

School Choice: Sunshine Replaces the Cloud

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As its 2001 term concluded, the Supreme Court handed long-suffering parents and children a major victory: *Zelman v. Simmons-Harris*¹ is the Court's most important education decision in almost 50 years—since *Brown v. Board of Education*.² By a vote of 5 to 4, the Court made a historic pronouncement: The school choice program before it does not violate the Establishment Clause of the First Amendment and is, therefore, constitutional. The decision opens an array of policy options to address the urgent crisis of urban education. Of equal importance, it provides strong jurisprudential support for the right of parents to direct and control their children's education.

The response to the decision from opponents of school choice³ was swift and vigorous. The National Education Association and People for the American Way pronounced the opinion a disaster for public education. Barry Lynn of Americans United for Separation of Church and State characterized the decision as a “wrecking ball” for the First Amendment's prohibition of religious establishment.⁴ The Court's dissenters agreed, predicting all manner of religious strife.

¹122 S. Ct. 2460; No. 00-1751, slip op. (U.S. June 27, 2002).

²347 U.S. 483 (1954).

³“School choice” can have a variety of meanings. It is used here to encompass publicly supported private school options, whether through vouchers, tax credits for tuition, or scholarships. I support deregulated public “charter” schools but believe that choice is not meaningful (or optimal in its competitive effects) if it is confined to the public sector. For a broader discussion of the arguments for school choice, see CLINT BOLICK, *TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT* 43–53 (1998).

⁴Quoted in David G. Savage, *School Vouchers Win Backing of High Court*, L.A. TIMES, June 28, 2002, at A1.

In reality, the decision marks no significant jurisprudential innovation for, as the Court observed, it fits neatly within “an unbroken line of decisions rejecting challenges to similar programs.”⁵ But its real-world impact is potentially titanic. The case is not really about religion at all: it is about the distribution of power over education. That is why the main challengers were not separation-of-church-and-state enthusiasts but teachers’ unions that otherwise could not care less about religious establishment. In the end, the Court recognized that the “primary effect” of the Cleveland scholarship program was not to advance religion but to expand educational opportunities. Accordingly, the Court concluded that allowing parents to direct a portion of public education funds to the schools of their choice, public or private, does not constitute religious establishment. What is far more surprising than the outcome of this case is that four justices could dissent.⁶

The Omnipresent Cloud

For as long as school choice has appeared on the policy horizon, constitutional questions have dogged it. Every school choice program adopted before 2000—whether vouchers or tax credits—was promptly subjected to legal challenge. The teachers’ unions deployed federal Establishment Clause (or, as they call it, “separation of church and state”)⁷ claims as well as state analogs. Moreover, as we pointed out in our petition for writ of *certiorari* in the U.S. Supreme Court, constitutional objections repeatedly have been raised against school choice proposals. So it was imperative for school choice proponents to remove that major obstacle to reform. Dating from the enactment of the first urban school choice program in Milwaukee in 1990, the task took a dozen years.

⁵ *Zelman*, slip op. at 21.

⁶ Illustrating the wide academic consensus that school choice is constitutional was an *amicus curiae* brief prepared by Professor Jesse Choper, former dean of the law school of the University of California at Berkeley, on behalf of three dozen law professors reflecting a broad philosophical spectrum. In addition to the professors signing the brief, prominent liberal academics taking a similar view included Laurence Tribe, Douglas Laycock, Jeffrey Rosen, Samuel Estreicher, Akhil Amar, and Walter Dellinger, acting U.S. Solicitor General in the Clinton administration.

⁷ The First Amendment provides in relevant part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

Before and during that time, the Supreme Court considered a number of cases dealing with various types of programs in which aid found its way into religious institutions. Two seemingly irreconcilable sets of precedents emerged. The first, reflecting a long period in which the Court's jurisprudence demanded a rigorous separation of church and state and evidenced a hostility toward religion, culminated in *Committee for Public Education v. Nyquist*,⁸ a 1973 decision striking down a package of religious school aid programs. The second, emanating from the view that the religion clauses of the First Amendment require governmental "neutrality" toward religion, produced six consecutive decisions sustaining direct and indirect aid programs.⁹ The apparently disparate frameworks resulted in divergent decisions among lower courts over school choice. Courts that found *Nyquist* controlling invariably found school choice programs unconstitutional; courts that found the subsequent cases controlling upheld school choice programs.

