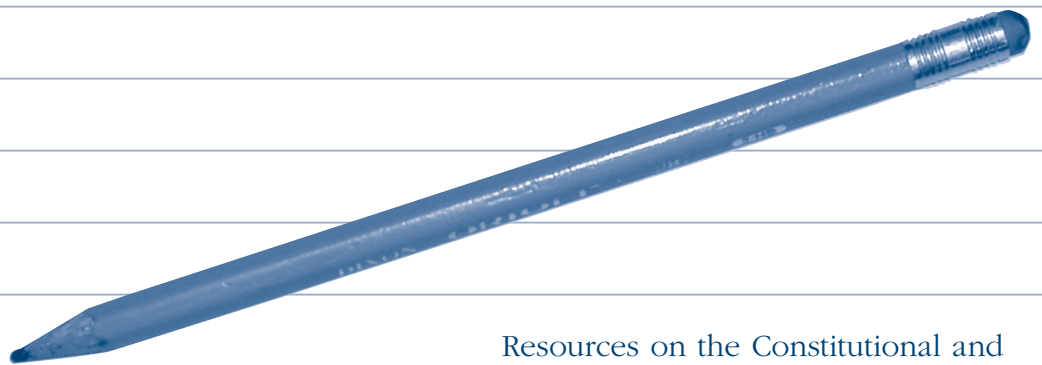


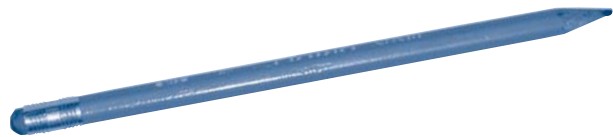
School Vouchers

Settled Questions, Continuing Disputes



Resources on the Constitutional and
Educational Policy Issues on School
Vouchers After the Cleveland Voucher
Decision in *Zelman v. Simmons Harris*

November 2002



Introduction

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The U.S. Supreme Court's June 27, 2002 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 thought 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 (Minnesota), 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 draftsman 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

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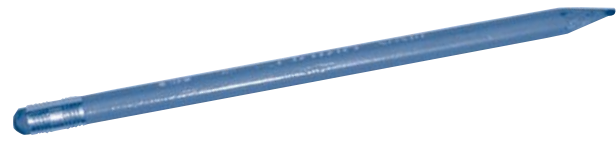
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Joint Statement by Church-State Scholars on School Vouchers and the Constitution

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

Drafted by:

Thomas Berg, University of St. Thomas Law School (Minnesota), principal draftsman
Alan E. Brownstein, University of California Davis School of Law
Erwin Chemerinsky, University of Southern California Law School
John Garvey, Boston College Law School
Douglas Laycock, University of Texas Law School
Ira C. Lupu, George Washington University Law School
William Marshall, University of North Carolina School of Law
Robert Tuttle, George Washington University Law School

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[s] 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 main-

tained neutrality, the court must consider “all [genuine] options [the state] provides [to] school-children,” 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. at 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); *Maber 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.

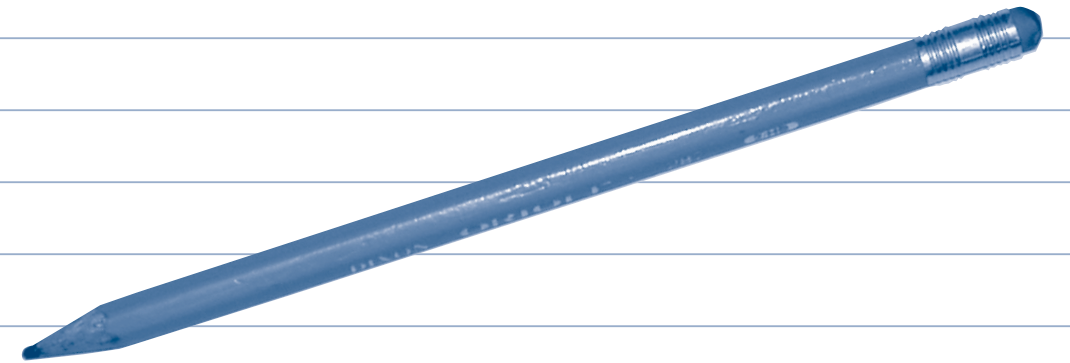
31. See also *Maber*, 432 U.S. 464; *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

32. 515 U.S. 819.

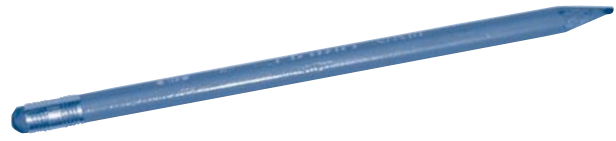
33. Cf. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Such a claim would raise questions about whether the associational right in *Dale*, which involved a direct prohibition on sexual-orientation discrimination in leadership positions, extends to the selection of teachers and others. It is also 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.

The Next Chapter in Educational Policy



Contrasting Views on Strengthening
Education Following the Cleveland
Voucher Ruling



A Call for Citywide Voucher Demonstration Programs

Paul E. Peterson, Harvard University

In *Zelman v. Simmons-Harris*, the Cleveland school voucher case, the Supreme Court found that vouchers do not violate the Establishment of Religion Clause of the U.S. Constitution because they allow parents a choice of school, whether religious or secular. Now that vouchers have passed this crucial constitutional test, it's time to try them out on a larger scale. State governments, perhaps with support from the federal government, should establish citywide voucher programs in two or three cities that would allow residents of the city to have their choice of school, public or private, religious or secular, either within or outside central-city boundaries.

Designed properly, such a pilot program holds the promise of helping to close the education gap between black and white Americans. To make the pilot program as effective as possible, the budget for the pilot city's school children, both public school and voucher students, should be increased by 50 percent – from the approximately \$8,830 per pupil spent, on average, in 2000-01 nationwide to the more than \$13,000 per pupil that some of the most exclusive suburban school districts enjoy. Were these sums made available, vouchers could be combined with salary increases for teachers, smaller classes, better facilities and other educational innovations. Ideally, the cities selected for the intervention would contain large African-American populations.

By combining vouchers with dramatically enlarged expenditures, this approach would transcend the partisan conflict between Democrats and Republicans, liberals and conservatives, union leaders and market theorists. One would no longer be choosing between committing more resources to education and asking schools to be more efficient. The pilot program would instead acknowledge the strength of both the liberal and conservative sides of this argument. At the same time, it would help answer several genuinely important questions: Can vouchers, properly designed, improve inner-city schools? Can vouchers close the education gap between blacks and whites? Can vouchers help revive the central city?

