

THE POLITICAL INTERSECTION OF SCHOOL CHOICE, RACE, AND VALUES

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INTRODUCTION

Teachers' unions and the education lobby have traditionally opposed school choice on the assumption that vouchers created an improper relationship between religion and state.¹ School vouchers are grants of public money given to parents that can be used to pay for their child to attend either a private school, charter school, or various public schools.² Specifically, the unions argue that vouchers used on private religious schools

1. Jonathan P. Krisbergh, Note, *Marginalizing Organized Educators: The Effect of School Choice and 'No Child Left Behind' on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025, 1033 (2006) ("The voucher concept is rooted in free-market principles of giving parents the choice of where their children are educated, with the idea that such choice will force school improvement to compete for students."); *see also id.* at 1038 ("[T]he teachers' unions are in unanimous opposition to school vouchers . . ."); *id.* at 1034 ("Many fear that vouchers represent a significant step to completely abandon public education in favor of a private system. The teachers' unions are 'some of the most vocal critics' of vouchers The Wall Street Journal reported that the NEA [The National Education Association] raised its dues specifically to help fund anti-voucher efforts." (quoting Richard S. Albright, *Educational Voucher Statutes: Does the Rosenberger Analysis Provide a Modern Constitutional Foundation for Legitimacy?*, 74 U. DET. MERCY L. REV. 525, 530 (1997))).

2. *Id.* at 1033.

violate the Establishment Clause of the United States Constitution.³ This position hinges on the argument that when government implements voucher programs, “[it] act[s] with the purpose of advancing . . . religion.”⁴ However, this contention was seemingly put to rest in 2002 when the U.S. Supreme Court, in *Zelman v. Simmons-Harris*, held that voucher programs, on their face, do not violate the Establishment Clause.⁵ Nevertheless, because the Court decided *Zelman* on a 5–4 split decision,⁶ the issue of whether school vouchers violate the Establishment Clause may resurface in the future.⁷

In spite of *Zelman*, voucher opponents pressed on in their opposition.⁸ After the 2002 decision, the unions have remained adamant in opposing school choice by any means necessary.⁹ They “have taken the fight to the courts, the legislatures, and before the court of public opinion.”¹⁰ Further, some voucher opponents have now guided the debate toward state constitutional interpretation.¹¹

In addition to the debate now not solely focusing on the Establishment Clause, the Court’s 2004 decision in *Locke v. Davey*¹² presented yet another obstacle for the voucher movement. In *Locke*, the Court held that a state’s denial of funding to a student who chose to pursue a ministry degree was constitutional, even when the funds were generally available to students who pursued nonreligious majors.¹³ The decision was a setback for the voucher movement.¹⁴ *Locke* seemingly demonstrated that Blaine Amendments, which are state constitutional provisions requiring more stringent standards of separation of church and state than the Establishment Clause,¹⁵ are constitutional.¹⁶ Thus, even though *Zelman* ruled that

3. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

4. See *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997).

5. *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (“The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not.”). While *Zelman* was admittedly a fact-driven case, the *Zelman* Court held that if certain requirements are met, the government can give grants of money to parents in order for the parents to send their child to a private religious school. See *id.* at 652–53.

6. Chief Justice Rehnquist and Justices Thomas, Scalia, O’Connor, and Kennedy voted with the majority. Justices Stevens, Souter, Ginsburg, and Breyer formed the minority.

7. See generally Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 174–77 (2002).

8. Irina D. Manta, *Missed Opportunities: How the Courts Struck Down the Florida School Voucher Program*, 51 ST. LOUIS U. L.J. 185, 185 (2006).

9. Krisbergh, *supra* note 1, at 1034–35.

10. *Id.* at 1034.

11. *Id.*; Manta, *supra* note 8, at 185.

12. 540 U.S. 712 (2004).

13. *Id.* at 725.

14. See Brian C. Anderson, *If Not Vouchers?*, CITY JOURNAL, Spring 2004, at 8, 8.

15. See Joseph P. Viteritti, *Blaine’s Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 670–75 (1998); see also Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 118 n.4 (2000); Anderson, *supra* note 14,

public money given indirectly to religious institutions is not a violation of the Establishment Clause,¹⁷ voucher supporters may now be forced to contest the controversial Blaine Amendments state-by-state,¹⁸ in addition to worrying about the possibility of *Zelman* being overturned.¹⁹

In Part I, this Note will discuss the constitutional arguments on both sides of the voucher issue. Part II will examine the political issues surrounding school choice. Specifically, I will examine the two main political arguments behind school choice: the values claim and the civil-rights claim, and whether these two views may work together to form a mutually beneficial voucher movement. In Part III, the author will propose an ideal voucher model that will satisfy both the civil-rights claim supporters as well as the values claim supporters.

I. LEGAL ARGUMENTS SURROUNDING SCHOOL CHOICE

Business groups and advocacy groups that promote education accountability have long battled against the teachers' unions in a battle of public opinion over vouchers. In 2002, the Supreme Court directly addressed the Constitutional issues surrounding school choice.

A. *The View That Vouchers Violate the Establishment Clause*

“The channeling of government funds to [private] schools—whether directly or through parents exercising their voucher-created consumer choice—has been opposed as constitutionally prohibited aid to religion.”²⁰ In *Zelman*, the dissent argued that “[t]he applicability of the Establishment Clause to public funding of benefits to religious schools was settled in

at 8 (noting that many individuals believe Congressman Blaine's attempt at amending the U.S. Constitution was driven by anti-Catholic beliefs); Blaine Amendments, <http://www.blaineamendments.org/Intro/whatis.html> (last visited May 28, 2009) (“Blaine Amendments are provisions in dozens of state constitutions that prohibit the use of state funds at ‘sectarian’ schools. They’re named for James G. Blaine, who proposed such an amendment to the U.S. Constitution while he was Speaker of the U.S. House of Representatives in 1875.”).

16. See Anderson, *supra* note 14, at 8 (noting that after *Zelman*, many voucher supporters had hoped that Blaine Amendments would be considered a per se violation of the Constitution).

17. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002).

18. See Anderson, *supra* note 14, at 8; see also Manta, *supra* note 8, at 186–87 (“This case would eventually become the first Blaine Amendment litigation before a state supreme court in the aftermath of *Locke v. Davey*, and both school voucher advocates and opponents nationwide would closely watch it develop. Significant disappointment ensued on the part of advocates when the Florida Supreme Court decided the case, *Bush v. Holmes*, on the grounds [of the uniformity clause of the state constitution] and failed to address the Blaine Amendment Most notably, this move to focus on the interpretation of state law alone ensured that the United States Supreme Court would not grant certiorari and that the OSP would definitely fall.”).

19. See generally Fried, *supra* note 7, at 174–92 (contending that the overturning of the *Zelman* decision is a real and distinct possibility).

20. See *id.* at 172–73 (“The Establishment Clause has been the proxy battleground for this fierce and important political battle.”).

Everson v. Board of Ed. of Ewing.²¹ In *Everson*, the court wrote, “No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”²² The issue in that case was whether a state could fund the transportation of children between their homes and their religious schools. The *Everson* Court summarized its decision by looking to Thomas Jefferson’s famous, albeit sometimes misunderstood, metaphor:²³ “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”²⁴

In the Ohio Pilot Project Scholarship Program, upon which the *Zelman* litigation was focused, families in failing school districts were given a choice concerning where their children attended school.²⁵ The program provided tuition aid for students to attend a public or private school that

21. *Zelman*, 536 U.S. at 686 (Souter, J., dissenting) (footnote omitted).

22. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); see also *Zelman*, 536 U.S. at 687 (Souter, J., dissenting) (“The Court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson*.”).

23. See Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>. In response to a letter from the Danbury Baptists which expressed concern for religious discrimination the Baptists were facing, Jefferson penned the following:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.

Id.

24. *Everson*, 339 U.S. at 16 (quoting *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878)). For an analysis of the flawed interpretation of Jefferson’s metaphor, see Raymond W. Kaseloni, Jr., *Everson and “The Wall of Separation Between Church and State”*: *The Supreme Court’s Flawed Interpretation of Jefferson’s Letter to the Danbury Baptists*, 17 REGENT U. L. REV. 101 (2004).

25. *Zelman*, 536 U.S. at 644 (majority opinion). For a more detailed explanation for the crisis that was ongoing in, specifically, Cleveland City Schools, see *id.* at 644–46. See also CHARLES COLSON & NANCY PEARCEY, *HOW NOW SHALL WE LIVE?* 342 (1999). Chuck Colson, the former General Counsel for President Nixon who went to prison for his involvement in the Watergate scandal, tells the story of an inner-city family who was helped by the Cleveland voucher program:

In Cleveland, Ohio, Delvoland Shakespeare was horrified when he visited the school his five-year-old son would attend in the fall. At the intersection outside the school, drug dealers occupied one corner, winos a second corner, prostitutes a third, and men shooting dice on the fourth. Inside the school, he saw students bouncing around without any discipline, and battered textbooks with no covers. In the boys’ bathroom, a man tried to sell him drugs. Mr. Shakespeare said “my son had to walk through this war zone, and once we got in the school grounds, he is still in a war zone . . . No way was I going to send him into that school.” The young African-American father moved his family into an attic so he could afford to pay for a private Catholic school. Finally, two years later, when Ohio began a voucher program that permitted parents to use the vouchers at religious schools, the Shakespeares won vouchers for both of their sons. Freed from tuition expenses, the family was able to move out of the attic and into their own home.

Id.

participated in the voucher program. In addition, the program provided tutors to students who remained at their failing public school. The tuition aid was the segment of the program that drew the most attention from school choice opponents.

The Ohio program allowed private schools to participate regardless of religious affiliation.²⁶ If a family fell within a certain threshold of the poverty line, they were given special priority in the program.²⁷ Further, if a parent enrolled their child in the program, the parent had the choice of sending their child to another public school, a private secular school, or a private religious school. It is important to note, however, that the state did not send the tuition checks directly to the private schools. Instead, the state gave the checks to the parents, who in turn decided where to use the checks.

Most of the voucher funds for the Ohio program were spent for tuition at religious schools.²⁸ The *Zelman* dissent argued that the tuition money would pay not only for students' academic instruction but also "to teach religious doctrine and to imbue teaching in all subjects with a religious dimension."²⁹ Thus, the dissent's argument rests on *Everson*:

How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers . . . ? It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria.³⁰

The *Zelman* dissenters argued that, in contrast to the majority's holding, even if neutrality was the relevant question to ask, the Ohio program was not actually neutral at all.³¹ They contended that the tuition limits of the program gave families an incentive to send their children to the private schools and said that evidence of this incentive was the sheer percentage of religious schools that were in the program.³² Again, the dissent attacked

26. See *Zelman*, 536 U.S. at 644–46. In addition, public schools were also allowed to participate.

27. *Id.* at 646 (noting that parents that enroll their children in the program are "eligible to receive 90% of private school tuition up to \$2,250").

28. *Id.* at 687 (Souter, J., dissenting).

29. *Id.*

30. *Id.* at 688.

31. *Id.* at 696; see also *id.* at 697–98 (arguing that the scheme was non-neutral because "public tutors may receive from the State no more than \$324 per child to support extra tutoring (that is, the State's 90% of a total amount of \$360) . . . whereas the tuition voucher schools (which turn out to be mostly religious) can receive up to \$2,250") (citations omitted).

32. See Joseph P. Viteritti, *Reading Zelman: The Triumph of Pluralism, and its Effects on Liberty, Equality, and Choice*, 76 S. CAL. L. REV. 1105, 1117 (2003).

the majority's position that the program did not violate the Establishment Clause because the parents had a choice regarding where to send their children.³³ Referring to the situation as a "Hobson's choice,"³⁴ the dissent contended that "[f]or the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious."³⁵ This argument was based on the fact that very few non-religious private schools were enrolled in the program.³⁶

Moreover, Justice Breyer and Justice Stevens considered vouchers from a purely public-policy perspective.³⁷ These Justices contended that any breach of Jefferson's wall of separation increased the chance of religious conflict in the country.³⁸ Justice Stevens admitted that in reaching the conclusion that the voucher program violated the constitution, he was "influenced by [his] understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another."³⁹ The arguments put forth by Justices Breyer and Stevens insert their personal philosophies on how to best advance social goals.⁴⁰ In other words, Justice Breyer's and Justice Stevens's dissents are "more political than legal."⁴¹

B. Zelman—Supreme Court Holds that Vouchers Do Not Violate the Establishment Clause

On the other hand, the *Zelman* majority accepted that the Ohio program's purpose was simply to provide educational choices for students who attend failing public schools.⁴² Put another way, the majority accepted that the voucher program's purpose was secular.⁴³ Chief Justice Rehnquist evaluated the Establishment Clause claim on three prongs. First, the aid

33. See *Zelman*, 536 U.S. at 707.

34. *Id.*; see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1076 (Philip Babcock Grove et al. eds., 1966) (defining a Hobson's choice as "an apparent freedom of choice where there is no real alternative").

35. *Zelman*, 536 U.S. at 707; see also Viteritti, *supra* note 32, at 1117.

36. See *Zelman*, 536 U.S. at 707.

37. See Viteritti, *supra* note 32, at 1118.

38. See *id.* at 1106 (they argued that vouchers constituted a breach of Jefferson's wall of separation).

39. *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting); see also Viteritti, *supra* note 32, at 1118–19 ("What is most remarkable about the dissents filed by Justices Stevens and Breyer is their emphasis on how choice, in the form of voucher programs, would foster political discord and tear the social fabric underlying American democracy.").

40. See Viteritti, *supra* note 32, at 1118.

41. *Id.*

42. Martha M. McCarthy, *Zelman v. Simmons-Harris: A Victory For School Vouchers*, 171 EDUC. L. REP. 1, 3 (2003).

43. *Id.* at 4.

must be administered in a neutral way.⁴⁴ Second, the participants—to whom the public aid is directed—must have true choice between religious and secular schools when determining to which institution to send their children.⁴⁵ Third, as mentioned, the aid cannot be given directly to the religious institution. Instead, it must be given to parents, who then have a choice as to where they use the check.⁴⁶ When these elements are met, a school voucher program can withstand constitutional challenges under *Zelman*.⁴⁷

In regards to the “true choice” prong, *Zelman* noted that the Court’s decisions over the years have not changed.⁴⁸ The Court relied on three decisions that upheld public aid to a “broad class of individuals, who, in turn, direct[ed] the aid to religious schools or institutions of their own choosing.”⁴⁹ In *Mueller v. Allen*, a lawsuit was brought against Minnesota for allowing parents who sent their children to private religious schools to deduct tuition, textbook, and transportation expenses.⁵⁰ The Court held that a program “that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.”⁵¹ Three years later, in *Witters v. Washington Department of Services for the Blind*, the court upheld a similar program.⁵² In 1993, *Zobrest v. Catalina Foothills School District* held that a state is not prevented from allowing a deaf child, who is enrolled in a private religious school, to use a sign-language interpreter provided by the state.⁵³ This line of jurisprudence demonstrates that neutral government programs that provide finan-

44. *Zelman*, 536 U.S. at 669 (majority opinion).