In fact, the two sets of precedents are harmonious. In *Nyquist*, the state provided loans, tax deductions, and other support exclusively for private schools and students who patronized them. The program was aimed at bailing out religious schools that were closing, and whose students were returning to public schools at considerable taxpayer expense. Applying the three-part Establishment Clause framework first set forth in *Lemon v. Kurtzman*,¹⁰ the Court concluded that the program's "primary effect" was to advance religion. The reasons for the Court's decision were understandable. Though acknowledging the strong secular purpose of providing educational opportunities outside of the public sector, the Court found that the aid was skewed entirely in favor of private schools. And among private schools, religious schools heavily predominated. Because the program was not "neutral"—for example, beneficiaries were defined in terms of the (private and overwhelmingly religious)

⁸413 U.S. 756 (1973).

⁹*Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Serv for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

¹⁰403 U.S. 602 (1973). In assessing aid programs, the Court examined whether the program (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) excessively entangles the state and religion.

schools they attended—the Court held that the aid scheme was impermissible. Given that the program’s aim was to help religious schools and their patrons, the decision was not surprising.

Had *Nyquist* been more categorical in its repudiation of school choice—adopting the separationists’ position that a single dollar of public funds may not constitutionally cross the threshold of a religious school—it would have destroyed any chance for school choice programs. Fortunately, the Court created an escape valve. It probably did so because the door to such aid already had been opened through enormously popular programs like the G.I. Bill and Pell Grants. So in a footnote, the Court planted the seeds of an exception— one that eventually became the general rule to which *Nyquist* became the exception. Specifically, the Court held open the question of “whether the significantly religious character of the statute’s beneficiaries might differentiate the present cases from a case involving some form of public assistance (for example, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.”¹¹

The Court returned to that question for the first time a decade later in *Mueller*. There the Court examined a Minnesota tax deduction for educational expenses. Because public school parents incur few expenses, the vast majority of tax deductions—allegedly 96 percent—were claimed by private school parents. The facts seemed eerily like those presented in *Nyquist*. But by a 5–4 vote, the Court upheld the deductions in a decision authored by then-Associate Justice William Rehnquist and, notably, joined by Justice Powell, who had authored *Nyquist*. The Court distinguished *Nyquist* on two main grounds. First, all of the money that flowed to religious schools through tax deductions did so as a result of independent choices made by families. Second, the program was neutral on its face, extending benefits to public and private school parents alike.

The Court rejected the invitation to determine the program’s primary effect by applying some sort of mathematical formula regarding the percentage of the program’s beneficiaries that attend religious schools. “We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under

¹¹ *Nyquist*, 413 U.S. at 782 n.38.

the law,” the Court declared.¹² Departing from a rule of facial neutrality, the Court emphasized, would render the constitutional inquiry hopelessly subjective. “Such an approach would scarcely provide the certainty that this field stands in need of,” the Court explained, “nor can we perceive principled standards by which such statistical evidence might be evaluated.”¹³ The Court concluded that “[t]he historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.”¹⁴

Jurisprudentially, the battle over school choice was over once *Mueller* was decided—a fact that the dissenters in *Zelman* nearly two decades later explicitly would acknowledge. *Mueller* provided the framework that would henceforth consistently apply, holding that aid that found its way into religious schools was constitutionally permissible so long as two criteria were satisfied: (1) the aid was directed to religious institutions only as a result of the independent decisions of parents and students (“indirect aid”), and (2) religious entities were not the only option available (“neutrality”). That framework was entirely congenial to school choice programs, whether vouchers or tax credits, and school choice advocates now had a constitutional roadmap by which to craft programs.

Mueller also disposed of a troublesome argument, articulated by the Court in prior cases, that college aid programs were conceptually different from elementary and secondary school programs because children in elementary and secondary schools are more impressionable and therefore more susceptible to religious school indoctrination. Though *Mueller* did not address the question directly, it was implicitly subsumed within the concept of parental choice. In cases involving public schools, such as school prayer cases, a doctrine of relative impressionability seems appropriate. But in indirect aid cases, children are hearing a religious message only because of their parents’ choice. In essence, parental choice operates as a constitutional “circuit breaker” between church and state.

¹² *Mueller*, 463 U.S. at 401.

¹³ *Id.*

¹⁴ *Id.* at 400.

Mueller also would affect *Zelman* in its rejection of a mathematical formula for determining Establishment Clause violations. In Cleveland, the overwhelming majority of students receiving scholarships were attending religious schools. *Mueller* confronted that issue head-on, subsuming it within both prongs of the inquiry, facial neutrality and indirect aid, and established a firm rule basing a program's constitutionality on facial neutrality.