Paul E. Peterson is the Shattuck Professor of Government, Director of the Program on Education Policy and Governance at Harvard University and a Senior Fellow at the Hoover Institution, Stanford University. He is coauthor of The Education Gap: Vouchers and Urban Schools (Brookings, 2002).

I urge this step forward because vouchers show signs of being able to enhance African-American test scores with few adverse consequences for others. Let us review the evidence.

Vouchers Today

School vouchers provide parents with a sum of money that can be used to pay part or all of the tuition at their chosen private school, religious or secular. So defined, there are in the United States numerous privately funded voucher programs paying approximately half the tuition for more than 50,000 students in New York City, Washington, D. C., Dayton, Ohio, and many other cities across the country. These private programs have generated valuable information, discussed later in this essay, about the way in which such programs can benefit inner-city African-Americans. But the voucher programs that have received the most public attention are three publicly funded ones enrolling nearly 20,000 students in Milwaukee, Cleveland and Florida.

The oldest program, established in Milwaukee in 1990 at the urging of local black leaders and Governor Tommy Thompson, was originally restricted to secular private schools and to fewer than 1,000 students. The Wisconsin legislature expanded Milwaukee's voucher program in 1995 to allow parochial schools to participate; the move led to court challenges based on church-state separation. In 1998, the Wisconsin Supreme Court upheld the constitutionality of the expanded voucher program; the U.S. Supreme Court declined to review the decision. That allowed voucher students in the city to attend religious schools as well. Nearly 11,000 students, more than 15 percent of the eligible population, will be receiving vouchers for up to \$5,785 for the 2002-03 school year, making it the country's largest and most firmly established voucher program.

The Cleveland program, enacted in 1996, was of lesser significance until the Supreme Court made it famous. Vouchers are for no more than \$2,250 and have been limited to approximately 4,000 students.

The Florida program, established in 1999 after Governor Jeb Bush had campaigned on the issue, initially had fewer than 100 students but is poised to become somewhat larger. Here, vouchers are offered to students attending failing public schools. Initially, only two schools in Pensacola were said to be failing, but more are scheduled to join their ranks in September. Also, nearly 4,000 special education students in Florida are using vouchers. (The program is still operating despite a recent ruling by a Florida circuit court judge that the program violates the Florida Constitution by providing indirect state aid to religion. The decision has been stayed while it is being appealed.)

In other words, much can be learned from existing privately and publicly funded voucher programs, but all are limited in size and funded at modest levels. Larger, well-funded pilot programs, with the potential of serving all residents in a central city, would greatly expand our knowledge of the efficacy of this reform strategy for closing the education gap between blacks and whites.

The Case for Central-City Pilot Voucher Programs

Despite a host of compensatory education reforms, the education gap has remained intact for decades. Although there were signs that the gap had begun to close during the 1980s, it opened up again during the 1990s, leaving us not far from where we were at the beginning of the civil rights revolution. In 1999, the math test scores on the National Assessment of Educational Progress (NAEP), commonly known as “the nation’s report card,” were, on average, 237 points for 9-year-old white students, the same as average black test scores at age 13. The test scores for 17-year-old African-American students were, on average, 282 points, as compared with 315 points for white students. This difference is better than one standard deviation difference, generally thought to be a very large difference.

Nor is this gap likely to close if most middle- and upper-income families can pick their school by moving into a desired neighborhood or using a private school, while low-income families cannot easily do so. School choice is already part and parcel of the American educational system. Every time parents identify a neighborhood to live in, they select a school for their child – often self-consciously. According to a recent survey, 45 percent of whites (as compared with 22 percent of African-Americans) consider “the quality of the public schools” when deciding where to live.

The choosing is becoming ever more sophisticated and pervasive. Web-based firms now provide home buyers with test scores and other detailed information on any school or district a family wants to learn about. But choosing a school costs money, the kind of money it takes to make a down payment and follow through on a monthly mortgage. The only thing equal about public education today is the equal insistence that one buy into a community if you want your children to attend its school. So it is not an accident that children lucky enough to be born into privilege attend the nation’s best schools. Indeed, given the structure of public education, it’s a foreordained conclusion.

African-Americans are the losers in this arrangement. Holding less equity and facing discrimination in the housing market, blacks choose from a limited set of housing options. As a consequence, their children attend the worst public schools. Richer, whiter districts rarely extend anything more than a few token slots to minority students outside their community of privilege. Like robins protecting their nests, the well-to-do guard their schools. The results are clear. Despite the efforts of the civil rights movement, public schools today remain almost as segregated as they were in the 1950s. According to the most recent data available, in the school attended by the average African-American, only a third of the students are white.

Since blacks have the least amount of choice among public schools, they benefit the most when choice is expanded. In multi-year evaluations of private voucher programs in New York City, Washington, D.C., and Dayton, Ohio, published as *The Education Gap: Vouchers and Urban Schools* (Brookings 2002), my colleagues and I found that African-American students, when given a choice

of private school, scored significantly higher on standardized tests than comparable students remaining in public school. In New York, where estimates are most precise, African-American students who switched from public to private schools tested, after three years, roughly 9 percentage points higher than African-Americans in public schools. This difference is roughly two grade levels and about half a standard deviation and equals the size of the black-white test-score gap nationwide.

These test-score gains were accomplished at religious and other private schools that had much less money than that available to New York’s public schools. Data available from the state of New York reveals that New York City’s public schools have twice as much money per pupil as the city’s Catholic schools – even after deducting amounts spent on the food lunch program, special education, transportation-related expenditures and the cost of the city’s massive public school bureaucracy. With so little money, these schools did not have fancy buildings and playgrounds. Indeed, private school parents reported fewer facilities and programs at their child’s school than public school parents did.

Yet private school parents also reported much higher levels of school satisfaction than their public school peers. Private school parents also were more likely to report that their children had smaller schools, smaller classes and an education-friendly environment (less fighting, cheating, property destruction, truancy, tardiness and racial conflict). Their children had more homework and the schools were more likely to communicate with the family. Nor were the private schools any more segregated than the public ones.