45. *Id.*

46. This pillar is intertwined with the “true choice” prong. Some scholars have combined these two prongs of the test. See Viteritti, *supra* note 32, at 1172.

47. See *Zelman*, 536 U.S. at 649 (arguing that Supreme Court “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”) (citations omitted); see also Matthew Ormiston, Comment, *Parental Choice and School Vouchers: A Viable Facet of Texas Public Education Reform?*, 9 SCHOLAR 497, 515–16 (2007).

48. *Zelman*, 536 U.S. at 649 (“Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.”).

49. *Id.*; see also McCarthy, *supra* note 42, at 4.

50. *Mueller v. Allen*, 463 U.S. 388 (1983).

51. *Id.* at 398–99; see also *Zelman*, 536 U.S. at 650 (noting that it was “irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools”).

52. *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488–89 (1986).

53. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993). In other words, “If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education.” *Id.*

cial assistance to parents rather than providing assistance directly to private schools do not violate the Constitution.⁵⁴

The government aid that is provided to parents in voucher programs is not unlike many other accepted government aid programs.⁵⁵ For example, when the government distributes welfare checks, the recipient may use the public aid to enroll in a religious-centered alcohol rehabilitation center. As long as the public aid reaches “religious institutions only by way of the deliberate choices of numerous individual recipients,”⁵⁶ the Constitution is not breached.

Further, the Court found the Ohio program “neutral with respect to religion.”⁵⁷ While this factor is intertwined with the “true choice” prong discussed above, there is somewhat of a distinction. The Court found it relevant that the children enjoyed “a range of educational choices.”⁵⁸ The government aid did not force students to attend religiously affiliated private schools. Instead, the program allowed students and their parents choices between a variety of education options. For example, children may of course stay in their public school, but they also may use voucher funds to receive tutoring in the same public school.⁵⁹ In addition, they may enroll in a secular private school, a community school, or magnet school.⁶⁰ It follows that attending a private religious school is only one of the options that students have, thereby making the program neutral with respect to religion.⁶¹

In sum, the majority’s opinion that the voucher program did not violate the Constitution rested on three ideas. First, the program gave parents a choice between enrolling their children in a secular or religious school.⁶² Second, the program was neutral toward religion.⁶³ Last, although this factor is somewhat connected to the first, the voucher program gave aid to religious schools only through an independent decision made by parents.⁶⁴

54. See *Zelman*, 536 U.S. at 649 (“[O]ur 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.”) (citations omitted).

55. See Michele Estrin Gilman, *Fighting Poverty with Faith: Reflections on Ten Years of Charitable Choice*, 10 J. GENDER RACE & JUST. 395, 408–09 (2007).

56. *Zelman*, 536 U.S. at 652.

57. *Id.* at 662.

58. *Id.* at 655.

59. *Id.*

60. *Id.*

61. See *id.* at 655–56.

62. *Id.* at 649 (“There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system.”); see also Viteritti, *supra* note 32, at 1105.

63. *Zelman*, 536 U.S. at 662; see also Viteritti, *supra* note 32, at 1105.

64. *Zelman*, 536 U.S. at 662; see also Viteritti, *supra* note 32, at 1105.

The case for the constitutionality of school choice is further supported because voucher programs “advance the fundamental right of family autonomy, specifically the right of parents to control the raising of their children.”⁶⁵ The Court first established the fundamental right to “establish a home and bring up children” in *Meyer v. Nebraska*.⁶⁶

Two years later, the Court furthered this right in *Pierce v. Society of Sisters*.⁶⁷ In *Pierce*, the Court held a state statute that mandated children’s attendance at public schools was unconstitutional because it “interfere[d] with the liberty of parents . . . to direct the *upbringing and education* of children under their control.”⁶⁸ Some advocates of school choice contend that *Pierce* affirmed the parental right to educate their children as they see fit by allowing private school systems to co-exist with government schools.⁶⁹ In essence, the argument is that *Pierce* contains an implied promise that allows parents to send their children to religiously affiliated schools.⁷⁰ Some of those same advocates, however, also concede that the *Pierce* promise seems to be an empty one because the majority of American parents cannot afford to send their children to private schools.⁷¹

The Court yet again addressed this question in *Wisconsin v. Yoder*.⁷² There the Court wrote that it is a fundamental interest of parents “to guide the religious future and education of their children.”⁷³ The Court “drove the last proverbial nail into the coffin”⁷⁴ in *Yoder* when it wrote, “This

65. See Ormiston, *supra* note 47, at 516.

66. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The *Meyer* Court recognized that “liberty” included the right to “establish a home and *bring up children*.” *Id.* (emphasis added). The Court held that a Nebraska state law that forbid teachers from teaching students in any language other than English “was an unconstitutional impediment of a parent’s fundamental right to control the rearing of their children. Accordingly, the Supreme Court endorsed a parent’s right to decide how their child shall be educated.” Ormiston, *supra* note 47, at 516–17.

67. *Pierce v. Soc’y of Sisters of Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925). The Court further stated that the principle of liberty prohibits
any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.
Id. at 535.

68. *Id.* at 534 (emphasis added).

69. See Gia Fonté, Note, *Zelman v. Simmons-Harris: Authorizing School Vouchers, Education’s Winning Lottery Ticket*, 34 LOY. U. CHI. L.J. 479, 498 (2003).

70. See *id.* at 499.

71. *Id.* at 499–500 (“Therefore, although the Court in *Pierce* broke the states’ monopoly on education, the decision did not truly provide American parents with the right to choose the education of their children. In fact, because the Court provided parents with the constitutional right to send their children to religious schools without providing parents with the financial means, the Court in *Pierce* effectively encouraged parents to place their children in public schools [S]ome argue that government funding of both private and public schools may be constitutionally required in order to achieve the promise of *Pierce*.”) (footnotes omitted).

72. 406 U.S. 205 (1972).

73. *Id.* at 232.

74. Ormiston, *supra* note 47, at 518.

primary role of the parents in the upbringing of their children is now established beyond debate as an *enduring American tradition*.⁷⁵

Just two years before the *Zelman* decision, the Court again addressed this issue in *Troxel v. Granville*.⁷⁶ In that case, the Court cited *Meyer*, *Pierce*, and *Yoder* as precedent when it held that “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”⁷⁷ The importance that is given to a parent’s right to control the upbringing of his children is illuminated by *Troxel*’s holding, which denied grandparents the right to see their grandchildren.⁷⁸

Again, it is arguable that the importance attached to this parental right is not paramount, given the fact that many parents are not currently given the financial means through vouchers—with very few exceptions—to send their children to private school in order to take advantage of this right.⁷⁹ Because voucher programs are currently very limited, only the children of the wealthy may take advantage of this right, while the very same system forces the nation’s poorest children to endure the government’s failing public schools.⁸⁰

1. *The Stability of Zelman*

While some dissenting opinions accept the majority opinion as the new established law, others give notice that they will not go down without a further fight.⁸¹ Harvard Law Professor Charles Fried refers to the later type of dissent as an “oppositional dissent”:

[T]he oppositional dissent rejects the majority’s opinion as a basis for further developments of the law. It would take the law right back to where it was before the wrong turn and implies that the dissenter will not accept the decision even grudgingly as a premise for reasoning—even if that reasoning might not carry the doctrine even further in the wrong direction. The oppositional dissent, then, is a potential vote for overruling and thus implies a refusal to allow the decision to shelter under *stare decisis*. By committing to

75. *Yoder*, 406 U.S. at 232 (emphasis added).