The Court reinforced those criteria three years later in *Witters*, which involved the use of college aid by a blind student studying for the ministry in a school of divinity. It is hard to imagine an atmosphere more pervasively sectarian than that; yet the Court upheld the use of the aid in a unanimous decision by Justice Thurgood Marshall.¹⁵ The Court emphasized that only a few students would likely use the aid in religious schools or for religious vocations. In *Zelman*, anti-school choice advocates seized on that language to suggest that religious schools appropriately could compose only a small part of a broader aid program.

But writing separate concurring opinions in *Witters*, five justices reiterated the more expansive criteria set forth in *Mueller*. Most notably, Justice Powell articulated a clear neutrality standard, declaring that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the primary effect test.¹⁶ Justice Powell also emphasized that such programs should not be viewed in isolation. Instead the proper inquiry must encompass "the nature and consequences of the program *viewed as a whole*."¹⁷ That observation would prove helpful in the Cleveland case in which the Court viewed the scholarship program in the broader context of school choices available to Cleveland families.

The next case, *Zobrest*, began to blur the lines between direct and indirect aid. In that case, a school district refused on First Amendment grounds to provide an interpreter for a deaf student attending a Catholic high school. If he had chosen a public or nonsectarian

¹⁵Despite the decisive win, *Witters* came away emptyhanded. When the case was remanded, the use of the aid was invalidated by the Washington Supreme Court under the "Blaine Amendment" of its state constitution, discussed below.

¹⁶*Witters*, 474 U.S. at 490–91 (Powell, J., concurring).

¹⁷*Id.* at 492 (emphasis in original).

private school, the student would have been entitled to an interpreter. The district asserted, however, that an interpreter in a Catholic school would sign religious as well as secular lessons. *Zobrest* raised a crucial question: Would aid have to be segregated between religious and nonreligious instruction? If so, it surely would trigger the third part of the Establishment Clause test, excessive entanglement between the state and religion.¹⁸ Fortunately for subsequent school choice programs, the answer was no. Again the Court assessed the issue in terms of indirectness of the aid: The fact that the child is attending a religious school and receiving religious instruction “cannot be attributed to state decisionmaking.”¹⁹

The *Zobrest* dissenters focused on the symbolism created by a public school employee interpreting lessons in a religious school. In their view, that raised the specter of state sponsorship. Because of that special problem, *Zobrest* in some ways presented a *tougher* case than a school choice program, which has no physical indicia of state sponsorship. Indeed, perhaps unwittingly, the dissenters acknowledged as much. Justice Harry Blackmun, joined by Justice David Souter, objected to the symbolic message when a public employee is involved “in the teaching and propagation of religious doctrine.” By contrast, the dissenters aptly observed, “When government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion.”²⁰ Unfortunately, Justice Souter did not share that insight nine years later in *Zelman*.

Rosenberger buttressed the neutrality principle even more. The University of Virginia excluded student-sponsored religious publications from receiving student fees on the ground that it would violate the First Amendment to include them. To the contrary, the Court ruled that it constitutes impermissible content-based speech discrimination and thereby violates the First Amendment to *exclude*

¹⁸The excessive governmental entanglement prong of the *Lemon* test addresses legitimate libertarian concerns about government regulation of private schools in school choice programs.

¹⁹*Zobrest*, 509 U.S. at 10.

²⁰*Id.* at 22–23 (Blackmun, J., dissenting).

the religious publications. The Court applied its now-familiar Establishment Clause framework to find that financial support for religious publications, within the broader context of student activities, did not have the primary effect of advancing religion.

The criteria set forth in *Mueller* and subsequent cases seemed hospitable to school choice programs. By definition, such programs are indirect when funds flow to religious schools only if parents choose to send their children there. Neutrality is slightly more difficult to establish when suburban public schools are unwilling to participate. But if the courts look at the broader context of school choices—including open public school enrollment and charter schools as well as parochial and nonsectarian private schools—the neutrality criterion could easily be satisfied. And all of the contemporary school choice programs were designed with the Supreme Court’s framework in mind.