There was no evidence that vouchers improved the test scores of students from other ethnic groups, however. Vouchers did not have a significant impact, positive or negative, on the test scores of either whites in Dayton or Latinos in New York City. (The number of non-African-Americans in the D.C. study was too small to facilitate inter-ethnic comparisons.)

These findings are all the more important, I believe, because they come from randomized field trials similar to the placebo trials conducted in medical research, generally regarded as the gold standard of scientific research. Yet the results from these randomized field trials do not so much break new ground as confirm findings from other studies. Two recent reviews of the literature have concluded that private schools are particularly beneficial for African-Americans. Princeton economist Cecilia Rouse found, “Catholic schools generate higher test scores for African-Americans,” though the results for white students are not so clear. Similarly, Jeffrey Grogger and Derek Neal, economists from the University of Wisconsin and University of Chicago, find that “urban minorities in Catholic schools fare much better than similar students in public schools,” but the effects for urban whites and suburban students generally are “at best mixed.”

It is little wonder that many African-Americans are among those most eager to find alternatives to traditional neighborhood public schools. Even though most civil rights leaders have yet to endorse school choice, their constituents are leading the way. In 1998, a nonpartisan research

group, Public Agenda, found that 59 percent of white parents supported vouchers but 72 percent of African-American parents did. In 2000, the Joint Center for Political and Economic Studies reported that 57 percent of African-American adults favored vouchers, as compared with 49 percent of the overall population.

No Child Left Behind

But what about those students left behind in traditional public schools? Even if students attending private schools are better off, won't those remaining in public schools be adversely affected? Like Caesar's Gaul, this question can be divided into three parts. Do vouchers attract the best and brightest from public schools? Does public school performance suffer? Do public schools lose critically important fiscal resources? Let's consider each question separately.

Do vouchers attract the best and the brightest from public schools? My own research has looked at this question in two different ways. In one study, my colleagues and I compared a random sample of all those who applied for a voucher offered nationwide by the Children's Scholarship Fund with a national cross-section of all those eligible to apply. African-American students were twice as likely to apply as others. Specifically, 49 percent of the applicants were African-American, even though they constituted just 26 percent of the eligible population. Other results reveal little sign that the interest in vouchers is limited to only the most talented.

On the contrary, voucher applicants were just as likely to have a child who had a learning disability as all those in the eligible population. Nor is it only the better-educated families who take an interest. Twenty-three percent of the mothers of applicants said they had graduated from college, as compared with 20 percent of the mothers in the eligible population.

In a second study, this time of vouchers in New York, Washington, D. C., and Dayton, my colleagues and I looked at those who actually made use of vouchers when they were offered to them. We did not find any evidence that private schools discriminated on the basis of a young student's test score performance at the time they received an application from a voucher recipient. Among young applicants in New York City and Washington, D. C., there were no significant differences in the test scores at the time of application between voucher users and those who turned down the voucher and remained in public school. In Dayton, those using the voucher had lower math scores at the time of application, showing even more clearly that private schools were willing to accept educationally challenged students. Only among older students (grades 6-8) in Washington, D. C., did we see some signs that private schools expected students to meet a minimum educational standard prior to admission.

Other researchers find much the same pattern. In Milwaukee, the Wisconsin Legislative Audit Bureau found that the ethnic composition of the participants in Milwaukee's voucher program

during the 1998-99 school year did not differ materially from that of students remaining in public schools. Similarly, a University of Wisconsin evaluation of an earlier, smaller voucher program in Milwaukee found few consistent test score differences or family background differences between those who took vouchers and those who remained in public schools. Analysts at the University of Indiana who evaluated the Cleveland program found that voucher "students, like their families, are very similar to their public school counterparts." In short, vouchers tend to recruit a cross-section of the families and students eligible for participation.

Upon reflection, these findings are not particularly surprising. Families are more likely to want to opt out of a school if their child is doing badly than if that child is doing well. A number of families, moreover, select a private school because they like the religious education it provides, or because it is safe or because they like the discipline. When all these factors operate simultaneously, the type of student who takes a voucher usually looks little different from those who pass up the opportunity.

Does public school performance suffer? If vouchers do not simply pick off the top students within the public schools but attract a cross-section of students, then there is no obvious educational reason why public schools should suffer as a result of the initiative. On the contrary, public schools, confronted by the possibility that they could lose substantial numbers of students to competing schools within the community, might well pull up their socks and reach out more effectively to those they are serving. Interestingly enough, there is already some evidence that public schools do exactly that.

Harvard economist Caroline M. Hoxby has shown, for example, that since the Milwaukee voucher program was expanded on a larger scale in 1998, it has had a positive impact on public school test scores. Public school scores in low-income neighborhoods most impacted by the voucher program improved more than scores in areas of Milwaukee and elsewhere in Wisconsin not affected by the voucher program. She also found a similar positive impact of charter school competition on public school test scores in Michigan and Arizona, the two states in the country with the largest number of students attending charter schools. In other words, when substantial numbers of students are using vouchers or going to charter schools, public schools in the vicinity apparently respond by improving their educational offerings and, as a result, public school performance is enhanced.

Even the threat of a voucher can have a positive effect on test scores. Research by Manhattan Institute scholar Jay Greene shows that when public schools were in danger of failing twice on the statewide Florida exam, making their students eligible for vouchers, these public schools made special efforts to avoid failure. Their test scores improved more than other schools that had D-minus test scores but were not threatened by vouchers. Greene was able to rule out the possibility that the improvements were the result of the additional resources made available to the failing schools. In other words, competition — even the threat of competition — had positive effects in Florida.

One can look at the impact of choice on public schools over the long run by comparing student performance across metropolitan areas with varying numbers of private schools. The more private schools there are, the more the competition and the greater the impact on public schools. If the presence of private schools undermines public schools, then one would expect to find lower public school performance in those metropolitan areas where private schools abound. But a Harvard study has shown exactly the opposite: Public school students do better in those parts of the country where there is more ready access to private schools. Similarly, some metropolitan areas have more school districts than others, giving parents the option to choose among different public school systems by moving to the neighborhood of choice. Knowing that this type of parental choice can affect community property values, school boards may respond by providing parents with better quality education for their children. Research shows that this in fact happens, that in those metropolitan areas with more school districts, students are given more demanding academic courses, school sports are given less emphasis, costs are reigned in and students learn more.