76. 530 U.S. 57 (2000).

77. *Id.* at 66 (holding that a state statute, which gave grandparents the right to petition the court for child visitation rights, was unconstitutional because it interfered with the parent’s right over the upbringing of their children).

78. See Ormiston, *supra* note 47, at 519.

79. See Fonté, *supra* note 69, at 499–500.

80. See *id.* at 500; see also Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DEPAUL L. REV. 997, 999 (2002).

81. See Fried, *supra* note 7, at 180–83.

an oppositional stance, the dissenter implies she will overturn precedent when the votes are there.⁸²

Fried suggests that Justice Souter's *Zelman* dissent falls within this category.⁸³ In contrast to the leading cases of the past, most notably *Nyquist* and *Lemon*, which were secure by solid majorities,⁸⁴ *Zelman* rests on a razor-thin majority. Fried notes several factors suggesting that *Zelman* remains on shaky ground: (1) the political pressure on the decision,⁸⁵ notably from secularists and teachers' unions; (2) the number of other sensitive political issues before the court that are also hanging on by a 5–4 margin;⁸⁶ (3) the Justices' average age,⁸⁷ which suggests the composition of the Court may be subject to further change in the coming years; (4) the extreme political nature of judicial confirmation;⁸⁸ (5) the desire for vindication from the 5–4 *Bush v. Gore* decision;⁸⁹ and (6) the nature of the dissent in *Zelman*.⁹⁰

Specifically, the nature of *Zelman*'s dissents may be cause for worry amongst voucher supporters and additional hope for voucher opponents. While there were three separate dissenting opinions,⁹¹ Justice Souter's seemed to be the principal dissent, as it was joined by all of the dissenters.⁹² This principal dissent carried an "opponentist message, [of] a commitment to continued dissent."⁹³ In contrast to traditional dissents, which as Professors Fried and Dworkin suggest are an attempt to best explain the legal materials,⁹⁴ Justice Souter's opinion treated an entire line of jurisprudence from *Mueller*—which ended the era of the no-aid principle—to *Zelman* simply as a mistake.⁹⁵ Thus, this dissent is "the proposal of an alternative course that the law might have taken but did not take."⁹⁶ Justice Souter's opponentist dissent is particularly interesting given that he was

82. *Id.* at 182.

83. *Id.* at 185.

84. *Id.* at 177 (noting that *Nyquist* was decided by a six-to-three margin, and *Lemon* was decided by a solid eight-to-one holding).

85. Fried, *supra* note 7, at 175.

86. *Id.*

87. *Id.* at 175–76.

88. *Id.* at 176.

89. *Id.* at 176–77.

90. *See id.* at 175–78.

91. Justices Stevens, Souter, and Breyer all filed separate dissenting opinions, but Justice Souter's dissent was the only one joined by all dissenting justices (Stevens, Ginsburg, and Breyer). *See Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (Souter, J., dissenting).

92. *See* Fried, *supra* note 7, at 185.

93. *Id.*; Professor Fried notes that the period of time "which the law did conform to Justice Souter's account was relatively brief: from 1971 to 1983." *Id.* at 188.

94. *See id.* at 187–89; *see also* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1093–96 (1975).

95. Fried, *supra* note 7, at 188.

96. *Id.*

an author of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁹⁷ In *Casey*, the Court paid “extraordinary paeon to stare decisis,”⁹⁸ when it wrote: “Liberty finds no refuge in a jurisprudence of doubt.”⁹⁹ The Court went further: “The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society’s work if it eyed each issue afresh in every case that raised it.”¹⁰⁰ Despite this apparent inconsistency in Justice Souter’s judicial philosophy, Fried suggests the constitutionality of vouchers under the Establishment Clause may resurface in the future because the four dissenters are not isolated. Instead, they form a block of four, enabling a change of one Justice to “ruin a project the majority has been working at for a generation.”¹⁰¹

Even more troubling for school-choice supporters, especially in light of Souter’s oppositionist dissent, is that since 2002 voucher programs have not picked up momentum as quickly as supporters of the movement had anticipated.¹⁰² Since *Zelman*, “vouchers have made little political headway—only three jurisdictions have adopted voucher plans, and proposals have failed in over thirty-four states.”¹⁰³ Because of the combination of the split decision, Justice Souter’s strong dissent, and the failure of vouchers to become grounded in American tradition since 2002, *Zelman* has not given the law stability or moved the school-choice issue exclusively to the political arena.¹⁰⁴

Further, the Court’s decision in *Locke* cast further doubt on the future of vouchers. As discussed, individual voucher plans will likely now have to argue for their constitutionality on an individual basis, under their state constitutions, particularly those states that have Blaine Amendments.¹⁰⁵ In the Florida school choice case, *Bush v. Holmes*,¹⁰⁶ most scholars anticipated that the Florida Supreme Court would consider the Blaine question.¹⁰⁷ Instead, the court chose to focus on a narrow state constitutional

97. 505 U.S. 833 (1992).

98. Fried, *supra* note 7, at 191.

99. *Casey*, 505 U.S. at 844.

100. *Id.* at 854 (“Indeed, the very concept of the [new] rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”).

101. Fried, *supra* note 7, at 192–93.

102. See James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 547 (2007).

103. *Id.*

104. Fried, *supra* note 7, at 177 (“By contrast, the leading cases of the earlier era rested on solid majorities: *Nyquist* was six to three, and *Lemon v. Kurtzman* was eight to one. No doubt if a regime of alternative non-government-run public school partially-funded by government were to become strongly established, it would be difficult to extirpate, but it would take years for such a system to strike deep roots, and it is a fair question whether last Term’s decision will last that long.”).

105. See Anderson, *supra* note 14, at 8.

106. 919 So. 2d 392 (Fla. 2006).

107. See Jamie Dycus, *Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & EDUC. 415, 416 (2006).

issue regarding the uniformity of education.¹⁰⁸ Thus, school choice must not only clear *Locke* and state Blaine Amendments, but must now also be able to clear other obscure state constitutional challenges.¹⁰⁹

The exuberance felt by the voucher movement after the *Zelman* decision is no longer present. As a result, if voucher supporters want school choice to remain, or rather to become, a viable option on a large scale for students across the country, they need a vision and plan that is both strong and coherent in order to cement school choice in the American tradition.

II. POLITICAL FEATURES OF SCHOOL CHOICE

A. *Two Different Views and Rationales Behind School Choice*

There are two divergent and competing views surrounding the rationale and justification for vouchers among supporters: the values claim and the civil-rights claim.¹¹⁰ As will be discussed in more detail below, the differences in philosophies and goals between these two rationales create some friction in the school-choice movement.

1. *The Values Claim*

The original battle cry for school-choice proponents was the values claim. In essence, this claim is based upon the foundation that was established in *Meyer*, *Pierce*, *Yoder*, and *Troxel*.¹¹¹ Specifically, this foundation is that parents, rather than the State, have the authority and autonomy to direct the education of their child. Many parents who support school choice are Catholics and evangelical Christians, whose support for vouchers flows from their desire to be in control of what values their children are exposed to.¹¹²

Atheism is not a lack of belief. On the contrary, atheism produces a very particular worldview.¹¹³ Similarly, taking every element of religion out of the public-school classroom is not a neutral stance; instead, it is making an affirmative pronouncement regarding religion and a moral

108. See *Bush*, 919 So. 2d at 397–98.

109. See Dycus, *supra* note 107, at 415.

110. See Forman, *supra* note 102, at 547. Professor Forman refers to what I term the “civil-rights claim” as the “racial-justice claim.”