The two most recent cases—*Agostini*, which involved providing public school teachers for remedial instruction in religious schools, and *Mitchell*, which considered computers and other materials for aid-eligible students in religious schools—also authorized neutral aid. Because the aid was provided directly to the school, however, the Court considered it relevant whether public funds “ever reach the coffers of religious schools.”²¹

Justice O’Connor wrote the 5–4 majority opinion in *Agostini* and applied the two-part framework of the post-*Nyquist* cases. *Agostini* signaled a willingness on the part of the Court to overrule *Nyquist*-era precedents that seemed to require discrimination against religious schools rather than neutrality. The Court also subtly modified the definition of neutrality. In *Nyquist*’s footnote 38 and in subsequent decisions, the Court had gauged neutrality in the context of both public and private choices. But in *Agostini*, the Court found that the neutrality criterion was satisfied where “the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.”²² Under that standard, school choice programs qualify even if they do not explicitly include public schools within the range of options.

²¹ *Agostini*, 521 U.S. at 228.

²² *Id.* at 231.

In *Mitchell*, the plurality opinion for four justices, written by Justice Clarence Thomas, treated neutrality as the sole criterion in aid cases. That prompted a separate concurrence by Justices O'Connor and Breyer. Though joining in the plurality's conclusion that the aid was permissible, they differentiated between indirect ("true private choice") and direct aid programs, emphasizing again that direct aid programs may be unconstitutional if they result in public funds reaching religious school coffers. Justice O'Connor seemed merely to be reiterating the two-pronged approach—neutrality plus true private choice—that the Court had applied since *Mueller*; but her alliance with Justice Breyer, who had not previously displayed moderation on Establishment Clause issues—was worrisome. Was Justice Breyer now a possible vote in favor of school choice? Or was Justice O'Connor a possible vote against?

The Cleveland Program

It was amidst that uncertainty—a congenial constitutional standard but a closely divided Court—that the Cleveland case went up to the U.S. Supreme Court, with the future of educational freedom at stake.

The Cleveland program arose amidst a chronically mismanaged school system whose control had been seized by a federal court from local officials and transferred to the state. When the program was enacted in 1995, Cleveland students had a 1-in-14 chance of graduating on time with senior-level proficiency—and a 1-in-14 chance of being a victim of crime inside the public schools each year. The state responded in part with an array of educational options, including the Cleveland scholarship program.²³

The Cleveland program was designed to satisfy the Court's Establishment Clause criteria. Eligible students, defined by residence and family income, could direct a portion of their state education funds as full payment of tuition at participating schools. Both private

²³Milwaukee has the oldest urban school choice program for low-income students, dating to 1990. It was expanded in 1995 to include religious schools. Florida created a state-wide choice program for students in failing public schools in 1999. Arizona enacted scholarship tax credits, by which taxpayers can receive a tax credit for contributions to private scholarship funds, a program that subsequently has been emulated by Pennsylvania and Florida. All of those programs and others were implicated in the U.S. Supreme Court's deliberations over the Cleveland program.

schools in Cleveland and public schools in the surrounding suburbs were invited to participate. Private schools would receive a maximum of \$2,500 per student, while suburban public schools would receive approximately \$6,000. Unfortunately, although all private schools in Cleveland signed up for the program, no suburban public schools did. Moreover, the two largest nonsectarian private schools in the program converted to community (charter) school status, thereby receiving about twice as much reimbursement as they had received in the scholarship program. As a result, approximately 82 percent of the schools in the program were religious, enrolling about 96 percent of the scholarship students.

A panel of the U.S. Court of Appeals for the Sixth Circuit, by a 2–1 vote, found that those facts amounted to a violation of the Establishment Clause.²⁴ In assessing the program's neutrality, the court did not examine the program on its face, but instead looked at the percentage of schools in the program that were religious and the percentage of students in the program who attended religious schools. The court viewed the scholarship program in isolation, declining to consider the broader context of school choices, including publicly funded private nonsectarian community schools. The court also concluded that no true private choice existed because few of the participating schools were nonsectarian—which the court attributed to the small amount of the scholarship and the state's failure to compel suburban public schools to participate.

In taking the case to the Supreme Court, we expected one of the following outcomes: (1) the Court would issue an opinion broadly validating school choice; (2) the Court would strike down the program on the basis of some peculiar aspect of its design but provide a roadmap for future school choice programs; or (3) the Court would uphold the program, but the majority would factionalize, as in *Mitchell*, thereby depriving us of a clear rule of law. On the basis of recent precedents, we did not think the Court would broadly disavow school choice. Any of the likely scenarios would give us greater certainty; but naturally the first scenario—a clear and decisive victory—would have the greatest beneficial impact for school choice.

²⁴*Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000). Previously the Ohio Supreme Court had reached the opposite result. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

And that, of course, is what school choice advocates aimed to achieve.

