be more restrictive. We believe that such restrictive interpretations infringe a number of federal constitutional provisions and plan to attack such interpretations as violations of federal constitutional rights. Ultimately our goal is to get the U. S. Supreme Court to rein in these overly broad state interpretations, thereby making the *Zelman* standard universally applicable.

Briefly, our position is that the federal constitution requires that if a school choice program allows parents to select a private school for their children's education, then parents must be allowed to select private religious schools, too. The free exercise of religion clause requires this and so does the Establishment Clause. After all, that Clause prohibits programs with a primary effect of hindering as well as advancing religion, and excluding the choice of religious schools from an otherwise free and independent choice is to discriminate against religion, thereby violating the mandate of religious neutrality embodied in the religion clauses. Such discrimination against religion also violates the Free Speech Clause by discriminating against the religious viewpoint and violates the Equal Protection clause by discriminating on a suspect classification without a rational basis, let alone being narrowly tailored to a compelling need. Interpreting these state provisions requires a real stretch to make them applicable to school choice programs that empower parents to choose private schools, including religious ones. Both sorts of provisions were designed to address specific situations bearing little resemblance to school choice programs. The Blaine Amendments, in particular, resulted from outright religious

bigotry, having been designed to rebuff Catholic demands for a direct public subsidy equal to those going to the public schools, which were at that time distinctly Protestant institutions, having been consciously designed and operated to promote a nondenominational brand of Protestantism.

Ironically, the Ninth Circuit recently decided a case in which it held that Washington State could not use its Blaine Amendment to excuse violation of the Free Exercise Clause. In *Davey v. Locke*, that court held that Washington could not exclude a theology student at a religious college from a merit scholarship program it made available to all other students attending private colleges. Washington defended on the basis of its Blaine Amendment, which it has interpreted very broadly in the past to preclude religious options that are permissible under the federal religion clauses. The court rejected this broad interpretation as a justification for religious discrimination, in much the same way that the U. S. Supreme Court rejected Missouri and Virginia's efforts to use their more restrictive interpretations in *Widmar* and *Rosenberger*, respectively.

Nor are Congress' hands clean in this matter-when Congress failed to pass the federal Blaine Amendment by the necessary supermajorities required for a federal constitutional amendment, Congress required in its enabling legislation that new states entering the union include Blaine Amendments in their new state constitutions. Consequently, all states admitted since 1875 have Blaine Amendments as a condition of statehood, which is also how Puerto Rico came to have a Blaine Amendment in its Commonwealth constitution. As a product of raw religious bigotry, these Amendments are a stain on America's claim to religious liberty and equal treatment under the law. They must not be permitted to perpetuate their legacy into a new century, and certainly cannot be permitted to thwart the most promising educational reform

currently under consideration. The educational future of our most vulnerable citizens demands that these sorry remnants of a shameful past be discarded on the ash heap of history where they belong.

Thank you for the opportunity to provide you my views, and I'd be happy to try and answer any questions you have.

SCHOOL CHOICE:
Answers to Frequently asked Questions about State Constitutions' Religion Clauses

By
Richard D. Komer
Sept. 6, 2002

1. Why are the opponents of parental choice suddenly focusing on state constitutions' religion clauses as a means of derailing school choice programs?

Actually, there is nothing new about parental choice opponents' efforts to thwart school choice by using state constitutions' religion clauses. They have always preferred to challenge parental choice programs on state constitutional grounds, because it is harder for the defenders of choice programs to obtain U.S. Supreme Court review of such decisions. What is new is that they no longer have the second string to their bow, which was their claim that parental choice programs violate the U.S. Constitution's Establishment Clause. Their defeat in *Zelman v. Simmons-Harris*[1] eliminated that line of attack, leaving them with the state constitutions as their only alternative.

Thus, in those cases where IJ and our allies have successfully defended parental choice programs, we have already confronted and overcome claims that state constitutions' religion clauses are violated by parental choice programs. For example, the Cleveland program upheld in *Zelman* had been previously litigated in state court, concluding in a decision by the Ohio Supreme Court that the program did not violate the state constitution's religion clause.[2] Similarly, our opponents challenged the Milwaukee parental choice program, on which the Cleveland program was modeled, on state religion clause grounds and were rebuffed by the Wisconsin Supreme Court.[3] The Arizona Supreme Court likewise rejected a challenge to the Arizona school choice tax credit based on Arizona's religion clause, as did the Illinois Court of Appeals with respect to Illinois' tax credit.

On the other hand, our opponents have successfully used state religion clauses to thwart the inclusion of religious school options in two cases, one in Puerto Rico and another in Vermont. And they recently convinced the trial court in Florida to rule that the Opportunity Scholarship Program there violated the state religion clause. Fortunately, that decision[4] has been stayed pending appeal, and we are hopeful that the decision will be reversed on appeal.

2. Did the Florida decision involve a Blaine Amendment? What exactly are Blaine Amendments?

Yes. Florida's religion provision is a Blaine Amendment. The Blaine Amendments are the most common type of religion clause found in state

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[1] 122 S. Ct. 2460 (2002).
[2] *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).
[3] *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1999).
[4] *Holmes v. Bush*, [cite].

constitutions. By our count, they are found in 38 state constitutions, although their language varies and some interpretation is involved in classifying a provision as a Blaine Amendment. For our purposes, we consider any provision that specifically prohibits state legislatures (and usually other governmental entities) from appropriating funds to religious sects or institutions (often specifically including religious schools) to be a Blaine Amendment.

The Blaine Amendments are named after a failed federal constitutional amendment introduced in the U.S. Congress by Senator James G. Blaine of Maine in 1875. It was directed primarily at efforts by Catholics to obtain a share of funding for their schools, which they had created because of their unwillingness to send their children to the public schools, which were Protestant in orientation. Although the public schools of that period were called "nondenominational," that appellation did not mean that they were non-religious or secular in today's terms. It meant that they did not teach the doctrine of any particular Protestant sect or denomination in the course of conducting religious activities, such as school prayer, Bible reading and lessons, and hymn singing. Understandably, Catholics and certain other religious groups were unwilling to participate in the public schools and maintained their own schools.

When Catholics began agitating for equal funding for their schools, politicians such as Blaine got into the act because the vast majority of Catholics were Democrats, while the Republicans who controlled Congress tended to be white, Anglo-Saxon Protestants.[5] Blaine and the Republicans turned the school aid demands of the Catholics into a political issue and proposed their amendment to prevent the legislature from meeting the Catholics' demands for equal treatment of their schools. Although the amendment easily obtained a majority of votes in both the House of Representatives and the Senate, in the Senate it failed to obtain the super-majority required for a constitutional amendment.

Despite their narrow defeat in the Senate, the backers of the Blaine Amendment succeeded over the next quarter century in promoting their anti-Catholic agenda by requiring that newly formed states include Blaine Amendment language in their state constitutions as a condition for admission to the union. Additional states added Blaine language on their own, joining still other states whose Blaine-like language pre-dated even the federal effort and provided models for Blaine's efforts.[6] Today, all of the Western states' constitutions have Blaine Amendments in them, and perhaps half of the states east of the Mississippi do also.

3. What about the other states that don't have a Blaine Amendment—do their state constitutions contain religion language that poses a potential problem for parental choice efforts?

Yes. Although the Blaine Amendments are the most common type of state religion clause, there is another very common provision that we call "compelled support" provisions. In fact, 29 states have this sort of language in their

[5] It is during this precise period that a Republican characterized the Democrats as the party of "Rum, Romanism, and Rebellion."
[6] For example, Massachusetts adopted the earliest Blaine-like language in the 1850's, during an earlier wave of anti-Catholic sentiment that was a reaction to increased Catholic immigration and fueled the Know-Nothing movement, which briefly captured control of the Massachusetts state government.

constitutions, so, obviously, many states have both compelled support and Blaine Amendment language. Only three states, Louisiana, Maine, and North Carolina have neither sort of language. The common component of a compelled support clause is language providing that no one shall be compelled to attend or support a church or religious ministry without his or her consent. Sometimes the language will specifically include religious schools in the entities that cannot be supported.

The historical antecedents of these provisions are much older than the Blaine Amendments and addressed a different concern, the colonial era practice of requiring church attendance and support for the colony's established church. Thus, this sort of provision can be found in some of the earliest states' constitutions, such as Pennsylvania, Vermont and Virginia, dating from the 1770s. Of the states west of the Rocky Mountains, only Idaho has a provision like this—there is a pronounced eastern bias to the map of states with compelled support provisions.

4. What is the legal argument that parental choice programs violate these Blaine Amendments?

Much like their theory under the federal establishment clause, the opponents of parental choice programs argue that providing student assistance to families opting for a religious school for their children's education is the equivalent of providing aid directly to the religious schools themselves. Although the Blaine Amendments were obviously designed to address direct aid to the schools themselves, which was, after all, what Catholics were requesting at the time the Blaine Amendment was created, the opponents of choice wish to extend the language to encompass money that incidentally reaches religious school coffers because parents have selected to spend their scholarships there.

The U.S. Supreme Court definitively rejected this theory under the establishment clause in *Zelman*, holding that where the scholarship program is religiously-neutral, *i.e.*, neither favoring nor disfavoring the choice of religious schools, and where the parents made a free and independent choice of a religious alternative for their children's education, the aid is not to be treated the same as direct aid to the religious schools. Parental choice opponents hope that the state supreme courts will nonetheless adopt a broader construction of their states' Blaine amendments that will be more restrictive of parental choice than the federal establishment clause. Our counterargument is the same as under the establishment clause: that scholarship/voucher programs aid families, not schools, and that not one dime reaches a religious school but for the free and independent choice of a parent.

5. Is the legal argument under the "compelled support" clauses similar to that under the Blaine amendments?

Yes. Parental choice opponents argue that when people's taxes are used to pay tuition for children whose parents have enrolled them in religious schools it is tantamount to compelling people to pay taxes to be given to a church, ministry or church school. This is, of course, a far cry from the practice of tithing that the compelled support clauses were originally intended to combat, where the government served as a tax collector for an established church. Nonetheless, the opponents of parental choice programs insist that these provisions prohibit giving

assistance to families if they choose a religious option for their children's education.