111. See *supra* notes 67–77 and accompanying text.

112. See Forman, *supra* note 102, at 563; see also *Id.* at 563 n.79 (“A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government . . . in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.” (quoting JOHN STUART MILL, ON LIBERTY 190–91 (London, Longman, Roberts, & Green Co., 3d ed. 1864) (1859))) (alteration in original).

113. See COLSON & PEARCEY, *supra* note 25, at 208.

code.¹¹⁴ Thus, because public schools do indeed teach values,¹¹⁵ evangelical parents object to their children being subject to values taught by the state at public schools. While some parents have the means to take their children out of a public school that they believe teaches values contrary to their own, most parents do not have adequate financial resources to take this step. Thus, the values claim argument suggests that *all* parents, on the basis of the aforementioned U.S. Supreme Court precedent, should have the right to send their children to schools which reflect their values.

2. *The Civil-Rights Claim*

In contrast, the civil-rights claim has recently been gaining more traction with school choice supporters.¹¹⁶ This viewpoint frames school choice in terms of a civil-rights struggle.¹¹⁷ Supporters of this viewpoint claim that the Supreme Court's ruling in *Zelman* rivals the Court's decision in *Brown v. Board of Education*¹¹⁸ in terms of the potential impact for low-income children,¹¹⁹ particularly African-American children in urban school districts.¹²⁰

Specifically, this argument contends that poor children should be given the same opportunity to a quality education as children who come from wealthy families. Generally the children who attend failing schools are those children who live in inner-city districts or other poor areas,¹²¹ whose

114. See Forman, *supra* note 102, at 564.

115. See *id.*

116. See *id.* at 567.

117. See *id.* at 547; see also Matthew D. Fridy, Comment, *What Wall? Government Neutrality and the Cleveland Voucher Program*, 31 CUMB. L. REV. 709, 714 (2001) ("The [Cleveland] School Voucher Program was established in a way that would benefit low-income families.").

118. 347 U.S. 483 (1954).

119. See McCarthy, *supra* note 42, at 11 ("While the impact of voucher programs on equity goals remains the source of substantial debate, if *Zelman* does portend a shift toward states adopting marketplace models of schooling, its impact could rival that of *Brown* in terms of altering the character of American public education. Policymakers need to understand the full ramifications of decisions they are contemplating in connection with voucher proposals and other strategies to privatize education as directions once set will be difficult to reverse. And decisions made now will affect the next generation of students and possibly the nature of schooling in our nation.") (footnote omitted).

120. Former U.S. Secretary of Education Rod Paige also suggested that *Zelman* was comparable to *Brown*. In an op-ed to the Washington Post, Secretary Page wrote:

Brown v. Board of Education changed American education forever. I know because I grew up in the South when schools were segregated. With *Brown*, education became a civil rights issue, and the decision introduced a civil rights revolution that continues to this day. *Zelman v. Simmons-Harris* holds the same potential. It recasts the education debates in this country, encouraging a new civil rights revolution and ushering in a "new birth of freedom" for parents and their children everywhere in America.

Rod Paige, Op-Ed., *A Win for America's Children*, WASH. POST, June 28, 2002, at A29; see also Dana Milbank, *Bush Urges Wide Use of School Vouchers*, WASH. POST, July 2, 2002, at A1 (noting that President Bush suggested that the *Zelman* decision was just as historic as *Brown* to parents who could not afford to send their children to a school of their choice.).

121. But see Joseph P. Viteritti, *Defining Equity: Politics, Markets, and Public Policy*, in SCHOOL CHOICE: THE MORAL DEBATE 25-26 (Alan Wolfe ed., 2003) (noting that there is some overlap with

parents are too poor to move to a better school district or to send them to a private school.

On the other hand, children of wealthy parents are more likely to attend better performing schools. They will live in either a public school district that is meeting or exceeding expectations, or they will be sent to a private school in the event that they live in a district with failing public schools. The civil-rights claim, then, is based on the contention that “poor” children should be given this same opportunity to succeed. Today, it seems that most support for vouchers rests on the civil-rights claim, rather than on the values claim which has been the dominant argument in the past.¹²² This was, seemingly, the view taken by the implementers of the Ohio voucher program. In the *Zelman* majority opinion, Chief Justice Rehnquist wrote, “Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools.”¹²³ Thus, it seems that the *Zelman* majority, at least in part, based its Establishment Clause holding on an argument with an underlying consideration of educational inequality and the situation of poor African-American students.¹²⁴

Similar to the Ohio program, Florida implemented three state-wide voucher programs, one of which was the Opportunity Scholarship Program.¹²⁵ Opportunity Scholarships were designed to allow students who were enrolled in failing schools¹²⁶ to transfer and enroll in an adequate public or private school. The vast majority of children who participated in

some underprivileged children attending adequate schools and some lower-middle class children attending failing schools).

122. See Forman, *supra* note 102, at 566–67 (“The Court’s opinion in *Zelman* does not, for example, engage the values claim Instead, *Zelman* opens with a description of the abysmal state of the Cleveland public schools. According to the Court, Cleveland had some of ‘the worst performing public schools in the Nation,’ and the majority of its students were low-income and minority. Only 10 percent of ninth graders passed a basic proficiency test, two-thirds dropped out or failed out before graduating, and those who graduated could not compete academically with students from other Ohio schools. Vouchers were a response to this educational tragedy, an attempt to rescue a generation of Cleveland’s urban poor.”) (footnotes omitted).

123. *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002).

124. See Gary D. Allison, *School Vouchers: The Educational Silver Bullet, or an Ideological Blank Round?*, 38 TULSA L. REV. 329, 356 (2002).

125. *But see* Bush v. Holmes, 919 So. 2d 392, 409–10 (Fla. 2006). The Florida Supreme Court ruled that the Opportunity Scholarship Program violated the state constitution, by violating the uniformity clause of the state constitution. *Id.* at 412. However, Florida has several other school choice options that are still available: (1) The McKay Scholarships, which allow parents of disabled children to choose either a public or private school that best addresses the needs of their child; (2) Corporate Tax Credit Scholarship Program, which gives scholarships to low-income children to attend a public or private school of their choice, worth up to \$3750; and (3) Charter Schools, which are authorized by local school districts but are given the freedom to choose their own curriculum and programs. See Foundation for Florida’s Future, http://www.foundationforfloridasfuture.org/school_choice.php (last visited May 28, 2009).

126. As judged by the standards put forth in Governor Bush’s A+ Education Plan. See Opportunity Scholarship Program, FLA. STAT. ANN. § 1002.38 (West 2004); School Grading System, District Performance Grade, FLA. STAT. ANN. § 1008.34 (West 2004).

the Opportunity Scholarship Program were minorities.¹²⁷ Specifically, in 2004, fifty-seven percent of students enrolled in the program were African-American, while thirty-eight percent were Hispanic.¹²⁸ Thus, it appears that the Opportunity Scholarship Program drew its inspiration from the civil-rights claim of vouchers, given that ninety-five percent of its participants were minorities.