Do public schools lose critically important fiscal resources? To see how school vouchers affect the fiscal resources available to public school children, the structure of public school financing needs to be briefly considered. Although the financial arrangements vary from one state to the next, on average, nationwide, 49 percent of the revenue for public elementary and secondary schools comes from state governments, while 44 percent is collected from local sources and the balance is received in grants from the federal government. Most of the revenue school districts get from state governments is distributed on a “follow the child” principle: The more students in a district, the more money it receives from the state; if a child moves to another district, the state money follows the child. However, local revenue, most of which comes from local property taxes, stays in the district no matter where the child goes. As a result, the amount of money the district has per pupil actually increases if a district suffers a net loss of students, simply because local revenues are spread over fewer pupils.

The voucher programs in Milwaukee, Cleveland and Florida have been designed along similar lines. The state money follows the child, but the local revenue stays behind in local public schools, which means that more money is available per pupil. In Milwaukee, per-pupil expenditures for public school children increased by 22 percent between 1990 and 1999, rising from \$7,559 to \$9,036. Not all of the increase was a direct result of the voucher program, but the case disproves any claim that public schools necessarily suffer financially when voucher programs are put into effect.

Though voucher programs have been designed to be fiscally advantageous to public school children, a central-city pilot program should do even more. It should be designed to enhance resources available to public and private schools alike. If funds for public schools are greatly enhanced, they will be given every opportunity to respond effectively to the competition private schools pose. And given the competition, public schools will have strong incentives to make effective — and efficient — use of the extra monies. At the same time, vouchers that are

much larger than those currently available will attract new entrepreneurs to education, both nonprofits and for-profits. Existing private schools will be as challenged as public schools by new, energetic educators.

Why Pilot Programs Should Be Open to All Central-City Students

Until now, all voucher programs have been limited to students from low-income families. While this may have been appropriate for initial demonstration programs, a larger program should not encourage segregation of students by income. Instead, programs should be designed to encourage both public and private school integration, both economically and socially. For this to happen, vouchers need to be generally available.

A citywide voucher program may also entice some of the middle- and working-class families who often leave cities because of the low quality of urban schools. Gentrification has restored a number of urban neighborhoods in a few parts of the country, but city life has proven mainly attractive to young people, oldsters and tourists, folks who need not worry about school quality. Unfortunately, many young couples leave the city they enjoy simply because they cannot bear the thought of placing their children in a public school — and a private school is beyond their means. Vouchers would provide an option for such families. If enough are enticed to remain in the city, schools will gradually become better integrated — and central cities will be revitalized.

Balkanization: Myth, Not Reality

Whatever the advantages of vouchers, some may feel that they would prove divisive in a pluralist society with multiple religious traditions. In his dissent from the majority opinion in *Zelman*, Justice Stephen Breyer saw the decision as risking a “struggle of sect against sect.” And Justice John Stevens in his dissenting opinion said he had reached his decision by reflecting on the “decisions of neighbors in the Balkans, Northern Ireland and the Middle East to mistrust one another...[With this decision] we increase the risk of religious strife and weaken the foundation of our democracy.”

These dissents echo the concerns of many distressed by the worldwide rise in fundamentalist religious conviction, worries that have intensified since 9/11. Though the concerns are genuine enough, it's hardly clear that government-controlled indoctrination of young people is the best tool for conquering intolerance. On the contrary, this strategy proved counterproductive in many parts of the former Soviet Union. Historically, the United States has achieved religious peace not by imposing a common culture but by ensuring that all creeds, even those judged as dangerous by the enlightened, have equal access to democratic processes.

Of course, religious conflict is part and parcel of American political history. In the late 19th century, many objected to the establishment of Catholic schools – indeed, anti-immigrant sentiment was so strong that amendments were added to state constitutions that seemed to forbid aid to religious schools. Those seeking to forestall voucher initiatives still are invoking these amendments today.

Yet religious schools hardly teach un-Americanism. Careful studies show that students educated in Catholic schools are both more engaged in political and community life and more tolerant of others than public school students. After enduring harsh criticism in a Protestant-dominated America, Catholic schools took special pains to teach democratic values. The more recently established Christian schools, as well as Jewish and Muslim schools, can be expected to make similar attempts to prove they, too, can create good citizens.

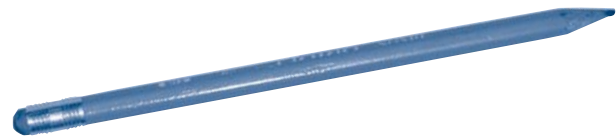
As Justice Sandra Day O'Connor pointed out in her concurring opinion, if Breyer's and Steven's fears were real, we would know it already. She showed that taxpayer dollars flow to religious institutions in multiple ways – through Pell Grants to students who attend sectarian colleges and universities, via child-care programs in which churches, synagogues and other religious institutions may participate and through direct aid to parochial schools of computers and other instructional materials. If thriving religious institutions create a Balkanized country, she seems to say, this would already have happened.

Nor do public schools necessarily spread tolerance and respect for the rights of others. One hundred years of public education in the South did little for white tolerance of African-Americans. As Justice Clarence Thomas argued in his concurring opinion, "The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects."

In other words, vouchers may be able to heal, not intensify, the country's most serious social division. At the very least, we should give the idea a try in a few, well-designed pilot programs in large central cities under circumstances where both public and private schools can thrive.

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Should States Implement Vouchers Even If They Are Constitutional?

Martin Carnoy, Stanford University

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The United States Supreme Court decision upholding Cleveland's voucher program removed the major federal constitutional obstacle to public funding of private religious schools. But states and localities still must decide whether shifting tax revenues to private schools is the best way to improve their educational systems.

A wide range of studies on the workings of different types of voucher plans suggest that vouchers are not the best way to improve education. These studies focus on the two major public voucher programs in the United States – one in Cleveland and a larger program in Milwaukee, Wisconsin – and on smaller voucher experiments in several other U.S. cities and nationwide voucher plans in Chile and New Zealand.

The results from these studies are remarkably consistent. They show that the academic gains for voucher students are minimal at best, and often non-existent. In fact, when the studies in the United States, Chile and New Zealand are added up, it is impossible to conclude that vouchers will improve students' academic performance, even if these students are from low-income families and attend the lowest-performing public schools. Indeed, if we take the U.S. results at face value, Latino students do not benefit significantly from vouchers, and only a small percentage of African-American students make any significant gains by transferring to private schools. Educational strategies that produce such insignificant results are not worth the risk, especially if they divert money and attention from the nation's public schools – the schools attended by 90 percent of all U.S. school children. States and localities that want to improve the nation's poorest-performing public schools should focus instead on policies with better track records, such as increasing teacher content knowledge, providing high quality pre-school education to low-income children, reducing class sizes, raising standards and increasing school accountability.