6. How successful have these anti-choice arguments been so far?

Not very successful. We have successfully repelled attacks on parental choice programs based on Blaine Amendments in Arizona,[7] Illinois,[8] and Wisconsin.[9] On the other hand, as we mentioned previously, opponents succeeded in nullifying the Puerto Rico parental choice program by an attack based on the Commonwealth's constitution.[10] As with so many of the newer states, Puerto Rico's constitution contains a Blaine Amendment because the congressional enabling act that permitted Puerto Rico to become a commonwealth required it. And the trial court in Florida ruled against the Opportunity Scholarship Program there based on a Blaine Amendment, although we are confident that decision will be reversed on appeal.

In states with compelled support clauses, we successfully defended parental choice programs against attack in Illinois,[11] Ohio,[12] and Wisconsin.[13] On the other hand, we lost in Vermont where the Vermont Supreme Court ruled that its clause required the exclusion of the option of choosing a religious school from Vermont's tuitioning system.[14] (Under that system, approximately 90 school districts tuition their high school students to the public or private high school the parents choose, in lieu of operating their own public high school.) Despite the fact that parents had the option of choosing religious schools from the inception of the program in 1869 until the Vermont court ruled it violated the establishment clause in 1961[15] (a decision the Vermont Supreme Court itself reversed in 1994[16]), the Court ruled that inclusion of the option would be compelled support of a ministry.

7. What does the future hold with respect to these state constitutions' religion clauses?

We have a pretty good idea based on past precedents how some states would approach their religion clauses. The question is which states are likely to construe their clauses to parallel that given to the establishment clause of the federal constitution and which states are likely to construe their provisions more restrictively vis-à-vis parental choice programs. Because the question of parallel interpretation has come up before in some states, we can look at past case law to aid in predicting how that state's supreme court might rule.

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[7] *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999).
[8] *Griffith v. Bower*, 319 Ill. App. 3d 993 (5th Dist.), *app. denied*, 195 Ill. 2d 577 (2001); *Toney v. Bower*, 318 Ill. App. 3d 1194 (4th Dist.), *app. denied*, 195 Ill. 2d 573 (2001).
[9] *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1999).
[10] *Asociacion de Maestros v. Torres*, 137 D.P.R. 528, 1994 PR Sup. LEXIS 341.
[11] *Griffith* and *Toney*, *supra* note 9.
[12] *Simmons-Harris v. Goff*, *supra* note 2.
[13] *Jackson v. Benson*, *supra* note 10.
[14] *Chittenden Town Sch. Dist. v. Dep't of Ed.*, 169 Vt. 310, 738 A.2d 539 (1999).
[15] *Swart v. South Burlington Sch. Dist.*, 122 Vt. 177, 167 A.2d 514 (1961).
[16] *Campbell v. Manchester Bd. of Sch. Dirs.*, 161 Vt. 441, 641 A.2d 352 (1994).

When in the past the U.S. Supreme Court has approved the inclusion of the families choosing religious schools in a program, such as transportation subsidies in *Everson v. Board of Education*[17] and free secular textbooks in *Board of Education v. Allen*,[18] many state legislatures responded by passing similar programs, which the same groups that now attack parental choice programs challenged as violations of these state religion clauses. Some of those earlier lawsuits were successful in persuading the state supreme courts to take a more restrictive view of permissible aid to families, while other supreme courts opted for a parallel interpretation. For these states, both parallel or non-parallel in their interpretations, we have a pretty good indicator of how those courts will rule in the future. The remaining states, which have not confronted the issue to date, are unknown territory.

For example, Washington epitomizes a state that has taken a more restrictive view. When the state legislature passed a transportation program allowing families with children in religious schools to participate on an equal basis with all other families, the Washington Supreme Court ruled that the state Blaine Amendment forbade such equal treatment.[19] Similarly, after the U.S. Supreme Court unanimously ruled that the establishment clause was not violated if Washington allowed a resident eligible for vocational rehabilitation to use his funding to attend a religious college and pursue a religious vocation, the Washington Supreme Court held that to do so would violate its Blaine Amendment.[20]

Illinois, on the other hand, epitomizes a state that interprets its state constitution's religion clauses in a parallel fashion to the federal guarantees. Despite having both Blaine and compelled support language in its constitution, Illinois interprets those provisions in lockstep with the free exercise and establishment clauses.[21]

A lot of states, however, fall into neither category, usually because their courts just have not confronted this issue before. Those states' courts' reaction to the question of whether to interpret their religion clauses to parallel the federal Constitution is impossible to predict with any degree of confidence. Many states fall into this category, so it is important to see how the next few cases go. Fortunately, there is an increasing recognition that the state Blaine Amendments in particular were conceived in an atmosphere of religious animus that counsels great caution in applying them expansively, as parental choice opponents would have courts do.

8. What do you mean by "increasing recognition"?

Most importantly, several members of the U.S. Supreme Court have recognized that the Blaine Amendments reflect an anti-Catholic legacy that is unworthy of the Court's approval. In *Mitchell v. Helms*,[22] Justice Thomas stated

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[17] 330 U.S. 1 (1947).
[18] 392 U.S. 236 (1968).
[19] *Visser v. Nooksack Valley Sch. Dist. No. 506*, 207 P.2d 198 (Wash. 1949).
[20] *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989). .
[21] See *Griffith* and *Toney*, *supra* note 9.
[22] 530 U.S. 793 (2000).

in his plurality opinion, which was joined by Chief Justice Rehnquist and Justices Kennedy and Scalia, that:

> [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. .... Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the Amendment arose at a time of considerable hostility to the Catholic Church and to Catholics in general ....[23]

Justice Breyer likewise seems to recognize the Blaine Amendment's anti-Catholic "pedigree" in his dissent in *Zelman*, which was joined by Justices Stevens and Souter, when he implies that anti-Catholic sentiment "played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (*i.e.,* Catholic) schooling for children."[24]

Nor is the U.S. Supreme Court the only court to recognize the Blaine Amendment's "shameful pedigree." In rejecting the challenge brought by parental choice opponents to Arizona's school choice tax credit, the Arizona Supreme Court stated that "[t]he Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to what was perceived as a growing 'Catholic menace.'"[25] The Court declined to give a broad reading to language it said it would be "hard pressed to divorce from the insidious discriminatory intent that prompted it."[26]

Both the U.S. and Arizona supreme courts relied on recent scholarship delineating the Blaine Amendments' origins in religious discrimination.[27]

9. Does the federal Constitution limit the interpretation of these state religion clauses in any way?

Yes, in our opinion. Not only are members of the U.S. Supreme Court showing increasing recognition that the state Blaine Amendments have a discriminatory pedigree, but the Court has decided a number of cases where it has refused to countenance states' efforts to justify infringements on free speech/free exercise rights based on expansive interpretations of their Blaine Amendments. For example, in *Widmar v. Vincent*,[28] the Court refused to let Missouri justify its denial of religious groups equal access to campus facilities at the University of Missouri on the basis of the Blaine Amendment and compelled support clauses in its state constitution. Similarly, in *Rosenberger v. Rectors & Visitors of the*

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[23] *Mitchell*, 530 U.S. at 828.
[24] *Zelman*, 122 S. Ct. at 2504 (Breyer, J., dissenting).
[25] *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz.), *cert. denied*, 528 U.S. 921 (1999).
[26] *Id.*
[27] See, *e.g.*, Joseph Viteritti, *Blaine's Wake:School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657 (1998); and Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992).
[28] 454 U.S. 263 (1981).

University of Virginia,[29] the Court refused to let Virginia justify its denial of student fee subsidies to a religious student publication on the basis of Virginia's Blaine Amendment and compelled support language. Missouri and Virginia happen to be two states that, like Washington, have consistently interpreted their religion clauses expansively to restrict parental choice.

When a state denies a student or his or her family educational assistance because that student is attending a religious school, while providing such assistance to those students whose families have chosen non-religious private schools for their children, it is discriminating on the basis of religion. Where the family is religiously-motivated in choosing the religious school, the discrimination denies the free exercise of religion, as well as constituting view-point discrimination under the free speech clause of the First Amendment. By classifying on the basis of religion (a suspect classification that must be subjected to strict scrutiny) without a compelling need to do so, the state denies those persons choosing religious schools the equal protection of the laws under the Fourteenth Amendment. And by violating religious neutrality and directly hindering religion versus non-religion, the state violates the establishment clause of the First Amendment as well. Under the supremacy clause of the U.S. Constitution, courts must avoid state constitutional interpretations that infringe upon federally-protected rights, and thus we believe that the restrictive interpretations of the state constitutions' religion clauses violate federal rights.

10. What do you plan to do about these restrictive interpretations of state religion clauses?

First, we plan to continue to help defend parental choice programs that states pass, as in Florida, from attacks based on restrictive readings of state religion clauses. Second, we plan to affirmatively attack these restrictive interpretations in lawsuits brought in states with a history of so interpreting their constitutions. We will allege that by excluding the choice of religious options in parental choice programs the states are violating federally protected rights.

We intend to target both Blaine Amendment states and compelled support states in order to make sure that neither sort of religion clause is interpreted in such a way that it presents a barrier to the full exercise of federal rights. Our first two such lawsuits will be in Vermont, which has a compelled support provision, and Washington, which has a Blaine Amendment. We are encouraged by the Ninth Circuit's recent decision in *Davey v. Locke*,[30] which held that Washington could not exclude from its college merit scholarship program a student who was pursuing a theology degree from a religious college. The court refused to accept Washington's defense that its Blaine Amendment required it to exclude the student.

Ultimately, we expect that the U.S. Supreme Court will have to address this issue, as it did in *Zelman* with the issue of whether the establishment clause permitted scholarship recipients to select religious schools. Towards that end, cases will be selected with an eye to developing conflicts among the subordinate

[29] 515 U.S. 819 (1995).
[30] 2002 U.S. App. LEXIS 14461 (9th Cir.).

appellate courts, state and federal. We are confident that in the end the Supreme Court will rule in favor of liberty and ensure that these state constitutional provisions are not used as vehicles for discriminating against those families who, for whatever reasons, prefer to educate their children in religious schools.