Knowing that the state of Ohio would focus on the Establishment Clause issues, we decided to take a more expansive approach in our brief.²⁵ First we moved to blunt the plaintiffs' tactical advantage of defining the terms of the debate. We did that by setting forth crucial "background principles" that should inform the Court's deliberation. The case did not merely implicate religious establishment issues, we argued. It also raised important considerations of federalism, parental liberty, and equal educational opportunities, all of which are values deeply embedded in our nation's constitutional tradition, and all of which are promoted by expanding parental choice and educational options. Moreover, the First Amendment contains not only a prohibition against religious establishment but also a guarantee of the free exercise of religion. That combination translates appropriately, as the Court has recognized, into a requirement of nondiscrimination, or neutrality, toward religion. Again, we suggested, the program serves the principle of nondiscrimination, whereas the exclusion of religious schools would violate it.

We then went on to address the "primary effect" criterion in real-world terms. The Cleveland scholarship program grew out of a severe crisis in the Cleveland city public schools, whose administration had been turned over to the state by federal court order. In the previous school year, those schools had satisfied 0 out of 28 state performance criteria. The scholarship program sought to enlist the widest possible range of educational options, and to operate within a broad array of public educational choices. The program's neutrality, we urged, should be determined on its face, not on the basis of statistics, for two reasons. First, hitching a program's constitutionality to the actions of third parties, such as suburban public schools, renders the process hopelessly arbitrary. Indeed, suburban public schools could effectively "veto" the constitutionality of the program by refusing to participate. It seemed perverse that because some schools refused to throw inner-city youngsters an educational life preserver, no schools would be allowed to do so. Second, statistics change from year to year.

²⁵I will discuss our broader litigation strategy in much greater detail in my forthcoming book, *VOUCHER WARS*.

Moreover, the program should be evaluated not in isolation, we argued, but in its broader context. We presented a study by education researcher Jay Greene showing that if all schools of choice in Cleveland—including magnet and community schools—were taken into account, only 16.5 percent of Cleveland schoolchildren were enrolled in religious schools. If the state had adopted all of the choice programs at one time, under a statistical standard the program unquestionably would be constitutional. Why should it matter that the state adopted different options one step at a time? We introduced evidence showing that after the litigation ceased in Milwaukee, the number of nonsectarian private schools participating in the program—and the percentage of children attending them—increased substantially. We also cited affidavits and studies demonstrating the educational effects of school choice, showing again that the program’s primary effect was not to advance religion but to expand educational opportunities for children who desperately needed them.

Finally, we argued that the program marked no revolution in Establishment Clause jurisprudence. Others who were involved in the litigation were interested in reforming that area of the law, urging the Court to overrule *Nyquist*, or even *Lemon*. We always have taken a much less radical approach: Our goal is to defend school choice programs, rather than to remake Establishment Clause law. So we argued that *Nyquist* need not be overruled. To the contrary, Cleveland’s school choice program presented an easier case than the programs presented in *Agostini* and *Mitchell* because the transmission of aid depended entirely on the independent decisions of parents. That characteristic attenuates any perception of state endorsement of religion, a recurrent Establishment Clause concern.

In sum, our approach and that of our allies was to depict the case as one about education, not religion. And if the program really was about education, we reasoned, then its “primary effect” could not be to advance religion.

Supreme Decision

The Court’s decision vindicated the most optimistic hopes of school choice supporters. Despite the narrow 5–4 victory, the Court majority spoke with a single, decisive voice, providing precisely the clarity necessary for the school choice movement to progress. Inexplicably, Justice Breyer retreated from the framework he had

set forth in *Mitchell*, but Justice O'Connor remained true. Writing for the majority,²⁶ Chief Justice Rehnquist moderated his position in *Mitchell*, accommodating Justice O'Connor by retaining the "true private choice" criterion that the *Mitchell* plurality sought to jettison.

Justices O'Connor, Kennedy, Scalia, and Thomas fully joined Rehnquist's majority opinion. The chief justice began by recounting the grievous educational conditions giving rise to the Cleveland scholarship program. Against that backdrop, the Court observed, the scholarship program was adopted as "part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren."²⁷ The Court examined other educational options, including magnet and community schools as well as the higher dollar amount they commanded.