Martin Carnoy is Professor of Education and Economics at Stanford University, where he teaches in the International and Comparative Education and Economics of Education programs. Currently, he heads Stanford's effort in a project studying accountability in U.S. schools. His recent works include Sustaining the New Economy, published by Harvard University Press, and All Else Equal: Are Public and Private Schools Different? (with Luis Benveniste and Richard Rothstein) to be published by Rutledge in December, 2002.

This paper examines some of the key questions states and localities should address when considering voucher programs.

Do school voucher plans improve students' educational performance?

The opinions by both Chief Justice William H. Rehnquist and Justice Clarence Thomas in the Cleveland voucher ruling explicitly invoke the "failure" of Cleveland's public schools to educate poor urban children. "[T]he promise of public school education has failed poor inner-city blacks," Thomas wrote. "While in theory providing education to everyone, the quality of public schools varies significantly across districts...[M]any blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities."

The implication of Thomas' remark is that urban minority children will perform significantly better in private schools, including religious ones. In Cleveland, however, this turns out not to be true.

Kim Metcalf at the University of Indiana has led a series of studies evaluating the Cleveland program since it took effect in the 1996-97 school year. These studies have been widely reviewed by both voucher proponents and opponents. Metcalf's research shows that educational gains for voucher students are small, if they exist at all. In his latest study, Metcalf compared students who received vouchers with public school students who had applied for a voucher but did not get one because not enough were available. Metcalf found no difference in test scores between the two groups. He also compared voucher students in private schools with public school students who did not apply for a voucher. The voucher students scored slightly better in language arts but not in math or reading.

Metcalf's research also suggests that new, for-profit private schools entering inner-city voucher markets may actually have worse academic records than "failing" public schools. In the first years of the Cleveland program, about 800 students attended two for-profit private schools, called the Hope Schools, started by entrepreneur and voucher advocate David Brennan. Metcalf found test scores for the students at the Hope Schools *declined* compared with students in public schools. At the same time, scores for voucher students in private religious schools increased at about the same rate as scores for public school students.

Cleveland's voucher plan was not the first school choice program in the nation. Milwaukee established its voucher program in 1990. In its initial experimental phase, vouchers in Milwaukee were limited to non-religious schools. At first, only several hundred students received vouchers, which they used to attend seven private schools. As the voucher amount rose from \$2,500 in 1991 to \$5,500 in 1994-95, the numbers increased to 830 students in 12 schools.

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With turnover rates of 30 percent among voucher students — about the same turnover rate as in Milwaukee’s public schools — comparing the performance of voucher and public school students in Milwaukee was methodologically complex. This resulted in major disputes among educational researchers, including Harvard’s Paul Peterson, Wisconsin’s John Witte and Princeton’s Cecilia Rouse. Reviewing their findings, it appears that the positive gains for voucher students in Milwaukee were small, at best. For example, Rouse estimated a small relative gain in math scores for Milwaukee’s voucher students in the third and fourth years, but no gains in reading scores or in math for students who spent less than three years in voucher schools. She also estimated that students in a Milwaukee public magnet school program with smaller class sizes had much larger gains in educational performance than did voucher students in private schools.

In 1995 the Wisconsin legislature voted to expand Milwaukee’s voucher program to include religious schools and raised the number of eligible low-income students to 15,000. (The Wisconsin Supreme Court upheld the constitutionality of the expanded program in 1998.) Initially, about 8,000 students applied for the vouchers, which remained at \$5,500, about the cost of Milwaukee’s per-pupil spending on primary education. One-third of the voucher-takers under this expanded program were already in private schools, but they qualified for vouchers because of low family incomes. By the 2001-02 school year, about 10,000 children were using vouchers at more than 100 private schools, 80 percent of which were religious schools. This makes Milwaukee the single largest voucher program in the United States. Yet it is difficult to tell whether voucher students are performing better than other students, partly because test scores have not been collected since the 1994-95 school year, when the program was limited to secular schools and had relatively few participants. The legislature dropped testing and evaluation requirements for participating schools when it expanded the program in 1995. Unlike public school students, voucher students are not required to take state tests.

By the late 1990s, small, privately financed voucher experiments were operating in New York City, Dayton, Ohio, and Washington, D.C. The amount of the voucher in the three cities is relatively small, ranging from \$1,500 to \$1,700. These voucher experiments had built-in evaluation requirements, based on an experimental design. Students were assigned vouchers at random from a pool of low-income applicants. Voucher recipients who went to private schools and non-recipients who stayed in public schools were tested annually to measure achievement gains. The researchers studying the experiments claim that such random assignments allow for unbiased comparisons of educational progress by low-income students attending both private and public schools.

As in Cleveland, the results from the three cities indicate that academic gains associated with vouchers are small or non-existent. In the latest, third-year round of studies, Dayton had to be eliminated from the study because so few students remained in the voucher program for all three years that the statistical results were insignificant. The largely African-American cohort of voucher students in Washington, D.C., who had shown the largest gains in the second year follow-up, showed no significant gains in either math or reading scores after three years. Their earlier gains disappeared.

The Latino cohort in New York City, which represented more than half of the voucher students in the New York sample, consistently showed no significant gains over the three years of the study. The African-American voucher students in New York did show significant test score gains in math and reading compared with public school students, but these gains were concentrated in two cohorts — those voucher students who began fourth and fifth grades in the first year of the experiment. By the third year, however, only 226 students in the New York City sample remained in these two cohorts, out of a total of 1,440 voucher students who participated in the first year of the New York experiment, and a total of 2,774 voucher students who began in the first year of the experiment in all three cities.

Thus, whatever claims are made for voucher student gains in the three city experiments — and these claims abound from voucher proponents — they are based on statistically significant results for 226 students, or only 8 percent, of the almost 2,800 students in all three cities who used vouchers in private schools. Even if Latino and other non-black students were excluded from the evaluation, there only were significant educational performance gains among 12 percent of the African-American students who used vouchers in the three cities.