The Author

Richard D. Komer is a senior litigation attorney at the Institute for Justice (IJ). Before joining the Institute in 1993, Komer served as a civil rights lawyer for 14 years in several federal departments and agencies, including service as Legal Counsel at the Equal Employment Opportunities Commission and as Deputy Assistant Secretary for Civil Rights at the U.S. Department of Education. At IJ he has worked on parental choice cases in Arizona, California, Florida, Illinois, Maine, Ohio, Pennsylvania, Vermont and Wisconsin.

Mr. CHABOT. Reverend McDonald.

STATEMENT OF REV. TIMOTHY McDONALD III, PASTOR, FIRST ICONIUM BAPTIST CHURCH, ATLANTA, GA

Rev. MCDONALD. Thank you, Mr. Chairman and other Members of the Committee for allowing me to come.

I certainly appreciate your opening comments and those of Representative Frank, particularly in regards to this hearing and what powers actually this Committee has. Nevertheless, I want this to be clear, that what we are discussing here is vouchers. We cloud it under the auspices of choice, but what we are talking about is vouchers and whether or not, given the Supreme Court decision, vouchers should be nationalized; and certainly I would have serious reservations about that.

Nevertheless, Congress already has a number of programs under its wings regarding choice that it is not funding, that being No Child Left Behind programs, charter school programs and others; and it behooves me to see that we are now considering this whole notion of nationalizing vouchers.

The Supreme Court decision was not about providing choice to parents but whether the Cleveland choice voucher program was structured in such a manner to not violate the first amendment Establishment Clause. Since parents are given the vouchers in the Cleveland program, the narrow vote of 5 to 4 in the Supreme Court ruled that they, not the Federal Government, should be the ones choosing to send their children to religious schools. By that we are meaning parental choice. In spite of the fact that this ruling is contrary to decades of law that define the relationship between the church and State, the Court stated that there was sufficient parental choice present in the Cleveland voucher program to not violate the Establishment Clause of the first amendment. However, the Court did not discuss whether voucher programs in general would withstand constitutional scrutiny nor whether the Federal Government should enact similar programs nationally.

Even before the ruling of *Zelman*, voucher proponents made the misleading claim that they were interested in providing choice to parents and to students. However, this Congress should not pursue vouchers because vouchers do not provide true choice to all parents nor to all students. Vouchers could never provide true choice to parents. Private schools were established to be selective in their admission policy, thus giving choice to the private schools and not to the parents, contrary to some belief. Unlike public schools, private schools are not required to adhere to Federal guidelines requiring that any institution in receipt of Federal funds abide by Federal guidelines, required that any institution would do that which the Government requires of them.

In the Cleveland program, we have to be very clear about what is being said. We do not exclude special education students, and we understand that the Cleveland program has on occasion done that. Furthermore, voucher schools, unlike public schools, may and do expel students easily so that large numbers of students in the program 1 year simply disappear the next year.

While many of the witnesses here today may espouse the effectiveness of voucher initiatives, I intend to reveal the underlying in-

tent of many voucher programs across this country that purport to help African Americans in particular, and they are always using us—as an African American minister and pastor of a predominately African American church, I hear quite often all of these claims about the benefits of vouchers. Voucher proponents want to claim that the so-called competition created by vouchers would force public schools to improve. Be it far from us. Nevertheless, this is a hollow claim. In fact, research better supports the claim that accountability, testing and increased resources lead to public school improvement, not so-called competition created by vouchers.

Education is not a competition, with only some students winning and the rest losing. Diverting money from public schools through the use of vouchers hurts the very students who rely on the promise of public education. Vouchers affect only a select few, and therefore the many, particularly African Americans, are left behind.

For example, while the United States Supreme Court may have declared Cleveland's voucher program constitutional, the Court did not dispute the fact that this program has cost taxpayers over $43 million. The same is true for Milwaukee.

The private school vouchers are not practical. Voucher initiatives would do little to nothing to help the majority of students because private schools were not created to fulfill the duties of educating all of America's students.

Voucher initiatives have failed to require participating schools to adopt academic standards like those adopted under No Child Left Behind, nor do they require participating schools to hire qualified teachers or hold the same standard of requirements of participating schools in the public school system. Voucher proponents are not willing to hold private schools to the same kind of standards and accountability that they demand of our public schools.

For this instance and for many others we are certainly in opposition to this. We have learned in Michigan and we also learned in California that African Americans overwhelmingly vote against vouchers when given an opportunity. In Michigan, it was almost 5 to 1 African Americans in opposition; and in California Latinos were pretty much the same.

Therefore, the fact is that we know a lot about the proven reform programs that work, we know what doesn't work, and I would hope and pray that as we look at this issue in this Congress that we would look at reducing class sizes, that we would look at making sure that teachers are qualified, have the resources that are necessary, so that we can make sure that we leave no child behind.

Mr. CHABOT. Thank you, Reverend.

[The prepared statement of Rev. McDonald follows:]

PREPARED STATEMENT OF TIMOTHY MCDONALD

Good morning, Mr. Chairman and members of the Committee, and thank you for allowing me the opportunity to testify today before this Subcommittee on the Constitution's oversight hearing on the Supreme Court's voucher decision and Congress' authority to enact voucher programs. My name is Reverend Timothy McDonald and I am a member of the Board at People For the American Way—a citizens' organization dedicated to protecting constitutional and civil rights, improving public education, and promoting civic participation. As the Chair of the African American Ministers Council, the representative of a large African American congregation and community activist, I am vitally concerned with preserving and improving our nation's

system of public education so that all children learn and achieve and, so that no child is left behind.

While I am aware that this hearing has been convened to discuss Congress' ability to enact school choice programs in light of the recently decided Supreme Court decision *Zelman* v. *Simmons-Harris*, I question the need for such a hearing. The federal government already provides school choice through policies like those in the recently enacted No Child Left Behind Act and through current charter school policies. On the other hand, I suppose that there is a need to discuss the federal government's role in supporting current school choice programs since the current Administration will not even fully fund the programs in the No Child Left Behind Act and has failed to increase the basic funding for charter schools.

Nevertheless, since Congress already has the ability to enact school choice programs, I can only assume that this hearing must be about Congress' role in enacting voucher programs. Consequently, I will focus my comments accordingly.

Zelman v. Simmons-Harris

The Supreme Court's decision was not about providing choice to parents, but whether the Cleveland voucher program was structured in such a manner to not violate the First Amendment's Establishment Clause. Since parents are given the vouchers in the Cleveland program, the narrow 5–4 majority of the Court ruled that they, not the federal government, were the ones choosing to send their children to religious schools, i.e. "parental choice." Despite the fact that this ruling is contrary to decades of law defining the relationship between the church and state, the Court stated that there was sufficient "parental choice" present in the Cleveland voucher program to not violate the Establishment Clause of the First Amendment. However, the Court did not discuss whether voucher programs in general would withstand constitutional scrutiny nor whether the federal government should enact similar programs nationally.

School Choice

Even before the ruling of *Zelman* v. *Simmons-Harris*, voucher proponents made the misleading claim that they were interested in providing choice to parents and students. However, this Congress should not pursue vouchers because vouchers do not provide true choice to parents. Vouchers could never provide true school choice to parents. Private schools were established to be selective in their admission of students, thus giving choice to the private school and not the parent. Unlike public schools, private schools are not required to adhere to federal guidelines requiring that any institution in receipt of federal funds abide by federal anti-discrimination laws. As a result, at the insistence of voucher proponents, private schools would be able to maintain their current exemptions to certain anti-discrimination laws, and exclude students based on religion, gender, limited English proficiency and disability. For example, private voucher schools in Cleveland can and do exclude special education students. Further, voucher schools, unlike public schools, may and do expel students easily, so that large numbers of students in the program one year simply "disappear" the next year.

Additionally, proponents often insist that vouchers enable taxpayers to better control their child's education. Yet, many students with vouchers will still be ineligible or unable to attend many private schools with long waiting lists and restrictive admission standards. A 1998 report from the U.S. Department of Education found that 85% of large central city private schools surveyed would "definitely or probably" not be willing to participate in a voucher program if they were required to accept "students with special needs such as learning disabilities, limited English proficiency, or low achievement."

Diversion of Public Resources

While many of the witnesses here today may espouse the effectiveness of voucher initiatives, I intend to reveal the underlying intent of many voucher proposals across this country that purport to help African American students. As an African American minister of a predominately African American congregation, I am well aware of the tales often told to my parishioners about the wonderful opportunities voucher initiative present to our community. Voucher proponents claim that the so-called competition created by vouchers will force public schools to improve. Nevertheless, this is a hollow claim. In fact, research better supports the claim that accountability, testing, and increased resources lead to public school improvement, not so called competition from vouchers.

Education is not a competition, with only some students "winning" the competition. Diverting money from public schools through the use of vouchers hurts the very students who rely on the promise of public education. Vouchers affect only a select few while leaving the overwhelming majority of students behind in under-

funded public schools. Thus, voucher programs only serve to funnel federal taxpayer dollars to sectarian schools and mislead parents about the options they provide. If the intent were to truly help low-income African American students, then priority would be given to funding those schools educating the majority of African American students—public schools. Instead, voucher programs rob the majority of African American public school students, and students in general, of precious resources.

For example, while the U.S. Supreme Court may have declared the Cleveland, Ohio voucher system constitutional, the Court did not dispute the fact that this program has cost taxpayers over $43 million. The vast majority of these funds was taken from disadvantaged pupil impact aid that otherwise would have gone to the most disadvantaged children in the Cleveland public schools. In addition, Wisconsin taxpayers paid $61 million to fund the Milwaukee voucher program for two years (1998–2000). Consequently, Milwaukee's public schools were forced to cut spending by roughly $45 million over two years. By the 1999–2000 school year, at least 60 percent of Wisconsin superintendents reported that budgetary constraints had forced them to cut school maintenance and improvement funds.

Moreover, private school vouchers are not practical. Voucher initiatives will do little to nothing to help the majority of students because private schools were not created to fulfill the duties of educating all of our nation's students. For instance, in my state of Georgia, Governor Roy Barnes does not support private school vouchers because they are not capable of serving the majority of students in the state. Instead, private school vouchers only serve to divert precious resources from the public school system that continues to educate 90 percent of our nation's children.