This trend, demonstrated in the Ohio and Florida programs, seems to be the predominant—or at least the most outspoken—viewpoint among voucher supporters today.¹²⁹ The values-claim supporters certainly still exist. However, many proponents of vouchers seem to believe that redefining school choice in terms of a civil-rights struggle has legal and political advantages over the values claim.¹³⁰ Given the favorable result for vouchers that was reached in *Zelman*, they may be correct.

a. Education—The Greatest Civil-Rights Battle of Our Time

Former Florida Governor Jeb Bush has said that school choice is a fundamental right that is a civil rights issue.¹³¹ Governor Bush believes that “[s]chool choice is as American as apple pie.”¹³² Former Massachusetts Governor Mitt Romney has suggested the same: “At some point, I think America—and, importantly, the minority communities—are going to say, ‘it’s time to split with our friends, the unions and the Democratic Party, and put our kids first here.’ *Unequal educational opportunity is the civil rights issue of our time.*”¹³³ The inequality lies in the fact that only wealthy families can save their children from the country’s failing public school system. As Governor Bush suggested:

Some people have choices . . . because they have the money to move to a better neighborhood, to go to a better school, or the

127. See Dycus, *supra* note 107, at 419.

128. *Id.* at 419–20.

129. See also Step Up For Students, <http://www.stepupforstudents.com/mission.php> (last visited May 28, 2009) (providing that another of Florida’s voucher programs, the Florida Corporate Tax Credit Scholarship Program, is intended to offer more educational opportunities to low-income families by providing children with educational scholarships so they can attend a private or public school of their choice).

130. Forman, *supra* note 102, at 547.

131. Jeb Bush, Governor, State of Fla., Speech at the Opportunity Scholarship Rally in Tallahassee, FL (Feb. 15, 2006) (on file with author); see also Clark Neily, *School Choice: The Civil Rights Issue of the 21st Century*, POINT-OF-VIEW, June 2005, at 1, 2, available at <http://www.jamesmadison.org/pdf/materials/372.pdf> (“School choice is *the* civil rights issue of the 21st Century.”).

132. Jeb Bush, Governor, State of Fla., Press Availability Following the Opportunity Scholarship Rally (Feb. 15, 2006); see also Jeb Bush, Governor, State of Fla., Press Availability Following the Corporate Tax Credit Appreciation Rally (Oct. 17, 2005).

133. Morton Kondracke, *Romney’s Agenda is a Winner*, TULSA WORLD, March 7, 2006, at A13 (emphasis added).

money to send their kids to a private school, and some people don't. That is an un-American concept, in my opinion, and [the parental decision of where to educate one's children] is a most important decision people make.¹³⁴

“Liberal democracies always have viewed education as the primary mechanism through which the state could reduce inequalities caused by family circumstances.”¹³⁵ Advocates of school choice argue that vouchers are a means by which society can provide relief for this current inequality. Justice Clarence Thomas extolled this idea in his concurring opinion in *Zelman*:

I cannot accept [the Fourteenth Amendment's] use to oppose neutral programs of school choice through the incorporation of the Establishment Clause. There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice.¹³⁶

Justice Thomas specifically commented on the plight of poor minorities. He wrote:

[T]he promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts. Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities.¹³⁷

He noted that the failing public school system affected minority children at a disproportionate rate.¹³⁸ He further insinuated, as do school choice supporters, that education was the best way for the government to combat discrimination by suggesting that “[i]f society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects.”¹³⁹

134. See Bush, Corporate Tax Credit Appreciation Rally, *supra* note 132.

135. Frank R. Kemerer, *School Choice Accountability*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 174, 188 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

136. *Zelman v. Simmons-Harris*, 536 U.S. 639, 679–80 (2002) (Thomas, J., concurring).

137. *Id.* at 682.

138. See *id.* at 681.

139. See *id.* at 683. Justice Thomas's concurring opinion in *Zelman* makes clear that he believes education, particularly school choice, is a civil rights issue. See *id.* at 676–84.

B. Is the Civil-Rights Claim a Viable Option for Voucher Supporters in Light of Its Tension With the Values Model?

The civil-rights argument appears to give school choice the best chance of success, both in the courtroom and in the court of public opinion,¹⁴⁰ which may be an even more important battle. Certainly, in Justice Thomas's mind, as well as many other American's minds, education is a civil rights issue.¹⁴¹

However, Georgetown law professor James Forman claims that while framing vouchers in terms of a civil-rights issue likely made the favorable outcome in *Zelman* possible,¹⁴² in the long run, a tension between the civil-rights sector and the values sector may present a difficult hurdle for the voucher movement to overcome.¹⁴³ Indeed, at first glance this hypothesis appears to have merit.

To elaborate, the civil-rights claim is based on academic rigor and improving underperforming public schools. This in turn would improve the educational standing of poor minority children. The values claim, on the other hand, is based upon religious liberty. Improving the educational quality of schools seems to be only a byproduct of the values-claim theory.¹⁴⁴ In addition, the religious liberty movement naturally does not desire to open up private Christian schools to government scrutiny and regulation.¹⁴⁵

The Court decided *Zelman* during the era that the accountability movement began gaining momentum.¹⁴⁶ This movement sought to gain oversight over not only public schools, but also private schools that accepted government funding.¹⁴⁷ As a result, private schools that accept vouchers may now be open to some government oversight.¹⁴⁸ Thus, it is feasible that religious conservatives—the original propeller behind the voucher movement—may come to reject vouchers because of the potential to expose Christian schools to government scrutiny.¹⁴⁹ As a result, Professor Forman predicts that while the civil-rights claim led to the constitutional approval received in *Zelman*, because of the divergent agendas of the civil-rights claim and the values claim, the voucher movement “may

140. See generally Forman, *supra* note 102.

141. Cf. *Zelman*, 536 U.S. at 676–84 (Thomas, J., concurring).

142. See Forman, *supra* note 102, at 547.

143. *Id.* at 553.

144. See *id.* at 552 (“The original movement for private school choice was grounded in the notion, shared by libertarians and religious conservatives, that private schools should be largely free of government regulation.”).

145. See *id.*

146. See *id.*

147. See *id.*

148. See *id.* at 553.

149. See *id.*

lack the necessary political support to thrive.”¹⁵⁰ Professor Forman therefore suggests “*Zelman* will end up mattering much less”¹⁵¹ than many voucher supporters had originally anticipated.

I contend, however, that the values claim and the civil-rights claim are not mutually exclusive. They may coexist and work together to make school choice a viable educational option. Between the large amount of money that the government spends on education, its compulsory element, the nation’s belief that education be available to everyone, and the general desire that public funds be made available only to government schools, a virtual monopoly has been given to public schools.¹⁵² Both the civil-rights claim and the values claim have interests in ending this public school monopoly.¹⁵³ This interest in combating a common problem is greater than any tension that may rest between them.

The two constituencies have the ability to compliment one another. Although the Florida Supreme Court has struck down one of Florida’s voucher programs,¹⁵⁴ the civil rights framing assisted in convincing voters and the Florida Legislature of the program’s merits in the first place. Traditionally, the school-choice battle drew a line in the sand, featuring a match-up between conservatives and liberals.¹⁵⁵ However, by framing vouchers in terms of a civil-rights struggle, the pro-voucher movement is able to break the stalemate between Democrats and Republicans by bringing new constituencies and demographics to their side.¹⁵⁶ For example, in Florida, after years of having some type of voucher program in place, some African-American legislators who initially opposed Governor Bush’s voucher programs have moved to support the programs.¹⁵⁷ In addition to minority parents and legislators who have joined the voucher bandwagon, other individuals who have become disillusioned with the union’s control over the public school system have joined the movement.¹⁵⁸

150. *Id.*

151. *Id.*

152. Fried, *supra* note 7, at 163–64. *But see id.* at 164 (noting that the Supreme Court rejected states’ efforts to establish an actual monopoly entrenched in the law through such decisions as *Meyer v. Nebraska* and *Pierce v. Society of Sisters*; the Court put an end to this attempt to forbid competing education systems, in the name of “fundamental liberty”).