There is also a theoretical problem with the African-American gains that come from this disaggregation. The randomized studies did not randomize by race. The only randomization was for the group as a whole in each city. There was no significant effect for the group as a whole in any of the three cities.

Voucher proponents interpret these results as being a very positive finding. While it is interesting that some voucher students were able to make significant gains, the overall result of the experiments is far more modest than claimed by voucher proponents.

The largest voucher plans are found outside the United States. The most researched program is in Chile. Since 1981, all students in Chile have been eligible to receive vouchers that can be used either in private or public schools. In 1980, before the voucher program was enacted, about 20 percent of Chilean pupils in kindergarten through eighth grade were in private schools. By the early 1990s, 43 percent of K-8 students in Chile were attending private schools, both voucher schools and independent schools, which do not accept vouchers. Many private school students — 36 percent of the 43 percent — attend private schools that accept vouchers. Of those who attend private voucher schools, one-third attends religious schools and two-thirds attend non-religious private schools organized for profit.

The Chilean experience is interesting because it reveals how education markets work when parents have a choice in a system with many private schools, and where private schools are largely unregulated. During the 1980s, there was not even a teachers’ union in Chile to “impede” educational innovation. Despite such conditions, this “free market” in education did not produce the predicted results:

- There is no evidence that student test scores in math and language arts improved during the long voucher era, 1981-2000.
- There is strong evidence that pupils in public schools with similar socioeconomic backgrounds to those in private voucher schools do as well or better on national tests.
- Students in Catholic voucher schools do somewhat better than students in public schools, and students in for-profit voucher schools do somewhat worse.
- The lower the socioeconomic background of the comparison voucher and public school students, the worse the private voucher school students score compared with public school students.

Chile's voucher experience has some sobering implications for the United States. In U.S. voucher experiments, including the one in Cleveland, low-income voucher students usually attend established private schools, mainly religious ones. Generally, the private schools accept just a few new voucher students at a time. Taking a few new low-income students into a school with students from somewhat higher socioeconomic backgrounds usually creates the most favorable conditions for voucher students' academic improvement because of the positive effect that the other private school students have on the voucher students. Once there are more students from very low-income families in religious schools, there will be less improvement.

The Chilean case also suggests that in larger voucher programs where new, for-profit private schools enter the unregulated market, low-income voucher students attending such schools might learn less than if they had stayed in public schools. The Hope Schools in Cleveland are this type of school and their test score data were lower than those in Cleveland's "failing" public schools. We do not have the test score data for students in Milwaukee's expanded voucher program, but the results in Cleveland and Chile suggest that we might well find voucher students in the many new for-profit private schools scoring lower than in Milwaukee's public schools.

Do vouchers encourage public schools to improve because of increased competition?

Even if voucher students do not make significant gains in test scores when they switch to private schools, allowing families to choose among educational alternatives might force poorly performing public schools to do a better job. Proponents have long made this a centerpiece of their arguments in support of vouchers. They contend that when public schools have a monopoly on local education, they can get away with delivering low-quality education and still maintain revenues. When public schools have to compete for students, in order to hold on to state funding, school officials and teachers would have the incentive to insure that students learn, that the school runs smoothly and that parents are satisfied.

Logically, then, it would seem that competition should have a positive effect on student performance. But if there is a competition effect, it seems to be a small one. Columbia University's Clive Belfield and Henry M. Levin have reviewed a host of studies on school performance in the United States, and they conclude that the benefits of competition are largely insignificant. "Increased competition and higher educational quality are positively correlated," they write. "However ...the effects of competition on educational outcomes appear substantively modest; between one-third and two-thirds of the estimates lack statistical significance..."

Voucher proponents cite a study by Jay Greene, a researcher at the Manhattan Institute, that examined the effects of Florida's "A-Plus Accountability and School Choice Program," which provided vouchers to students attending public schools that received a failing grade in state evaluations for two out of four previous years. According to Kenneth Jost, staff writer for *Congressional Quarterly*, Greene "found evidence that schools that received a failing grade in 1999 – and thus faced the threat of vouchers – achieved test-score gains more than twice those recorded at other schools in Florida." But Gregory Camilli and Katrina Bulkley of Rutgers University argue that Greene "vastly overestimated" the test score gains in the Florida program, which was recently struck down by a Florida circuit court judge as a violation of the state constitution. (The decision was suspended while it is being appealed.)

More problematic, Greene attributed the increase in test scores to the threat of vouchers when there was no direct relation between the two. Research I did with the Economic Policy Institute shows that in the year before Florida's A-Plus program was implemented, before there was a voucher "threat," Florida schools branded as failing also had higher test-score increases than other schools. Lowest-scoring ("failing") schools in Texas and North Carolina, states with high-stakes accountability systems but no vouchers, also had the highest test score gains in the late 1990s.

Harvard economics professor Caroline M. Hoxby has studied academic performance in Milwaukee's public schools since the city's voucher experiment expanded in the late 1990s. According to Jost, she found "above-average gains in many of the schools – and particularly high gains in schools in low-income neighborhoods that she said faced the greatest 'competition' from vouchers." "Overall, ... public schools made a strong push to improve achievement in the face of competition from vouchers," Hoxby wrote in a 2001 paper on her study.

Yet, in the same study, Hoxby found no similar effect in public schools in two other sites she analyzed — Arizona and Michigan — where public schools face competition from charter schools. Neither does she provide evidence that the Milwaukee schools with the largest increases in test scores were the ones facing "the greatest competition from vouchers." Rather, she assumes that public schools in the lowest-income neighborhoods are losing the most students to private competitors.

Together with Wellesley economist Patrick McEwan, I have examined statistical data on the effectiveness and efficiency of private schools in Chile's voucher system over a 20-year period. We found no greater improvement in public school test scores in those municipalities where public schools had more intense competition from private schools than in districts without significant competition. We also interviewed many public school principals in Santiago and other cities about their response to vouchers. We found them fully aware that they were competing for students with private schools. But most of the people we interviewed felt that in an environment where private schooling was considered "higher class," improving their public schools had little effect on Chilean parents' school choice.