Accountability

Considering the new accountability measures in the No Child Left Behind Act, it is irresponsible for Congress to support proposals that direct public funds to schools over which the public does not exercise effective oversight. Exactly the same accountability should be demanded of schools accepting federal funds no matter if they are private or public. These methods should be allowed to work without the destructive false choice of private school vouchers. Voucher initiatives fail to require participating schools to adopt academic standards like those just adopted under No Child Left Behind Act, nor do they require participating schools to hire qualified teachers or uphold the same standard of facility maintenance. Voucher proponents are not willing to hold private schools to the same kind of standards and accountability that they demand of public schools.

For instance, there are serious accountability problems in the Cleveland voucher schools. Despite all the hoopla by supporters, an independent evaluation of the program has found no significant academic gains by voucher students. Individual voucher schools have had a number of problems. One school that was in the voucher program operated for two years despite the fact that its 110-year-old building had no fire alarm or sprinkler system, and was under a fire watch requiring staff to check for fires every 30 minutes. Lead-based paint, which can cause brain damage in children, was found in the school at a level eight times greater than generally regarded as safe. Additionally, the school had to repay nearly $70,000 in tax dollars because it was getting voucher money for students that were not in the school at all. Similar problems at another voucher school were compounded by clearly inadequate classroom instruction in which the school was effectively a video school where students sat in front of a TV and watched recorded lessons on screen. Clearly, accountability remains a serious problem in voucher schools and Congress should not be a part of sponsoring such unaccountability.

Public Opinion

The claim is often invoked that African Americans support voucher initiatives; therefore, Congress should support voucher proposals to help the African American community. However, this is simply not true. A 2001 Zogby International poll offered African Americans five options for improving education. Among African Americans, the choice of "providing parents with school vouchers" finished dead last of the five options. In fact, African-Americans chose "reducing class sizes" over vouchers by a 7-to-1 margin. A 2001 poll conducted by the Opinion Research Corporation found that 61 percent of blacks and 59 percent of Latinos would rather see more funding "go toward the public schools than go to a voucher program." Black America's Political Action Committee—a group chaired by the archconservative and provoucher Alan Keyes—released a poll in July 2002 that some are portraying as a sign that African Americans support vouchers. However, the poll asked black voters whether, if given the option, they would keep their children in regular public schools (45 percent) or enroll them in either a public charter school or a private school (48 percent). Because it lumps together charter schools (public schools with account-

ability standards) with private schools that have no required accountability standards, this poll, in fact, does not support the assertion that African Americans support private schools.

It is frequently said that the only poll that matters is on Election Day. At the ballot box, African Americans were instrumental in resoundingly defeating voucher initiatives in Michigan and California. African American voters in Michigan rejected vouchers by 77% to 23%. In California, Latino voters rejected vouchers by the same margin. Detroit voters turned down the voucher proposal by an 82–18% margin. What this tells us is that when voters are educated about the realities of vouchers, that they choose to invest in public schools so that the vast majority of the nation's children can receive a quality education, not just a select few.

Alternative Options

Voucher initiatives undermine efforts to immediately and effectively address the needs of the majority of this nation's children by diverting precious funding away from public school reforms that have proven success rates.

The fact is that we know a lot about some proven reform programs that work.

In Wisconsin, for example, there's a program called Student Achievement Guarantee in Education (SAGE) that reduces class sizes in early grades in schools serving poor children. SAGE works. The evidence is clear that SAGE helps close the achievement gap between white and minority students—with long-lasting results. You would think that with that kind of proven result, public officials would be falling over themselves to replicate that success. Unfortunately it's not true. In Wisconsin last year, activists had to work hard to defeat a proposal by the governor to cut millions of dollars out of the SAGE program in order to expand Milwaukee's voucher program, which by contrast has no demonstrated proof of improving students' academic achievement in the long run.

Furthermore, successful initiatives like that in Wisconsin have encouraged additional class size reduction proposals that will bring better education to more students. People For the American Way is proud to be taking a leadership role, with the NAACP and other national and state organizations, in helping Florida State Senator Kendrick Meek amend the state Constitution to put limits on class size in Florida public schools. These are the types of initiatives that Congress should be involved in—initiatives that provide meaningful reform and opportunity for all children.

Conclusion

Despite what proponents may say, vouchers have not been proven to accomplish meaningful reform, will not help the majority of African American children, and are not supported by the African American community at large. Vouchers merely divert public taxpayer dollars to private and religious institutions. On the other hand, there are immediate reforms that have been proven to work, such as smaller class sizes and teacher quality initiatives. As a board member of People For the American Way, I support ideas that truly provide effective public school educational options, particularly for low-income students, such as magnet schools, properly run charter schools, and even the recent provision in the No Child Left Behind Act that allows parents in chronically failing public schools the ability to transfer to better performing public schools. These methods can help provide quality public education, with accountability for educational performance and true choice by parents and students. These methods can and should be allowed to work.

Mr. CHABOT. Dr. Mims.

STATEMENT OF CLEASTER WHITEHURST-MIMS, MARVA COLLINS SCHOOL, CINCINNATI, OH

Ms. MIMS. Thank you, Mr. Chabot and other Congressmen for having me here.

I come to you this afternoon because I came to talk about this, but I also came to honor my parents. My mother always told her eight children, put God first and education second and of course you would be richly blessed. And she was true.

I know that this is a discussion, as Mr. Frank has said. So I hope that some of the information I can share with you from a nonsectarian private school may help you in your future discussion.

First, I want you to just imagine being stranded on an island and you see a big ship coming—whether it is entitlements or whether it is a voucher, something that would give you some kind of escape from educational—to educational freedom. Now just imagine that you are a crew member on that ship. You have the power to save a desperate people or let them perish. Would you continue the discussion or would you toss the wisdom of the judiciary branch about just for self praise?

Today, too many parents, mostly black, are trapped on urban islands throughout this Nation. To them, education, no choice, is not a right-or-left issue. It is not about most of the things that I have heard here this afternoon. It is about human rights. It is an equal educational opportunity, the opportunity to access quality education and become literal leaders of this Nation, instead of failing leaners. It is an opportunity to become a principal rather than a prisoner. In fact, it is like Frederick Douglass said, it is freedom itself.

I am here to witness for the human side of this issue, the side that I have been working with for 13 years, the side where ordinary people unified, desired will energize an effort to create a school when there was no help. Out of desperation these people created a little boat, and we have sailed for 13 years to the urban shores, picking up one child at a time to educate them. We did not, as most people would claim, rescue only the academically talented. We accept children whose achievement levels spanned the continuum of the bell curve. Average students came for greater chance, brighter students came for a greater challenge, and those labeled slow, reluctant, attention deficit disorder and risk, special education, uneducatable all came for a greater expectation.

Yashar Israel was a child like that. Yashar was trapped in a special education class which cost about $15,000 a year of public funds. She was then enrolled in Marva Collins Prep School. Because of volunteerism, we only charged them $2,700. For 5 years that parent only paid $13,500. Yashar after graduating entered another private school. She paid $4,000, this single-parent mother, for 4 years, which was $16,000. This child then graduated from high school at the top 10 percent of her—of the school, went on to college and graduated with a 3.8 GPA.

What we need to know here is that this taxpaying mother, working two jobs, paid $29,000 for her child to attend school and saved the Government $135,000. There are many people out there like that. I could tell you many stories like Yashar's that are begging for whatever you have to give, whether it is discussion or whatever it is for them. That is why I am here today, to plead for the human side, not the right or the left.

Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Ms. Mims follows:]

The Education Voucher Is A Boat To Freedom
by Cleaster Whitehurst-Mims

The parents at Marva Collins Preparatory Prep and Cleaster Mims International Day/Boarding schools, along with millions of parents throughout this nation, were jubilant on the day of the Supreme Court's school choice decision.

Visualize being trapped on an island, your food supply is low and you sight a large boat sailing your way. Would you not be filled with jubilation?

After the decision in favor of Cleveland schools, our hope for the expansion to Cincinnati was very high. We formed a Parent Research Committee to keep abreast of the discussions on the issues and determine its benefits to MCPS and CMI.

A close scrutiny revealed that our candle of hope was being snuffed out by those who seek to politicize, debate, and skew possible public funds away from private schools.

Our committee agreed that educational choice is not a "right" or "left" issue; it is not a conservative nor liberal issue. Instead it is a "literate lifting" issue that leads to freedom. Choice is a right that all Americans relish, and must not be snuffed out.

In our search, we found that private and public education have co-existed for years. Private education has always provided quality educational choice for the affluent, giving them an edge and an option. It has saved the government many education dollars.

The wisdom of the Court, in expanding educational choice to the masses, is evidence that these men and women realize that nothing is more precious or significant to our freedom than our right to choose.

The decision to provide public funds to "nourish the mind" is just as noble today as the decision to provide public funds (food stamps) to nourish the body over forty years ago.

The government guidelines did not stipulate where recipients should use their food stamps. They were not told to shop only at Kroger or A&P. The recipient could go to any store as long as they used the food stamps for food which was government inspected.

Simplistic as the example may seem, I believe that the welfare program serves as a model for the implementation of the educational voucher program. With today's technology, the program should work more efficiently.

We are here to find a way that the government can provide public funds to the parents who wish to send their children to Marva Collins Prep School, a nonpublic, nonsectarian school.

Thirteen years ago I retired to volunteer to administer the school. Having been driven by my mother's voice echoing in my memory for fifty-five years these words, "Put God first and education

second and you will be richly blessed," I had no other option but to try and save one child at a time.

After thirteen years of struggle and sacrifice, fortitude and frugality, I remain as persistent today as I was in 1990 when a group of desperate, poor and middle class parents came together under my leadership to form a school that has changed the educational landscape of our Cincinnati community. I am motivated by my belief that when America makes education a priority for all her children, she will be more richly blessed.

The parents came together because they felt that they were trapped in a system where administrators and teachers made exuberant salaries, worked in aesthetic buildings, taught their children very little, but blamed the parents for the children's lack of academic achievement.

The parents were frustrated, tired and hopeless. Out of their desperation and my determination, we brought to the urban shore a hope that we continue to foster.

Those who oppose vouchers as an educational choice based on the claim that vouchers will skim off the best and the brightest from the public schools, need to hear our story.