153. For further discussion of the public-school monopoly, see Harry G. Hutchison, *Shaming Kindergarteners? Channeling Dred Scott? Freedom of Expression Rights in Public Schools*, 56 CATH. U. L. REV. 361, 390 (2007); *see also* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 71 (2007).

154. *See generally* Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).

155. *See* John E. Coons et al., *The Pro-Voucher Left and the Pro-Equity Right*, 572 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 114 (2000).

156. *See, e.g.*, Jack E. White, *Erasing Trent Lott’s Legacy*, TIME, Jan. 13, 2003, at 35.

157. *See* Bill Maxwell, *Vouchers Can’t Help If Black Parents Won’t*, ST. PETERSBURG TIMES, August 16, 2007, at 13A (finding that many parents and black legislators, disenchanted with public schools, began to believe that any alternative, including vouchers, were better).

158. *See id.*

A study conducted by the Joint Center for Economic and Political Studies found that while virtually no establishment-Democrats support school choice programs, an astounding 60% of African-American constituents support school choice.¹⁵⁹ This constituency has the potential to make school choice a powerful political issue. It is important to note the dichotomy that exists in the Democratic Party. The vast majority of Democratic elected officials and financial contributors oppose school choice. In contrast, the sixty percent of African-Americans who support vouchers make up a large percentage of the Democratic base.¹⁶⁰ The Democratic establishment that opposes school choice is primarily explained by the vast power that unions, particularly the teachers' unions, exercise in Democratic politics. The large percentage of African-Americans who support school vouchers should be a cause for concern in the upper echelons of the Democratic Party, as African-Americans become more convinced that the party's education platform is not necessarily in their best interest. On the other hand, school-choice supporters should find hope in this statistic. By combining the political influences of African-Americans, Catholics, evangelical Christians, and many fiscal conservatives who view school choice as promoting efficiency, school choice has the potential to present a political force that is capable of rivaling the teachers' unions.

By taking the civil-rights approach, however, schools face pressure to meet certain academic standards rather than merely providing a means of allowing parents to put their children in schools that reflect the parents' values, as the values claim promotes.¹⁶¹ Thus, the civil-rights claim must be based on evidence that private schools are more effective in educating students than government-run schools.¹⁶² Despite the unions' arguments to the contrary,¹⁶³ there is sufficient evidence that supports the position that school choice produces greater student achievement.¹⁶⁴ For example, one

159. White, *supra* note 156, at 35.

160. See Ed Stoddard, *Many Conservative Blacks Still Vote for Democrats*, REUTERS, Nov. 1, 2006, available at <http://www.reuters.com/article/newsOne/idUSN3123802020061101> (noting that in the 2000 election, only eight percent of African-Americans voted for George W. Bush, the Republican nominee. In 2004 that number improved only slightly, with eleven percent of African-Americans voting for President Bush).

161. In my opinion, it is not true that parents who support vouchers on account of the values claim are not interested in the academic capability of their child's school. I think these parents are generally very involved in their child's life, and thus, are very interested in their child succeeding academically. However, I think the overriding concern that drives them to support vouchers is their desire for their children to be educated in an environment that reflects their own values.

162. See Forman, *supra* note 102, at 570.

163. See Nat'l Educ. Ass'n, *Five Talking Points on Vouchers*, <http://www.nea.org/home/ns/17011.htm> (last visited May 28, 2009). The National Education Association released five talking points on vouchers: (1) "There's no link between vouchers and gains in student achievement"; (2) "Vouchers undermine accountability for public funds"; (3) "Vouchers do not reduce public education costs"; (4) "Vouchers do not give parents real educational choice"; (5) "The public disapproves of vouchers." *Id.*

164. See generally WILLIAM G. HOWELL & PAUL E. PETERSON, *THE EDUCATION GAP: VOUCHERS*

famous study found that African-American public-school students who transferred to a private school significantly improved their test scores.¹⁶⁵

The most significant issue under the civil-rights approach is whether private schools receiving government funds should be open to government accountability and scrutiny. As previously mentioned, *some*¹⁶⁶ supporters of the civil-rights claim contend that “[t]he flow of public monies to religious schools and nonprofit institutions should come with ‘strings attached’ designed to insure that public purposes are served.”¹⁶⁷ Values claim supporters, on the other hand, while possibly wanting accountability in the public schools, do not want the same accountability and oversight in the private schools.¹⁶⁸ However, it is possible to support vouchers on the basis of the civil-rights claim and, while seeking a quality education for underprivileged children, reject the same level of government intrusion into private schools as is in public schools. Thus, the argument that the accountability has undermined the voucher movement is not necessarily true.¹⁶⁹

III. IDEAL VOUCHER MODEL

The objectives of a civil-rights-voucher claim can be met with minimal government intrusion or accountability to the government based on market-driven economics. This is because private schools do not have to be accountable to the state or federal government, as they are accountable to the consumers.¹⁷⁰ For example, if parents are satisfied with their children’s private school, the school will continue to stay in business and effectively educate students.¹⁷¹ Conversely, if the school is underperforming, parents will be unhappy and will withdraw their children from the school.¹⁷² As

AND URBAN SCHOOLS (2002); Jay P. Greene & Marcus A. Winters, *The Effect of Residential School Choice on Public High School Graduation Rates* (Manhattan Inst. for Policy Research, Working Paper No. 9, 2005), available at http://www.manhattan-institute.org/html/ewp_09.htm; Jay P. Greene, *Graduation Rates for School Choice and Public School Students in Milwaukee* (School Choice Wis. 2004), available at http://schoolchoicewi.org/data/currdev_links/grad_rate.pdf.

165. HOWELL & PETERSON, *supra* note 164, at 145–46.

166. It is important to note that not all individuals who appear to be in the civil-rights-claim corner of vouchers support government regulation of the private schools. For example, Governor Jeb Bush appears to be more in the civil-rights corner than the values corner, yet it appears that he does not support government oversight of private schools receiving public money.

167. Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 418 (2000) (“The predictable result will be that some religious institutions and communities will have to compromise their special mission in order to enjoy access to public funds.”).

168. See Forman, *supra* note 102, at 565 (“A key feature of these early plans—and one that was essential to capturing the support of the evangelical community—was that they left schools largely unregulated.”).

169. See generally *id.*

170. Forman, *supra* note 102, at 566.

171. *Id.*

172. *Id.*

the Wisconsin Supreme Court suggested, if there is less government bureaucracy, and parents have the choice of where to send their children to school, educational quality will improve.¹⁷³

The Florida Supreme Court that struck down Governor Bush's Opportunity Scholarship Program based its decision upon the state constitution's education uniformity clause.¹⁷⁴ Specifically, the court contended that the uniformity clause was violated because the program allowed Florida to fund private schools that were not subject to the same requirements as public schools.¹⁷⁵ Thus, because Florida private schools that received state funds were not under the same level of state oversight as public schools,¹⁷⁶ the court held that "Opportunity Scholarships" were unconstitutional.¹⁷⁷

The Florida court makes unfounded assumptions. As long as private schools produce adequate results, their means of accountability should not have to be synonymous to the accountability in public schools.¹⁷⁸ But this is not the prevailing belief today among voucher opponents.¹⁷⁹ They oppose any school voucher system. Voucher supporters argue that teachers' unions fear that once accountability and competition are entered into the system, the public schools' monopoly will cease to exist:

There is a belief in the education community, and indeed in society at large, that one of the main reasons reforms have not taken hold despite over twenty years of effort is that the politics of education are biased toward the status quo. The teachers' unions are now in a defensive mode, having to battle "potentially crippling legislation" allowing school choice.¹⁸⁰

Private schools do not need public school solutions. The accountability reform measures regarding public schools that are sweeping the nation are

173. *Davis v. Grover*, 480 N.W.2d 460, 476 (Wis. 1992) (noting that "less bureaucracy coupled with parental choice improves educational quality").