Rehnquist observed that "our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."²⁸ Whereas the Court's recent cases had expanded the permissible realm of direct aid, "our jurisprudence with respect to true private choice programs has remained consistent and unbroken."²⁹ Recounting that jurisprudence, Chief Justice Rehnquist declared that "where a government aid program is neutral with respect to religion, and provides assistance to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause."³⁰

The Court was convinced that the program was both neutral and "a program of true private choice," as part of "a general and multi-faceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district."³¹ Continuing,

²⁶ It was fitting that the chief justice wrote the majority opinion, for he also authored the *Mueller* decision in 1983, which inaugurated the modern era of Establishment Clause jurisprudence.

²⁷ *Zelman*, No. 00-1751, slip op. at 5.

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ *Id.* at 10.

³¹ *Id.* at 11.

the Court noted that the program “confers educational assistance directly to a broad class of individuals defined without reference to religion.”³² Moreover, “[t]he program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so.”³³ By contrast, the program did not provide a financial incentive for parents to choose religious schools. To the contrary, it creates “financial *disincentives* for religious schools.”³⁴ Parents receiving scholarships have to co-pay a part of their tuition (\$250), whereas parents choosing traditional, magnet, or community schools pay nothing. Emphasizing that “such features of the program are not necessary to its constitutionality,” they “clearly dispel” any notion that the program is skewed toward religion.³⁵

Citing the Greene study, the Court viewed the program in the broader context of school choices, and rejected the statistical snapshot as a touchstone of constitutionality. “The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a private scholarship and then choose a religious school.”³⁶ Beyond that, the Court emphasized, “The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.”³⁷

Finally, the Court considered *Nyquist*, finding no reason to overrule it because it did not compel the Court to strike down the Cleveland program. After all, *Nyquist* involved programs that were designed unmistakably to aid religious schools, and the Court expressly had left open the question—answered subsequently in *Mueller* and other cases—of the constitutionality of a genuinely neutral aid program. Hence, the Court’s ruling changed jurisprudence not at all.

³² *Id.* (citations omitted).

³³ *Id.* (emphasis in original).

³⁴ *Id.* at 12 (emphasis in original).

³⁵ *Id.*

³⁶ *Id.* at 14 (emphasis in original).

³⁷ *Id.* at 17.

In closing, the Court underscored the moderation of its decision:

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.³⁸

Justice O'Connor wrote separately to emphasize two points: that the decision does not mark "a dramatic break from the past," and that the inquiry regarding "true private choice" should "consider all reasonable educational alternatives to religious schools that are available to parents."³⁹ In the overall context of school choices in Cleveland, Justice O'Connor emphasized, religious schools played a small role. Moreover, government policies in general, including tax exemptions for religious institutions, already bestow a substantial financial benefit. That context, she explained, "places in broader perspective the alarmist claims about implications of the Cleveland program" sounded by the dissenters.⁴⁰

Justice Thomas's concurring opinion was especially poignant, remarking that "[t]oday many of our inner-city public schools deny emancipation to urban minority students," who "have been forced into a system that continually fails them."⁴¹ He observed, "While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society."⁴² The Cleveland scholarship program, he concluded, "does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate

³⁸*Id.* at 21.

³⁹*Id.* at 1–2 (O'Connor, J., concurring).

⁴⁰*Id.* at 7.

⁴¹*Id.* at 1–2 (Thomas, J., concurring).

⁴²*Id.* at 8.

their children. This is a choice that those with greater means have routinely exercised."⁴³

Justice Thomas also raised the question about whether the Establishment Clause should be construed to limit state action. By its terms, the First Amendment is addressed to Congress. Most of the provisions of the Bill of Rights have been "incorporated" to apply to the states through the 14th Amendment. But as Thomas observed, "When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty."⁴⁴ He concluded with this warning: "Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and dis-serves those in the greatest need."⁴⁵

Dissenting Justices Stevens, Souter, and Breyer rejected the Establishment Clause framework that the Court has applied for the past two decades. Stevens raised concerns about "religious strife," invoking the specter of "the Balkans, Northern Ireland, and the Middle East"⁴⁶—concerns echoed by Souter's claims of "divisiveness"⁴⁷ and Breyer's warnings of "religiously based conflict"⁴⁸—all notwithstanding that, as the majority pointed out, "the program has ignited no 'divisiveness' or 'strife' other than this litigation."⁴⁹ Nor, as the majority observed, do the dissenters propose any rule of law by which the Court could discern when a program is too religiously divisive to sustain.