> We started a private, nonsectarian, co-ed, school for preschoolers (3 years of age) through the sixth grade.
> Rev. L.V. Booth and Olivet Baptist Church provided housing in its basement for the cost of gas and electricity.
> I purchased 100 used desks for $1.00 each, selected books from Goodwill, yard and library sales.
> We embraced Marva N. Collins' teaching methods and techniques and honored her by putting the school in her name.
> We raised $18,000 from a raffle for startup funds.
> We opened the school on October 1, 1990 with two teachers, a secretary, a volunteer administrator and 43 students whose academic achievements reflect all points on the "Bell Curve." They were not the brightest, but became the best and the brightest.

The makeshift classroom, recycled books, furniture and equipment yielded a phenomenal success rate. Within seven months, students had increased reading and math grade equivalent scores 2 - 6 grade levels above their entrance scores.

After five years of operation, MCPSC had shattered the myth that students' ability to achieve was somehow tied to lots of money. The aesthetics of the environment had no profound effect on learning. Instead we found that love and expectations brought about our student achievement and the school's success.

As a result, our little candle has attracted the attention of parents and statesmen around the state, nation and world.

Don't snuff out the candle for the parents whose children are labeled slow, disadvantaged,

uneducable, ADD. Their parents are still pleading for help.

Marva Collins Prep and CMI give them an opportunity; we strip away the labels, forbid the Ritalin, put them in uniforms, love and teach them, and change their whole life.

Don't snuff out the candle for the parents who are having major problems paying their tuition.

Take a moment and reflect on these cases:

> Picture a small child tenaciously tugging on the teacher, screaming, "Mom, I don't want to leave my school." The mom can no longer afford to pay tuition. She has no choice. This child is now in a private high school as a result of a scholarship donation.
>
> Imagine a mom, of a fourth grade son who is learning algebra, burning paper and rags to keep warm in the winter and burning candles to study because she has to choose between tuition payments and gas and electric bills. This child is now in college and the mom is 30 hours from receiving her bachelors degree.
>
> Have you looked in the tear stained face of a mother whose child was in the fifth grade and could not read, and every institution she tried labeled her child uneducable? Her only option is to drive 100 miles a day to a private school that will help her. This child returned to his public high school as a reader, graduated from a vocational school, and is now a productive employee in a uniform factory, paying taxes.

Think of how I feel every time I face a parent with a dire need. I have no scholarship money, no massive endowment fund to help a weeping, single parent whose child has been tracked in a special ed class (public cost per pupil about $9,000). The parent enrolls all children in MCPS (private cost $7,500 for four). This parent took a second job, and Hamilton County vouchers paid for after-school care. This "special ed" student graduated from a highly selective high school in the top 10% of her class, graduated from college (2001) with a 3.8 GPA, and is currently preparing for Law school.

As CEO and volunteer administrator, I am faced with these and many other hopeless cases. The major problems we face are the problems of tuition funds for parents. The solution to many parents' problems are funds (private or public) to make educational choices for their children.

Don't snuff out their candle of hope. Provide them with the boat that will take them to an island of knowledge and enlightenment. America's future will be richly blessed.

Exhibit A

Historical Profile

Few non-sectarian, private schools can claim the struggle of the Marva Collins Preparatory School (MCPS) of Cincinnati, a school that was established on volunteer labor and donations of its director, parents, and supporters. With a donated building for the payment of gas and electric bills, used furnishings, used books, and a fundraising raffle, MCPS created an educational institution that raised the academic levels and gave hope and success to at-risk, average and gifted students.

1990-1991
- o Incorporated as a private non-profit and non-sectarian school
- o Opened for operation with 43 students (pre-K through sixth grades) in the basement of Olivet Baptist Church, L.V. Booth, Pastor.

1991-1992
- o Increased enrollment to 120 students and added grades seven and eight
- o Procured state approval to operate as a school pre-K through eighth grades.

1992-1993
- o Acquired Science Grant from Jergen Foundation
- o Set up hands-on science lab
- o Increased enrollment to 140 students.

1993-1994
- o Raised $40,000.00 from forty individual donors for down payment of first school
- o Purchased via land contract the Hebrew Country Day School
- o Moved into the Marva Collins Prep School's first campus
- o Established hands-on science lab
- o Set up a before and after school care program
- o Increased enrollment to 150
- o Acquired a library grant from Procter and Gamble
- o Furnished the Library and Resource Center
- o Received national acclaim from Walter Williams, syndicated columnist.

1994-1995
- o Increased enrollment to 200 students
- o Secured bank loan to pay off land contract mortgage on Dawn Road campus

1995-1996
- o Purchased the St. Theresa's Nursing Home on land contract for the future home of residential school
- o Received Charter from the State of Ohio
- o Established after school tutorial program
- o Set up Capital Campaign Drive.

1996-1997
- o Received State of Ohio Auxiliary funds for textbooks, computers, and administrative costs
- o Expanded after school program to include foreign language, computer classes, and performing arts
- o Received Title II & Title VI of less than $2,000.00 from government.

1997-1998
- o Obtained the services of 25th Hours Grant Writing Service
- o Appointed a Capital Campaign Manager

- o Received first grants exceeding $25,000.00 each.

1998-1999
- o Increased student enrollment to 250
- o Established International Exchange Program
- o Traveled with sixteen students, twelve parents and two staff members to South Africa on first exchange program.

1999-2000
- o Hosted thirty students, five teachers and eleven parents from South Africa
- o Renovated the Theresa's Nursing Home into school classrooms and boarding facility
- o Opened day school for operation on September 4, 2000 at the newly renovated facility in Silverton, Ohio, a suburb of Cincinnati
- o Moved 105 fourth through eighth grade day students to new boarding school facility
- o Hired two faculty members from South Africa
- o Augmented the curriculum with a Spanish Program
- o Augmented the curriculum with a Physical Education Program.

2000-2001
- o Officially opened the day and boarding facility
- o Moved faculty and staff personnel into residence hall
- o Stocked new library with books
- o Set up Computer lab
- o Equipped Science Lab

2001-2002
- o Raised funds for kitchen and laundry facilities
- o Completed kitchen renovation
- o Leased kitchen facility
- o Set up Student Store
- o Changed name of residential school from Marva Collins Preparatory School, Inc. to **Cleaster Mims International Boarding School, DBA**
- o Added an athlete component
- o **Incorporated the Cleaster Mims International Boarding School, DBA.**

2002-2003
- **o Officially opened the Cleaster Mims International (CMI) school as a secondary extension (7^{th}-8^{th} grades) of the Marva Collins Preparatory School, Inc.**
- **o Hired recruit, counselor, and athlete directors**
- **o Enrolled fifteen residential students.**

EXHIBIT B

HISTORY

The Cleaster Mims International Boarding School, DBA, a non-profit, private, non-sectarian, co-educational, secondary school, is rooted in an affiliated with the Marva Collins Preparatory School, Inc. of Cincinnati (MCPSC).

In 1990 **Cleaster Whitehurst-Mims**, President/CEO, founded and incorporated the first **Marva Collins Preparatory School** in the nation; embraced the methods and techniques of Marva N. Collins, founder of Westside Preparatory School of Chicago; named the school in honor of this renown educator for her contribution to educational reform and established a non-profit, private school serving students in pre-kindergarten through the sixth grades.

In order to make tuition affordable for its student population (low and middle incomes), **Cleaster Whitehurst-Mims** volunteered as school administrator and **MCPS** became an excellent educational institution that raised the academic levels and gave hope and success to students, many who were labeled "uneducable." The school quickly became a model for Cincinnati and the state of Ohio. Mims did not build this "island of excellence" with government funds but with volunteer labor, public and corporate donations, used books, used furniture, and used equipment.

In 1991, two grades - seventh & eighth - were added to meet the demands of parents seeking academic and moral excellence for their children. The population grew rapidly. After three years MCPSC out grew its first home (Olivet Baptist Church facility); after five years it outgrew its 200 capacity building which was purchased in 1993, and after ten years the school expanded to a larger building which included a boarding facility.

In 2002, the Board of Trustees named the boarding facility the **Cleaster Mims International Boarding School, DBA** to honor the founder, president, chief executive officer, and volunteer administrator of **MCPSC**. The boarding school was established to meet the needs of parents seeking a secondary school that employs the methods and techniques rooted in the principles, policies and pedagogy of MCPS of Cincinnati.

See historical profile

Mr. CHABOT. We appreciate the testimony of all the witnesses here this afternoon.

At this point, the Members of the Committee have 5 minutes each to ask questions. I will begin with myself.

Dr. Mims, let me ask you, using your school as an example, as I said I have been very impressed with what you have been able to accomplish there in the time that you have been working with the kids. How would your school benefit from a school choice program with respect to resources and what additional things would you be able to provide to the children in the Cincinnati area?

Ms. MIMS. There would not be much more that we could give them, other than giving the parents a chance to come to the school. We don't want Government funds. We want the parents to be given the money in some way so that they can choose. Because I believe that if you can give a person food stamps to provide for their body and you do not stipulate what store they shop, then you certainly could make some kind of provision for especially the people I serve who are very, very poor. I have volunteered for 13 years of my life in order to help these children get the kind of education that they get and work full time at the university and then give the school half of my money in doing so we could benefit in that way.

Give the money to the parents and let them go where they choose to.

Mr. CHABOT. Thank you.

Let me ask you another question. Reverend McDonald, in his testimony and in his written testimony, he had stated private schools were established to be selective in the admission of students. In your experience and at your school and at schools that you are aware of, have you excluded children with learning disabilities or what has been your experience?

Ms. MIMS. No, I have not. We take children first come, first served. People have heard about the program. We insist that people who have children who are on Ritalin come off the Ritalin, and we teach them, and people hear about the program, and they come, and we accept them. Every parent is interviewed by me, and I don't know of any children we have ever turned away.

Mr. CHABOT. Thank you.

Let me turn to Professor Laycock and Mr. Komer. The Reverend McDonald also had stated in his written testimony that the Supreme Court's ruling in *Zelman*, "Is contrary to decades of law defining the relationship between church and State." In your opinion, and you mentioned that this somewhat in your testimony, but how faithfully did the Supreme Court opinion upholding the charter school choice program in *Zelman* track its prior decisions?