As in all research on the competition effect, we had to deal with the so-called "cream skimming" issue. If parents tend to view private schools as "better" than public schools, higher-educated parents are likely to be the first to transfer their children out of public education. After 20 years of vouchers, Chilean public schools have a much higher concentration of children with less-educated parents than in 1980. Since parents' education is positively related to children's academic performance, when higher-educated families switch to private schools, test scores in public schools tend to decline independent of any positive effect competition may have on test scores in these same schools. It is virtually impossible to separate out the negative effect on average test scores of cream skimming from the positive effect on test scores of competition. Public schools lose their higher-scoring students to private schools, which drives down average public school test scores, at the same time that school officials try to improve scores to retain students.

The effects of "cream skimming" also were examined in two recent studies of New Zealand's school choice plan, where students can choose public or private schools outside their local area (a type of voucher program). Studies show extensive "cream skimming" takes place in New Zealand, with increased polarization in the academic performance results between schools catering to lower-income Maori families and those with mainly higher-income students of European origin.

Most telling is that average test scores did not go up in Chile and New Zealand despite the competition among schools. Between 1994 and 2001, it is possible to compare Chile's fourth and eighth grade test results in the various years each test was given (fourth grade in 1994, 1996, 1998 and 2000; eighth grade in 1995, 1997, 1999 and 2001). Test scores in this period remained virtually flat. Neither have researchers found any evidence that New Zealand's students learned more once a voucher program was put into place. If competition is supposed to raise educational productivity, these systems should be performing better. Instead, researchers have observed a lot of student shifting among schools with no evident positive effect on overall academic results.

The bottom line is that there is tremendous risk in relying on vouchers to improve low-performing public schools. Even if the prospect of losing students to private, charter or magnet schools makes the public schools try harder, they are simultaneously likely to lose their "better" students

to their competitors, especially when voucher programs are larger scale. The danger is that the public schools become identified even more as "losers" than they were before vouchers were introduced. This makes it even more difficult to recruit good teachers. As a result, expectations for student performance may fall even lower and incentives for public schools to improve may decline instead of increase.

The risk is accentuated by the results of studies that were discussed earlier showing that voucher students who leave for private schools are likely to do no better academically than they would have had they stayed in their neighborhood public schools. This is a lose-lose situation, and it is precisely what seemed to have happened in Chile in the 1980s, before the democratic government elected in 1990 implemented a direct intervention policy of improving school facilities, supplying new curriculum materials and retraining teachers to counteract the negative effect of vouchers and to improve student test results in the lowest-performing schools.

Do vouchers lower educational costs?

Economist Milton Friedman is often described as the founding father of the school voucher movement. In an article written in the 1950s, Friedman contended that government could educate the nation's children more cost effectively by giving families fixed amounts of money – vouchers – for them to use in public or private schools. By eliminating the "monopoly" of public education, Friedman argued, the cost of education would fall.

Contemporary voucher proponents often cite Friedman in making their claim that private schools can deliver the same or better schooling for lower cost. This line of reasoning, along with resource constraints, has kept voucher subsidies in current experiments relatively low. In Cleveland, for example, families qualifying for school vouchers receive up to a maximum of \$2,250, depending on parents' income. In Milwaukee, the initial voucher was \$2,500, although it rose in three years to \$5,500. The voucher experiments in New York, Washington, D.C., and Dayton provide subsidies of \$1,500-\$1,700.

Voucher levels of around \$2,500 would probably induce private religious schools to accept some new students. Although actual costs of education in religious schools vary from locality to locality and are difficult to estimate because of many hidden subsidies, it seems that urban Catholic primary school tuition averages about \$3,000 and actual costs are probably at least a third more. The extra cost of adding 10 or 20 more students spread over several grades is relatively low, especially if no additional teachers have to be hired.

It is also possible that private schools do have lower costs per pupil than public schools even when they add additional classrooms to accommodate voucher students. Private schools tend to pay teachers lower salaries than do public schools. They are able to do so because they often hire

younger teachers and because they offer “better” working conditions, such as brighter students, smaller class sizes, a more disciplined environment, an absence of special education students or, most often, a religious environment that conforms to the teacher’s beliefs. There is also a lot of hiring of young, inexperienced teachers in Catholic and other private schools, who then move on to public schools to get the higher salaries once they gain experience. As journalist Norman Draper noted, writing about schools in Minnesota, “Private schools aren’t just privately funded. They get millions of dollars for textbooks and health and counseling services from the state, as well as bus service from neighboring public schools and the use of public-school facilities.”

School districts and states should, in theory, be able to take advantage of these lower costs to save on educational spending. But there are good reasons why this does not happen. One is that private school operators want the largest possible voucher amount from the state or district. They want to be able to recruit more experienced teachers, for example, and this costs more. Policy-makers, on the other hand, want to set vouchers at a fairly low level, but high enough to create enough seats to accommodate the number of students to be funded by vouchers. Even if some voucher plans – those in Cleveland, New York, Washington and Dayton, for example – allow private schools to charge tuition above the voucher amount, private school operators always have an incentive to push for higher vouchers, particularly when their competitors, the public schools, are receiving more money per student than they are.

David Brennan, the Ohio entrepreneur, quickly realized that his Hope Schools were losing money at Cleveland’s \$2,250 voucher level. He tried unsuccessfully to get the legislature to raise the value of the voucher. Since Ohio also provides for charter schools, funding them at about the same amount per student as public schools, Brennan converted the Hope Schools into charters to take advantage of the higher levels of financing. Milwaukee’s original \$2,500 voucher also failed to induce all but a few schools to take voucher students. Milwaukee’s voucher rose from \$2,500 to \$5,500 in three years under pressure from private school operators claiming they could not afford to take in students at the lower price.

At \$5,500, about the same cost per pupil as in Milwaukee’s primary schools, some private voucher schools seem to be making a profit. Thus, instead of saving on educational delivery because of lower teacher salaries, by setting the voucher high enough to attract new private schools, the public sector transfers some taxpayer dollars from teacher salaries to the pockets of private school operators. This might be worthwhile if it meant that children in those schools were learning more, but the evidence from other voucher plans, such as Cleveland’s and Chile’s, suggests that they may well be learning less. Since they are not subject to state testing, there is no way of knowing whether this is true.

Another problem with trying to use vouchers to lower public spending is that much of the voucher money might be used to subsidize students already in private schools, even when the voucher is limited to low-income students. In Cleveland, the Ohio legislature limited the propor-

tion of vouchers that could be used in this way to 25 percent, but as reported by New York Times writer Jacques Steinberg, research by a private group, Policy Matters Ohio, shows that the proportion of voucher students in Cleveland who already were enrolled in private schools was actually higher, at 33 percent. The study shows that in some Catholic schools in Cleveland, all the voucher recipients were already enrolled in private school, and they were predominantly white. In the expanded Milwaukee program, there was no such limit and the voucher was much larger, at \$5,500. It seems that initially about one-third of the vouchers went to students already in private schools.