The government already dispenses billions of dollars through the G.I. Bill, Pell Grants, student loans, and other programs that can be used for religious education. Yet Americans are not at each other's throats in religious conflict. Strife is minimized because benefits are used in a nondiscriminatory fashion and directed by individual choice. That actually promotes a value that liberals are supposed to support: diversity. No one views a Pell Grant used at Georgetown

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 3 (Stevens, J., dissenting).

⁴⁷ *Id.* at 34 (Souter, J., dissenting).

⁴⁸ *Id.* at 13 (Breyer, J., dissenting).

⁴⁹ *Id.* at 20–21, n.7. (Rehnquist, C.J.)

or Yeshiva University as primarily advancing religion, because of the plethora of available options. Nor have the Cleveland, Milwaukee, or Florida school choice programs created religious strife because they correctly are perceived as educational programs.

The main dissenting opinion, written by Souter and signed by Stevens, Ginsburg, and Breyer, castigated the Court's jurisprudence beginning with *Mueller*. It also concluded that no true private choice exists in Cleveland. Instead parents are presented with a Hobson's choice⁵⁰ between bad public schools and much better religious schools—a choice without a realistic alternative. It seems odd that the proposed solution would be to eliminate the only positive choice. Souter concedes that in his view there is nothing the state permissibly can do to make religious options available. "The majority notes that I argue both that the Ohio program is unconstitutional because the voucher amount is too low to create real private choice and that any greater expenditure would be unconstitutional as well," he observes. "The majority is dead right about this."⁵¹ For the dissenters, the only constitutionally permissible option is for the state to consign students to government schools, no matter how defective.

The dissenters warn that "the amount of federal aid that may go to religious education after today's decision is startling: according to one estimate,⁵² the cost of a national voucher program would be \$73 billion, 25% more than the current national public-education budget."⁵³ That estimate is grossly misleading. Private school education in the lower grades can actually save the government money. Consider that \$2,250 in public funds, supplemented by \$250 from each student, covers full private school tuition in the Cleveland program. Moreover, Establishment Clause jurisprudence never has turned on the amount of money spent—in the view of rigid separationists, one dollar is too much—but rather on the absence of government coercion. The dissenters would return us to an era in which the U.S. Supreme Court grafted onto the Constitution a requirement of discrimination against religion.

⁵⁰ *Id.* at 24 (Souter, J., dissenting).

⁵¹ *Id.* at 23.

⁵² The "projection" is from the anti-school choice People for the American Way, whose studies are copiously cited by the dissenters, although they are not part of the case record.

⁵³ *Zelman*, slip op. at 27 n.20 (Souter, J., dissenting).

Finally, the four dissenters take up the role of lobbyists, beseeching the “political branches [to] save us from the consequences of the majority’s decision,” and expressing the “hope that a future Court will reconsider today’s dramatic departure from basic Establishment Clause principle.”⁵⁴

Justice Breyer presented a separate dissent, joined by Stevens and Souter (but curiously, not by Ginsburg). He wrote separately “because I believe that the Establishment Clause concern for protecting the Nation’s social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program.”⁵⁵ For Breyer, school choice programs not only must comply with the express intent of the First Amendment—to prohibit laws “respecting an establishment of religion”—but also must avoid promoting “religiously based social conflict.”⁵⁶ In that regard, it doesn’t seem to matter that the Cleveland program, in its sixth year of existence, has not created religious conflict. Neither does it seem to matter that the aim of the program is educational. Instead, Breyer views the program against the backdrop of religious strife. He notes that in the United States, “[m]ajor religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. . . . And several of these major religions contain different subsidiary sects with different religious beliefs.”⁵⁷ Does that suggest we can all get along only if each group is denied the opportunity to direct government benefits as it sees fit? Even worse, must non-Catholic families be denied an opportunity to send their children to inner-city Catholic schools?

Justice Breyer concedes that the “consequence” of existing aid programs that include religious options “has not been great turmoil.”⁵⁸ Nor is there evidence that the Cleveland program—or any other school choice program—has caused religious strife. But a voucher program, in Justice Breyer’s view, “risks creating a form of religiously based conflict potentially harmful to the Nation’s social

⁵⁴ *Id.* at 34. Justice Souter took the additional dramatic step of reading his dissent from the bench.

⁵⁵ *Id.* at 1 (Breyer, J., dissenting).

⁵⁶ *Id.* at 7.

⁵⁷ *Id.*

⁵⁸ *Id.* at 10.

fabric.”⁵⁹ Note the hypothetical language: it does not *do* it, it only *risks* it, and what it risks is not invariable harm but *potential* harm. On that double hypothesis, the dissenters would substitute their abstract concerns for the state of Ohio’s urgent effort to deliver educational opportunities to the children of Cleveland.