Mr. LAYCOCK. Well, I think this decision was plainly foreshadowed, and no one should have been really surprised by it. But the reality is that the Supreme Court opinions in this area were deeply schizophrenic for most of the last 50 years. They would repeatedly say, on the one hand, not one penny to any religious institution and, on the other hand, don't deprive any American citizen of a social welfare benefit because he chooses to make some choice about religion.

I think it was that schizophrenia that led to the famous paradoxes that people joked about over the years: Books are okay, maps

were bad, what about an atlas, in Senator Moynihan's line. Many of those paradoxes have been overruled now, and the choice side of that schizophrenia has emerged triumphant at least with respect to vouchers, still a little murky with respect to direct grants to the schools.

But this opinion grows directly out of one line of what the Supreme Court has been saying for the past 50 years, and it is plainly the direction they have been moving. But they said inconsistent things as well ands that is what the dissenters were citing.

Mr. CHABOT. Thank you.

Reverend McDonald, you had asked—I think one of your concerns, as I understand it, is that your concern is that through school choice programs that money may be taken away from public schools, that they may suffer. The argument that many proponents of school choice and vouchers would make is that the competition is necessary and would be very helpful to public schools to have a more competitive environment—somewhat like in the business world where there is more competition and they would excel and that the students would benefit. Would you like to comment on that?

Rev. MCDONALD. Sure. I totally disagree with that argument, and it is based on fact. It is based on what we have seen in Milwaukee and what we have seen in Cleveland. When you only have a pot of money, whenever you take money out of that pot, place it in another, that means that this one that is left behind is going to suffer.

It is clear to us that the majority of the students are in public schools, and that is a fact, and I don't care where you go—the majority. You are going to have the Marva Colleges who excel, who do beautiful kind of things and a small minority of students are going to benefit from that, Yashars and a few others. But for every Yashar there are 10,000 that are left behind.

So to say that we are creating competition by this analysis of choice—I mean, the fact of the matter is the parents don't truly have a choice because the schools can decide and say and whether or not they accept or reject a particular child for whatever reasons there might be. And what the parents have are options but not—I think the whole idea of choice is a misnomer.

Mr. CHABOT. Anybody want to respond on that competition issue? Mr. Komer.

Mr. KOMER. I would like to just clarify a few of the supposed facts. In both the Cleveland and Milwaukee programs the students are selected by lotteries. They are not selected by the normal private school admissions process. So any school that participates in those two programs, which are now fairly large, participate by random selection of their students among the voucher applicants. So they have no ability to pick and choose.

Also, I would like to just mention that the voucher amount particularly in Cleveland, which is so small, is supplemented by the special education allotments that would otherwise be spent on the student. So that the voucher for a special needs student is, in fact, substantially larger in both programs, which helps to deal with the issue of the disincentive of admitting kids with special needs.

I think the important thing to remember about competition—and in this I actually agree with Congressman Frank—that these programs are too small. I would be delighted to see them expanded and expanded greatly in both Cleveland and Milwaukee. I think it is a matter of fact and a matter of—that any objective observer would conclude that in Milwaukee the program is now large enough, enrolling over 10,000 students in a system that has perhaps 100,000 students, that in fact the public schools and the public school administration has begun to respond to the increased competition from the private sector which is engendered by the voucher program. They are in fact responding and responding in very positive ways, ways that they have never done absent the threat of losing kids to vouchers.

Mr. CHABOT. Thank you. My time has expired.

The gentleman from Massachusetts is recognized for questions.

Mr. FRANK. Mr. Komer, you mentioned that I think in both Ohio and Milwaukee—Cleveland and Milwaukee the students were selected by lottery, is that correct?

Mr. KOMER. Yes, sir.

Mr. FRANK. Suppose you had a system—there may be some—I am not an expert on this. Suppose you had a system whereby—let me ask this: The students are selected to get the voucher, but how about for admission to the schools?

Mr. KOMER. They are admitted to the schools if there are more students than there are slots who have vouchers.

Mr. FRANK. Do the schools have any discretion in who they take?

Mr. KOMER. No, not within the universe of vouchers.

Mr. FRANK. Suppose you had a voucher system where you had to apply as a student to a particular school and then once you got admitted you could go for the voucher. Would that be okay?

Mr. KOMER. I suspect it would. I mean, there are——

Mr. FRANK. Then let me ask this. We have to think about all the implications of this. What about a situation where you apply to a school and admission to the school was only open to people of a certain religion and you then got admitted to that school because of, among other things, your religion? Would a voucher program then be pose any constitutional problems? That is, I can only go to this particular school if I am of this particular religion. Would there be any constitutional problems in letting me use a publicly funded voucher to go to such a school?

Mr. KOMER. No, I don't think there would be.

Mr. FRANK. It troubles me to see we would be funding a kind of discrimination in education based on the student's religion and saying that you would only be eligible——

What about—Mr. Laycock, suppose we had only some religions running schools of that sort and not others. Would that cause any problems in that situation?

Mr. LAYCOCK. I mean, that is a very hard question.

Mr. FRANK. I am sorry, did someone tell you we were only going to ask easy ones? But it is an oversight of the Court. These are the kinds of implications that have to be considered.

Mr. LAYCOCK. Absolutely. I didn't mean it was an unfair question. I meant I don't have a high degree of confidence in the answer I am going to give you.

I think that the focus ought to be on the program as a whole. And if there are a broad range of options open to students in the program and if in general there are enough seats in the program, then it should not render the program unconstitutional if at some of the schools there is a religious preference in admission or even requirement. My understanding is relatively few schools say you have to——

Mr. FRANK. How about the constitutionality?

Mr. LAYCOCK. What they say is they prefer their own. But clearly that question would be litigated, and the Supreme Court might disagree with me.

Mr. FRANK. I sense a certain reluctance to say something specifically negative about a program that you are generally supportive of.

I guess what bothers me about this is, well, okay, we will fund these schools that prefer their own. If people want to prefer their own, they have a right to do it with purely private funds. When you start publicly funding preferences of their own I get kind of nervous, and I think that this is not a time when we should be promoting that kind of situation.

Mr. LAYCOCK. Up the funding and make the real choice available and I don't care about these pockets of preference.

Mr. FRANK. I understand that. But we are not in that world, as you know. We are in a world in which there is inadequate funding. I have seen none of my conservative friends who are big voucher advocates talk about funding it federally, certainly on that level.

Mr. Komer, I am interested in your call for the United States Supreme Court to be more active in striking down State supreme court interpretations of their own constitution. I am particularly impressed by the pages 10 and 11 where you talk about Blaine amendments which 38 States, I think you said, have.

It says, the Blaine amendment is the result of some outright religious bigotry and they are a product of raw religious bigotry. They must not be permitted to perpetuate the legacy.

In other words, because you disapprove of these amendments and of the historic circumstances in which they were produced, you want the United States Supreme Court to go into these States and knock them out or render them relatively light in impact. Most States can amend their constitutions fairly easily, much more easily an the Federal Constitution, mainly by referendum.

I guess you are entitled to the position. I would think some of my conservative friends who believe in States rights and are worried about judicial activism would be a little nervous about a position that says, look, these are lousy amendments, and we don't like the way they were adopted, and they stand for prejudice, go get 'em, Scalia. Do you think that some people might be uncomfortable with that?

Mr. KOMER. First, I would like to take a moment to——

Mr. FRANK. We don't have time. Answer that one first, and if the Chairman cuts you off he can cut you off on the other one.

Mr. CHABOT. He probably won't. So go ahead.

Mr. FRANK. But if I had done it the other way around, he might have, so you go ahead.

Mr. KOMER. The point about the Blaine amendments is that the same interpretation that has been given to the Establishment Clause and now rejected by the U.S. Supreme Court is often given to the Blaine amendments by the State supreme courts. The Blaine amendments themselves can be, in fact, interpreted perfectly consistently with the *Zelman* decision.

Mr. FRANK. Wait a minute. Are you basically saying that where there is State constitution language that is somewhat similar to the Federal Constitution language State courts don't have a right to interpret that differently under the State constitution than the Federal courts have interpreted it in the Federal Constitution?

Mr. KOMER. Yes.

Mr. FRANK. That is a very radical change in doctrine.

Mr. KOMER. Yes, where it infringes upon the Equal Protection Clause of the United States Constitution, the Free Exercise Clause and the Free Speech Clause.

Mr. FRANK. If there is an infringement, that is a separate thing. State constitutions have no right to infringe on Federal law. But that is an independent point from arguing that the States have done a bad job of interpreting their own constitution. They have a right, it seems to me, to interpret their own constitution any way they want until and unless it comes into conflict with the separate and independent Federal constitutional rights. The fact that they are independently interpreting it differently than the Federal Government would interpret the same language is a different proposition than the one where there is a clash.

Mr. KOMER. And we are not disagreeing.

Mr. FRANK. It sounded like we were a minute ago.

Mr. KOMER. No, we are not. Because what we are disagreeing about is whether or not an overbroad interpretation of the Blaine amendment language does, in fact, infringe upon Federally protected rights.

Mr. FRANK. That is uninfluenced by your disrespect for Blaine amendments in general? You are not influenced by your not liking them, by your not liking the historical circumstances in which they were adopted? That doesn't make you more willing to see the Federal court step in with regard to those State constitutional provisions as opposed to maybe some others?

Mr. KOMER. No. My interest here is in protecting the federally——

Mr. FRANK. That is not the way your statement reads.

Mr. CHABOT. The gentleman's time has expired.

The gentlelady from Pennsylvania is recognized for 5 minutes.

Ms. HART. Thank you, Mr. Chairman.

There are so many things I want to say. Most of them are rebuttal, but that is not what my job is here today, so I will try to stick to what the issues are in what I think is actually a very appropriate hearing.

We have seen the Supreme Court decision that seems to give us a little bit more firepower in support of legislation that was rightly before this Committee and is still before this Congress, and I think it is important for to us examine the relationship of that case to what the issue is of our faith-based initiative. So I think—Professor Laycock mentioned that in his statement. So I would like it if you

could, Professor, elaborate a little bit more on the relationship between the *Zelman* case and what you have seen as part of the proposals regarding this faith-based initiative that has been before us.

Mr. LAYCOCK. Let me say I testified on the faith-based bill a year ago, and I have not kept current on what has happened to it.

Ms. HART. That is okay. You can stick with what you knew a year ago. That is about where we are, unfortunately.