Should vouchers be targeted at low-income students or should they be available for all students?

All the current voucher programs in the United States are targeted at low-income, inner-city students. A targeted voucher is limited to a certain group of students and is designed to improve their educational situation. The majority opinion in the recent Supreme Court decision had such targeted vouchers in mind when it referred to helping children in so-called “failing” schools.

The advantage of targeting is that it guarantees that private educational providers will serve the intended student population. This is important because many private schools would rather locate in districts where they could attract students from better-educated, higher-income families. Such students bring many more educational resources to schools. This poses a problem even in targeted plans, since private schools may attempt to attract the “better” students from public schools and keep away those with special educational needs and challenges.

Targeting may create political problems as well. If politicians claim repeatedly that private education is better than public schooling, and if they provide vouchers to low-income students to attend private schools, middle-class parents may begin to demand vouchers for their children as well. Voucher advocates are also likely to push for expansion of targeted voucher plans to the general population. For them, restricting vouchers to targeted low-income students is just a first step to making vouchers available to everyone.

Under a general, non-targeted voucher plan, the primary beneficiaries initially would be students already in private schools, followed by students living in higher-income areas that could support more expensive private schools charging higher tuition. Families with children in private schools willing to accept a voucher will use the voucher to reduce the tuition they already pay. New private schools are more likely to locate in higher-income areas where they can attract higher-income students able to add more tuition to the voucher amount. If the amount of the voucher were the same for all students, low-income districts would have difficulty attracting new private schools because most educational entrepreneurs would prefer to go into neighborhoods with higher scoring, easier-to-teach students from families able to pay additional tuition.

Should private schools receiving vouchers be regulated in the same manner as public schools?

In public education systems, schools are highly regulated by government and accountable to taxpayers to educate children according to standards set by school districts and the state. Schools are financially reviewed by state auditors, teachers are certified by the state, schools have to deliver a required curriculum and publicly elected school board members are accountable to their constituents. They are also obligated to educate all school children, including those with special needs and educational challenges.

Recently these accountability systems have been expanded to include regular testing of students by the state and sanctions on “failing” schools that do not improve to meet higher standards. None of this guarantees that a particular school will be a good school, but it does give taxpayers a lot of information to judge whether schools are doing what they are mandated to do. Should private schools that accept public subsidies be subject to the same degree of accountability that taxpayers demand from public schools? Most voucher proponents argue that they should not, in part because strong accountability to the state, beyond financial audits, would dampen educational innovation. But without comparable information, at least on private schools’ average academic performance, parents might think that their children are receiving an excellent education only to learn too late that they were wrong.

The regulation issue is particularly serious because many, if not most, private schools – particularly religious schools – may not accept vouchers if they are required to submit to the same regulations and standards as public schools. This could significantly reduce the supply of private schools entering the market, which might deter states that want to implement major voucher plans from imposing any accountability demands on private schools. Unregulated voucher plans also are less expensive for states to administer than regulated ones. If states or districts attempt to implement the voucher plans envisaged by the Supreme Court majority in *Zelman v. Simmons-Harris*, they could end up with dual educational systems, in which private schools are unregulated and public schools are subject to strict standards and public accountability.

Are vouchers worth it even if they are constitutional?

Voucher proponents often claim that vouchers will greatly improve American education by introducing more competition into the nation’s school systems. They also insist that vouchers will greatly improve and expand the educational opportunities available to low-income, inner city children.

If this were the case, we should be able to see these changes in Cleveland, Milwaukee, New York, Washington, D.C., Dayton, Chile and New Zealand, all of which have tried some form of

voucher plan in the past 10 years. But the academic gains are simply not there, or at least none but the most enthusiastic voucher advocates have been able to find them. Voucher parents tend to like their children’s private schools, but all the data suggest that vouchers have not produced significant academic gains either for the children who switched to private schools or the children who stayed behind in the public schools competing with the private schools.

Considered carefully, these results make sense. The assumption underlying the whole notion of vouchers is that for a given amount of resources, private schools are more productive than public schools. For that to be true, private schools must be able to recruit more productive teachers and administrators than public schools can. Alternatively, similarly capable teachers and administrators working in a private school setting would have to be more effective than if they were working in a public school with similar students. If we assume that teachers and administrators in private schools are, on average, more productive, any group of students switching out of a public school into a private school is likely to improve its average academic performance. But no one has been able to find better-than-average teaching or even school organization in private schools with students of similar socioeconomic backgrounds to students in public schools.

Luis Benveniste, Richard Rothstein and I have studied many private and public schools in California looking for differences in academic quality, but we could not find such differences. We found that private Catholic primary schools in a typical urban school district employ teachers and administrators who are no better or worse than the district’s public school teachers and administrators. Private schools may be able to select students whose parents are more concerned with their children’s safety or religious (moral) training, but we found the academic quality of the teaching and administration was about the same as in the public sector. However, we did find major differences in the academic expectations and focus on learning between those schools, both private and public, attended by students from higher socioeconomic backgrounds and those private and public schools attended by lower-income children. Parents and school personnel in higher-income neighborhoods, whether private or public, were much more focused on academic issues than were parents and school personnel in lower-income neighborhoods.

Finally, implementing voucher plans, even in small experiments, is not a simple matter. State and local governments must consider the economic and political implications of their choices, including the amount of the voucher, the decision about whether to hold private voucher schools more accountable and decisions about which families should be eligible for vouchers. The Court’s majority opinion in *Zelman v. Simmons-Harris* focused on constitutional issues related to the form of the tuition aid and the choices that were available to parents, not on the desirability of vouchers themselves. The opinion sidestepped data on the academic outcomes of private school vouchers, as well as issues of accountability and student eligibility. States and school districts will not be able to do so. With small potential educational benefits and major political risks, voucher plans have not appealed to the vast majority of states and school districts in the past. Indeed, voters in at least six states have defeated ballot initiatives to establish voucher pro-

grams – most notably in California and Michigan, where voters in November 2000 defeated proposals for school vouchers by more than a 2-to-1 margin. This wisdom should continue to guide policy-makers in the future.

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