One wonders whether, in 5 years or 10, when the dire prognostications of religious strife remain unfulfilled, the dissenters would reconsider. Likewise, one wonders why the dissenters focused on an argument that the plaintiffs made only in passing. While the plaintiffs tried mainly to shoehorn the Cleveland program into the *Nyquist* construct, they expended relatively little effort in raising religious strife concerns. For their part, the dissenters implicitly acknowledged that the past 20 years of jurisprudence firmly sanction school choice programs. Yet, they substituted the subjective fears of individual justices for the clear command of governmental neutrality embodied in the First Amendment’s religion clauses. Fortunately, that view did not prevail, but it is genuinely alarming that it attracted four votes.

The Road Ahead

Notwithstanding the dissenters’ rhetoric, the majority opinion is the law of the land, and it dissipates the cloud over school choice programs. All recent voucher programs and proposals readily satisfy the applicable criteria. So do scholarship and tuition tax credit programs.⁶⁰ It now seems entirely permissible for the government to adopt a program in which *all* education funding is channeled through students—to public and private schools alike. The decision could help usher in an era of child-centered public education reform whereby the state is a *funder* of education even if not a *provider*—focusing less on *where* children are being educated and more on *whether* children are being educated.

The immediate beneficiaries of the *Zelman* decision are families in school choice programs who have lived in constant fear that their children would be pried out of the only good schools they have ever

⁵⁹*Id.* at 13.

⁶⁰Indeed, because *Mueller* is so closely on point, tax credit programs have fared more easily in litigation so far. In three cases defending tax credits, we have not lost a single round in any court.

attended. The anti-school choice lobby is deprived of its federal constitutional argument. In Florida, where litigation challenging the state's opportunity scholarship program is ongoing, the federal constitutional cause of action has evaporated. The federal constitutional objection had not only presented a legal obstacle but a legislative one as well. School choice opponents surely will continue to resist any effort to dismantle the public school monopoly, but no longer will they be able to credibly assert that such efforts are unconstitutional.

The litigation focus will shift to state constitutions. Forty-seven states have religious establishment provisions that are more explicit than the First Amendment. About three dozen are "Blaine Amendments," tracing back to the late 19th century when anti-Catholic activists succeeded in adding restrictive language to state constitutions in an effort to preserve Protestant hegemony over public schools and taxpayer funding.⁶¹ Most of the provisions prohibit "aid" or "support" of private or religious schools. Some states, such as Wisconsin and Arizona, have construed their provisions in harmony with the First Amendment, finding that school choice programs do not aid or support private schools but instead aid and support students.⁶² But at least a dozen states have interpreted their constitutions as forbidding aid to students in religious schools.

The *Zelman* decision allows the school choice movement, for the first time in 12 years, to shift from defense to offense in the courts. Rather than fighting the Blaine Amendment issue state by state, we plan to file test cases that will invoke the neutrality principle to strike down all state constitutional provisions that discriminate against religious options. Moreover, school choice advocates now have ultimate legal authority for this proposition: Instead of remedies calling merely for more money, educational deprivations can be remedied through vouchers.

Remarkably, it took 12 years of intense litigation to establish the baseline principle that parents can decide how to direct the spending devoted to their children's education. It will take much more work

⁶¹ See, e.g., Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J. L. & PUB. POL'Y 657 (1998).

⁶² *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), cert. denied, 528 U.S. 921 (1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), cert. denied, 525 U.S. 997 (1998).

School Choice: Sunshine Replaces the Cloud

to establish even more ambitious principles of educational freedom, but the task is an essential one. To paraphrase Winston Churchill, this triumph marks only the end of the beginning.

For now, advocates of educational freedom have much to celebrate. In common cause with economically disadvantaged families, we have prevailed in our first big test in the U.S. Supreme Court. The special interest groups dedicated to the status quo are momentarily vanquished. The empire will strike back, to be sure; but this decision shows that they can be beaten, that David can indeed slay Goliath.

When the unions first challenged the Cleveland scholarship program in 1997, they characterized the parents as “inconsequential conduits” for the transmission of aid to religious schools. The unions merely revealed their arrogance and cynicism. Yes, the parents *were* inconsequential, but they no longer are. In fact, in Cleveland and Milwaukee and other pockets in America, the parents are finally, and forever, in charge.

That’s exactly what threatens the education establishment. Let’s hope it proves contagious.