Mr. LAYCOCK. But my view is that the principles announced in *Zelman* align pretty directly to the faith-based initiative. So that if the Government-funded or Government-assisted social service is available to the intended beneficiaries without regard to religion, either the religion of the beneficiary or the religious views of the service provider, if beneficiaries are free to choose their own provider and if there is a genuine secular choice available, then the faith-based initiative is constitutional under *Zelman*.

The very controversial matter about whether providers who participate in these programs forfeit the right that they would otherwise have under title VII to prefer employees of their own faith, I think they shouldn't forfeit that. I think they ought to retain that right, but the Supreme Court plainly does not pass on that question in *Zelman*. That still remains to be argued about and to be litigated.

Mr. LAYCOCK. And then finally, and this does go to some of the points Mr. Frank has been making, it is much more difficult to provide a genuine secular choice if you don't have ample funding for these programs. And in lots of these programs we turn the potential beneficiaries away, and that is a significant constraint on choice. And so the funding levels and the choice rationales are interconnected here.

Ms. HART. Okay. Thank you for that. I want to commend Dr. Mims on the work you have been doing. I don't know much about it. But from your statement, it is clear to me that you get it; that the goal is and the focus is and should be each child, not a public school system, not a public services system, but if we are getting away from school choice then it should be the recipient of whatever public service it is that we are talking about conveying regarding the faith based initiative.

But I want to ask you a question about the—because there is a dichotomy I think a little bit. I am interested in school choice. I have been an advocate for school choice for a long time. I was a State senator for 10 years in Pennsylvania. They now have a tax credit for organizations to contribute to charities that will provide vouchers. So they provide them privately. But the tax credit encourages that contribution. It has been a hugely successful proposition. I am assuming it is usually successful because you are offering something that people want.

Ms. WHITEHURST-MIMS. Yes.

Ms. HART. And what is it that they want? I mean what are you providing that is different than they could get if they went to the public school down the street?

Ms. WHITEHURST-MIMS. What I think our school—I am sorry. What I think our school gives to parents is hope that they don't get. We have created an institution whereby the parents feel a part of that institution. Many of them have come into the institution

with children who were deficient, and those children are learning, they are excelling. Now the parents are being taught by the children. I have parents who are now in premed courses at the university because their children pushed them, because we raised the bar. Our expectations are very high. We don't think in terms of the color of the child or the social, economic background of the child. We put them all in uniforms and they all mix together and they all learn together and they are happy learners, and I have found where children are happy and they are motivated they love learning. And therefore, we take them at 3 years of age. And my 3-year-old children read, add and subtract by the end of the school year. And I give the CAT test to preschool children. There is no CAT test for them, but I give them the kindergarten test and they all score in the 99th percentile. So when that happens, people run. We don't have enough space for them.

Ms. HART. And that is great.

Ms. WHITEHURST-MIMS. They are motivated.

Mr. CHABOT. The gentlelady's time has expired.

Ms. WHITEHURST-MIMS. I am sorry.

Ms. HART. Thank you. No, I am pleased and I thank you. Mr. Chairman, I will stay for round two.

Mr. CHABOT. Thank you very much. The gentleman from Michigan, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you very much. I wanted to ask Mrs. Whitehurst-Mims about her school in terms of parental involvement, uniforms, and the learning disabled.

Ms. WHITEHURST-MIMS. Okay. Specifically, do you want to know in general parent involvement? Parent involvement is very much encouraged. You have to remember, I was once a teacher in the public schools and I saw parents being alienated there. They were not accepted. If they were poor, they didn't want to come to the school. Well, of course when I started this school I made sure that that would not be a part of that. So I dropped all the barriers to parent involvement.

Another thing that we did in the public schools, we had meetings when we knew that the poor parents could not come and so, therefore, now I have meetings on Saturday. That is convenient. So we make our education system available and convenient for the parents and thereby we gain their involvement.

Mr. CONYERS. It is not mandatory?

Ms. WHITEHURST-MIMS. Mandatory? Yes, it is mandatory.

Mr. CONYERS. Oh, it is mandatory.

Ms. WHITEHURST-MIMS. It is mandatory that they participate, yes.

Mr. CONYERS. Now, what about the disabled?

Ms. WHITEHURST-MIMS. The disabled, we have limited—if you are talking about disabled, most of the children we get are children who are considered ADD or special education. We have not gotten any people who are physically handicapped.

Mr. CONYERS. How large is the school?

Ms. WHITEHURST-MIMS. The school now has 210 students.

Mr. CONYERS. Now, are there uniforms required?

Ms. WHITEHURST-MIMS. Always have been. We set the tone for the whole district in Cincinnati with that.

Mr. CONYERS. Well, what I am trying to figure out is that with all these requirements, it sounds like we may be getting children from families that may be able to participate in a private program, only they are doing it with State money. And this may require not every child would be able to even get in that program.

Ms. WHITEHURST-MIMS. Well, what has happened, they weren't at first. You have to remember I started in the basement of a church with 43 children. But because of the demand, we grew. So the more demand, you just grow according to your demand. And we have helped a lot of children and we can help even more. I believe there is a school in Milwaukee, Marva Collins School in Milwaukee that has about 200 students on the waiting list. And so——

Mr. CONYERS. Well, in that way then we can predict the end of the public school system in Cincinnati if your school keeps growing and we keep paying Federal money, and your school keeps—which is really incredible to me that you can take people with physical or mental problems and with the same amount of money——

Ms. WHITEHURST-MIMS. Less.

Mr. CONYERS. With less.

Ms. WHITEHURST-MIMS. Yes.

Mr. CONYERS. Yeah. That is quite a little feat. And I suppose——

Ms. WHITEHURST-MIMS. It is about passion.

Mr. CONYERS. Yeah. But I suppose I would have to find out why all—why in Cleveland, for example, Reverend McDonald, most of the suburbs decided not to use vouchers. Is that correlatable?

Rev. MCDONALD. I think when we look at the voucher program as a whole. Even in Cleveland 75 percent of those who receive the vouchers were already in the private schools, so all that we were doing was subsidizing with public money those who were already attending private, which is kind of the norm where these voucher programs already exist. We started out talking about helping poor minority black kids in Cleveland and in Milwaukee.

Now both of those programs have changed significantly so that a larger portion of those dollars are not going to poor black inner city kids, but are in fact going to the suburbs, going to families who already have their kids in private schools, and we are using public taxpayer dollars to subsidize those families primarily and we think that to be unfair.

Mr. CONYERS. Back to Mrs. Whitehurst-Mims. Are you aware that the tests across the country, Florida, Milwaukee, that vouchers have been shown not to improve academic achievement?

Ms. WHITEHURST-MIMS. No, I am not aware of that because I didn't think vouchers had been tried.

Mr. CONYERS. Well, let me read to you this from the People from the American Way, which I will make available to you——

Ms. WHITEHURST-MIMS. Okay.

Mr. CONYERS [continuing]. To all of you because I would like to get your responses. This is the sentence. "the Florida and Milwaukee voucher programs do not require their private schools to administer standardized tests and report scores. However, while Cleveland is required to administer ninth grade tests, it is not required to make test scores public; hence, the public has no way to assess performance. Over the last few years, other research and analysis of voucher programs have failed to support the case being

made by voucher supporters. The United States General Accounting Office reviewed State evaluations and found little or no difference between the academic achievement of voucher students and public students in Cleveland and Milwaukee, the two major urban school systems with publicly funded voucher programs." .

You are not familiar with these studies?

Ms. WHITEHURST-MIMS. No, I am not familiar with those studies.

Mr. CHABOT. The gentleman's time has expired. Would any of the witnesses care to comment on the information that Mr. Conyers has brought up?

Mr. KOMER. The information that the Congressman is referring to is advocacy information that the People for the American Way has put out. In fact, the academic studies which have been made of both Milwaukee and Cleveland have shown small but definitely positive results with respect to both programs. The problem is that these programs are relatively new. Kids have not been in them very long, and we are utterly confident that the longer the kids are in these programs the better they will perform. The opposite of course is true for all, almost all inner city public schools, which is the longer a child remains in the program the farther behind he falls.

Mr. CONYERS. Well, do you have any authority for that statement?

Mr. KOMER. Yes, I do. The official evaluations of the Milwaukee program were done by Professor Witte. The official evaluations in the Cleveland program were done by Dr. Kim Metcalf and there were studies done by Jay Greene and Paul Peterson of both those studies and of private studies that have shown that all, both the public and private programs, have shown positive results for the kids who are in the programs.

Mr. CONYERS. So you agree that private schools should be subject to the same testing as public schools?

Mr. KOMER. Actually I think it is not a bad idea for voucher programs to test the students. However, the ones that we have had to date have had evaluation components built in. But they have not included administering the same State tests.

Mr. CONYERS. So the answer is yes?

Mr. KOMER. What is the question to which the answer is yes?

Mr. CONYERS. Well, the question was to what you answered. You gave the answer and I said and the answer is yes.

Mr. KOMER. My position is that these programs have in fact been found to be positive.

Mr. CONYERS. Well, let me put it this way. You do not think private schools should be subject to the same testing as public schools.

Mr. KOMER. I don't think that is a necessary component to evaluating a voucher type program. I actually think that the voucher programs will demonstrate academic improvement regardless of what kind of accountability devices you want to come up with.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Virginia is now here. I don't know if the gentleman wanted to ask any questions or not, but we are just getting ready to wrap up, but——

Mr. SCOTT. Well, I just had—I apologize for being late, Mr. Chairman. Just to make clear from I guess Mr. Laycock, perhaps

you can answer, is there any question that you cannot directly, federally directly fund a church?

Mr. LAYCOCK. I don't think there is any question about that. No one has suggested that. You cannot directly fund a church.

Mr. SCOTT. No one is suggesting that?

Mr. LAYCOCK. No one is suggesting that we directly fund a church. What the debate is about is the funding of secular services provided by the church. But the kinds of programs that were at issue in the 1780's where we pay the minister with tax dollars, clearly unconstitutional, and no one is proposing that it be renewed.

Mr. SCOTT. Well, let me ask it a little differently. If a church is running a secular program, can the check, Government check be written to the church?

Mr. LAYCOCK. I don't think it should make any difference. I think you ought to be able to write the check to the church. But of the programs the court has upheld, the check is written to the parent or the other participant in the program and then that parent pays the church, sometimes by endorsing the check over.

Mr. SCOTT. That is fine. Again my question is, can the Government write a check to First Baptist Church for running an education program?

Mr. LAYCOCK. I think the answer to that is yes. Now, the reason I am hesitating is because the Supreme Court is hesitating. The Supreme Court is much more comfortable if we write the check to the parent. And given that preference, the supporters of these programs ought to provide for the check to be written to the parent and they don't need to test that issue. But economically it doesn't make any difference whether the money goes to the provider.

Mr. SCOTT. Actually we are testing the issue in legislation that is being considered. And if the entire Cleveland decision was the nuance between direct and indirect, what did that entire decision mean if you could have written a check directly to the pervasively sectarian organization? Unless—I mean you had to conclude everybody assumed you couldn't write the check directly to the pervasively sectarian organization. Otherwise all of the argument back and forth wouldn't have been necessary.

Mr. LAYCOCK. Well, I agree with that. But, you know, I think what should be critical is who is making the choice; that the individual parent chose to go to this religious program rather than some secular program. And I think writing the check to the parent instead of the program is simply, is mostly symbolic and is a backup for this real question of who is writing the check. But you are absolutely right. The Supreme Court prefers the check to go to the individual parent.

Mr. SCOTT. You keep saying preferred. If the check had been written directly to the pervasively sectarian organization, made payable to them, the Government having made the choice, that is where the money was going to go, not the parent, is there any question that would have been unconstitutional?

Mr. LAYCOCK. Yes. I don't know what the Supreme Court would say about that.

Mr. SCOTT. There is a question.

Mr. LAYCOCK. I think there is a question. I don't think it is a question we have to face because there is no reason to structure the program that way.

Mr. SCOTT. Well, but there is legislation pending that does structure the program that way. And so——

Mr. LAYCOCK. And that will be——

Mr. SCOTT. That is why we had the question.

Mr. LAYCOCK. That will not be within the safe harbor that *Zelman* creates. They have to litigate that issue. I think the real question should be in this legislation who makes the choice of the religious provider. But certainly——

Mr. SCOTT. Finally, the Government makes the choice that First Baptist Church gets the money, not the parent, the Government, and the Government is going to run the education program—going to choose which religious organization gets to run the program. What kind of sense would this decision have made if that—if you do not assume that that would be unconstitutional?

Mr. LAYCOCK. Okay. I am sorry. I misunderstood the context you were talking about. Yeah. In some of the charitable choice proposals the proposal is that the Government awards a contract to a provider and they award it on religiously neutral criteria and they pick the best provider or something like that. *Zelman* says nothing about those programs. And, you know, and because those programs—they may ultimately depend upon an individual choosing to go to that program. But if built into the mechanism is the Government picks on some objective and neutral criteria of that provider——

Mr. SCOTT. We had an amendment in this Committee that required some objective merit and that was rejected on a party line vote. So we know if we object to merit it isn't going to have anything to do with it. The bureaucrat picks the church.

Mr. LAYCOCK. Well, if the bureaucrat picks the church without any standard, that is probably unconstitutional. Standardless licensing is unconstitutional in the first amendment context and I suspect the Court would be very suspicious of standardless grants as well.

Mr. CHABOT. The gentleman's time has expired. I want to thank the panel very much for their testimony here this afternoon and their responses to the questions from the Members. I thought you all did a very good job. And as I said starting out, you know every child in this country deserves to have a quality education and in light of the Supreme Court's recent decision it is likely that school choice vouchers, whatever you want to call them, is going to play a significant role in improving that educational system in this country. So you all have helped us in determining policy issues down the road.

So thank you very much for being here. If there is no further business to come before the Committee, we are adjourned.

[Whereupon, at 3:22 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF ALBERT J. MENENDEZ AND EDD DOERR

Americans for Religious Liberty is a twenty year old nonpartisan, public interest organization dedicated to preservation of the constitutional principle of religious freedom through separation of church and state.

Although we believe the Supreme Court's 5-to-4 ruling in Zelman was erroneous, we accept that it remains for the present the last word on the subject. However, serious public policy concerns should compel Congress to refrain from enacting legislation that could adversely affect the public educational system that serves 90% of our nation's children.

The primary concern of legislators should be the education of those children who attend schools that are publicly controlled, open to serve all children regardless of religion, ethnicity, linguistic background, family income level, or degree of handicap. This country faces a crisis in providing a sound education for a growing school age population, so already limited resources should not be diverted to nonpublic schools that commonly practice forms of discrimination in admissions, hiring, and curriculum selection that would be unacceptable in public schools. Public funds should not be sent directly or indirectly to schools not accountable to the taxpaying public. Just in the past month, for example, a Protestant school in Lexington, North Carolina, expelled a student not because of grades or conduct but because he is a Catholic. This could not happen in a public school.

So-called "school choice" programs that involve public funds for nonpublic schools are misleading, because it is the nonpublic school that chooses the student, either directly through admission policies or indirectly through the nature of the religion or ideology that pervades the school's curriculum. Few Christian parents, for example, would choose to send their children to a Jewish or Muslim school, and few Catholic parents would choose to send their children to a fundamentalist school in which Catholicism is denigrated.

Nonpublic schools are not required to serve special needs children and many either do not or cannot. Many nonpublic schools charge tuition above the value of a school voucher. Further, numerous studies in the U.S. and abroad have shown that nonpublic schools seldom if ever do a better academic job than public schools.

It remains sound public policy for public funds—whether federal or state or local—to be provided only to public elementary and secondary schools, which have long been funded inadequately and unevenly. And it remains sound public policy, as articulated by Jefferson and Madison, for government to refrain from compelling citizens through taxation to support faith-based schools which in theory and practice are generally pervasively sectarian. A key element of our American heritage is the right of every person to voluntarily support only the religious institutions of her or his free choice.

Finally, the American people have made it abundantly clear in 25 statewide referenda from coast to coast over the past 35 years that, by an average aggregate vote of two to one, they are opposed to school vouchers or their analogs.

Thank you for allowing us to address this important issue.

PREPARED STATEMENT OF RICHARD T. FOLTIN

The American Jewish Committee (AJC), a national human relations organization with over 120,000 members and supporters represented by 32 regional offices, has a long history of commitment to the nation's public schools and to the principle of separation of church and state that is the premier protector of our religious liberties. AJC respectfully requests that this statement be included in the record of today's hearing of the House Judiciary Subcommittee on the Constitution on the United States Supreme Court's June 27 decision in *Zelman* v. *Simmons-Harris* and Congress' authority to enact school vouchers programs.

AJC has made no secret of its severe disappointment in the 5–4 decision of the high court upholding as constitutional Cleveland's publicly funded vouchers program. As AJC General Counsel Jeffrey Sinensky said on the day that *Zelman* was handed down, "This decision represents a troubling endorsement of unsound public policy, and, by allowing for the direct government subsidy of religious education, takes a battering ram to the constitutionally mandated wall of separation between church and state." However, AJC submits this statement today not to reargue the merits of the Court's ruling, but to strenuously urge the subcommittee to bear in mind that the Court's upholding of the Cleveland program did not resolve whether vouchers programs are sound public policy, much less whether Congress ought to enact legislation imposing such programs on the states.

As a strong supporter of public education, AJC believes that the use of public money to support private schools, sectarian and nonsectarian alike is simply bad public policy. Contrary to the claims of voucher advocates, government subsidies will not make the difference for many low-income parents as to whether their children attend private schools. Many of those parents who now cannot afford private schools without vouchers will still be unable to do so with vouchers. Thus, low-income families will, as a rule, still be unable to send their children to quality private schools. Voucher initiatives create an illusion that they will somehow assist the public-school system by introducing competition. However, most poor children will remain in a public-school system already subject to severe budgetary constraints, especially in the inner city. Further, voucher programs will inevitably deplete scarce resources, weakening public schools by diverting limited tax revenues to private and religious schools that often face no requirements for how they spend tax dollars on curriculum content, teacher certification, student testing, enrollment diversity, and services for students with disabilities.

Moreover, vouchers programs, even if they do not run afoul of the First Amendment's prohibition on government establishment of religion, represent a bad policy choice in terms of the values inherent in the principle of separation of church and state. Participating religious schools may be permitted to discriminate in admissions and in employment on the basis of religion, and will be enabled to use public dollars for religious educational purposes, thus placing taxpayers in the position of supporting instruction in religious beliefs that may be contrary to their own. In addition, there are dangers for religious schools when they are funded by the state. These are the dangers that Justice Souter had in mind when, in a 2000 dissenting opinion, he referred to the threat to the integrity of religion posed by "the corrosion of secular support." The more religious schools come to rely on state funding the greater those dangers, as the state understandably seeks to impose accountability and antidiscrimination protections, among other public policy principles, on money coming from the public fisc. These, and other aspects of vouchers programs, will promote exactly the types of divisions and tensions in our society against which the separation of church and state guards.

It remains to be seen, as well, how far a so-called choice program may deviate from the Cleveland program and still be upheld as constitutional. The *Zelman* decision certainly leaves open to question the constitutionality of any program that fails to afford parents true choices between religious and non-religious schools, and between public and private alternatives, by, for instance, providing inadequate funding for secular, public alternatives, and that fails to incorporate antidiscrimination protections.

Perhaps as crucially, whatever Congress' authority to legislate in this area, it would contradict the principle of local control of education for Congress to impose vouchers programs on the states that do not choose to adopt these programs themselves. In addition, even a program tracking the Cleveland program in all respects may be invalid in those states with constitutions that contain stringent prohibitions on public funding of religious institutions, also an aspect of state autonomy that the Congress should respect.

In sum, as we said in the amicus brief that we filed in *Zelman*, "despite its laudable goal of improving educational opportunities for a select group of students, the

[Cleveland vouchers] program is a misguided effort both in policy and in law." Certainly, so far as policy considerations are concerned, nothing in *Zelman* has changed that analysis, and, in any event, Congress ought to leave to the states, some operating under state constitutional provisions with church-state safeguards more stringent than those afforded under the First Amendment as interpreted by the Supreme Court, the determination as to whether and how to adopt vouchers programs.