174. *See Bush v. Holmes*, 919 So. 2d 392, 409-10 (Fla. 2006).

175. *See Dycus*, *supra* note 107, at 423.

176. *Id.* ("The court . . . identified two specific programmatic elements in which consistency between public and private schools was not required: teacher qualifications and curriculum. First, teachers in private schools, unlike public school teachers, were not required to have bachelor's degrees, to be credentialed by the state, or to undergo background screening. Second, private schools were not required to abide by Florida's curriculum guidelines, the 'Sunshine State Standards,' which required public schools to teach 'all basic subjects as well as a number of other diverse subjects, among them the contents of the Declaration of Independence, the essentials of the United States Constitution, the elements of civil government, Florida state history, African-American history, the history of the Holocaust, and the study of Hispanic and women's contributions to the United States.'" (quoting *Bush*, 919 So. 2d at 410)).

177. *Bush*, 919 So. 2d at 412-13.

178. *See Forman*, *supra* note 102, at 566.

179. *See Krisbergh*, *supra* note 1, at 1026.

180. *Id.* (quoting Donald D. Slesnick II & Jennifer K. Poltrock, *Public Sector Bargaining in the Mid-90s (The 1980s Were Challenging but This is Ridiculous)—A Union Perspective*, 25 J.L. & EDUC. 661, 669 (1996)).

certainly needed.¹⁸¹ But those accountability measures are needed in order to lure public schools out of their deep sleep. Just as the business of running the state is not about providing jobs to political appointees, neither is the purpose of education to provide jobs to teachers or education bureaucrats.¹⁸² The jobs are only a means to the end—educating students.¹⁸³ However, the education lobby often forgets this point. Teachers' unions represent school employees, not children. Albert Shanker, a former head of the American Federation of Teachers,¹⁸⁴ demonstrated this point when he said, "I'll start representing kids when kids start paying union dues."¹⁸⁵ For years, the government has given billions of dollars to public schools without many, if any, strings attached.¹⁸⁶ Schools were not required to show any student improvement as a prerequisite for the funds.¹⁸⁷ Because of this lack of accountability, students test scores and graduation rates have stayed stagnant despite doubling the amount of money spent per child (after adjusting for inflation).¹⁸⁸ Thus, the accountability movement is necessary for public schools. However, if the same bureaucratic problems do not burden private schools, then they should not be subject to the same requirements. If private schools can achieve the desired ends through a different means, they should be free to pursue those objectives.

Private schools are still accountable even if they are not accountable to the government. Milton Friedman, a Nobel Prize winning economist, was a vocal proponent of school choice.¹⁸⁹ Friedman argued that giving parents the option to choose their child's school would create free-market competition.¹⁹⁰ He viewed school choice as "a straightforward application of first-year college economics to ameliorating poor school quality."¹⁹¹ While mo-

181. See, e.g., Foundation for Florida's Future, http://www.foundationforfloridasfuture.org/a_plus_accountability.php (last visited May 28, 2009) (describing Florida's A+ Accountability plan, which grades schools based on student learning and gains, and ended social promotion).

182. See MATTHEW BROUILLETTE, SCHOOL CHOICE IN MICHIGAN: A PRIMER FOR FREEDOM ON EDUCATION 54 (1999), available at <http://www.mackinac.org/archives/1999/s1999-06.pdf>.

183. In turn, the ultimate purpose for educating students is to provide the economy with an educated workforce and to provide each individual the means to provide for himself or herself, as well as one's family.

184. Interestingly, Albert Shanker was one of the original advocates of Charter Schools. See American Federation of Teachers, <http://www.aft.org/tropics/charters> (last visited Mar. 23, 2009). This position would be unthinkable for a current-day education union leader.

185. Neal McCluskey, *Wither the NEA?*, CATO INSTITUTE, July 13, 2004, available at http://www.cato.org/pub_display.php?pub_id=2734.

186. See Steven Malanga, *Give us the Money!*, CITY JOURNAL, Autumn 2004, at 7, 7.

187. *Id.*

188. *Id.*

189. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1982); see also Alliance for School Choice, *A Brief History of School Choice*, http://www.aschoolchoice.org/school_choice_history.aspx (last visited Mar. 23, 2009).

190. See Caroline Minter Hoxby, *Rising Tide*, EDUCATION NEXT, Winter 2001, at 69, 69-70, available at http://media.hoover.org/documents/ednext20014_68.pdf.

191. Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 941 (2007).

nopolies help the monopolists, they hurt the consumers (in this case, the students).¹⁹² Conversely, competitive markets improve the product for everyone.¹⁹³ This competition, Friedman contended, would create more effective schools.¹⁹⁴ The result would be more efficient schools which produce greater learning gains.¹⁹⁵ Friedman's hypothesis has been confirmed, as most studies find that voucher programs not only help the children who use vouchers to attend private schools, but that they also improve the performance of public schools.¹⁹⁶ For example, Harvard Economist Caroline Hoxby conducted a study that produced empirical evidence demonstrating that public schools facing competition for students from private charter schools produced higher student achievement and learning gains than similar public schools that did not face such competition.¹⁹⁷ Competition is good for everyone involved in the competition, as the rising tide lifts all boats.¹⁹⁸ As a result, according to Friedman, the government's only roles should be school funding and ensuring that those schools meet *minimal* standards.¹⁹⁹

In contrast to Professor Forman's doomsday hypothesis for school choice, values-claim supporters will likely be willing to accept a minimal amount of regulation. However, the government should not regulate private schools out of their own unique identity.²⁰⁰ Private schools would regress if the government mandated them to conform into the same model as public schools.²⁰¹ Nevertheless, private schools taking public money should expect to be subject to a minimal amount of regulation.

While the state may have some oversight on curriculum, this regulation should not be any more stringent than is currently in place under the various state laws.²⁰² Outside of these minimal curriculum standards, private schools should be free to design their own unique curriculums. Pri-

192. *See id.*

193. *See id.*

194. *See* Ormiston, *supra* note 47, at 501.

195. *See* Saiger, *supra* note 191, at 941 ("The result of [school choice] would be a better and more cheaply schooled populace.").

196. *See* Jay P. Greene & Marcus A. Winters, *An Evaluation of the Effect of D.C.'s Voucher Program on Public School Achievement and Racial Integration After One Year*, MANHATTAN INSTITUTE FOR POLICY RESEARCH, available at http://www.manhattan-institute.org/html/ewp_10.htm (noting this fact despite contrary findings).

197. Hoxby, *supra* note 190, at 69-71.

198. But unfortunately, our school system currently is in the midst of a different kind of rising tide. *See* Krisbergh, *supra* note 1, at 1025 ("[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people." quoting Nat'l Comm'n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform* (1983), reprinted in 84 *ELEMENTARY SCH. J.* 112, 112 (1983)).

199. Ormiston, *supra* note 47, at 501.

200. Coons et al., *supra* note 155, at 99.

201. *See* R. KENNETH GOODWIN & FRANK R. KEMERER, *SCHOOL CHOICE TRADEOFFS: LIBERTY, EQUITY, AND DIVERSITY* 16 (2002).

202. *See id.* at 222-24 (noting that current regulation of private school curriculum in most states is not substantial); *see also* Coons et al., *supra* note 155, at 100.

vate schools should also remain free to hire (and fire) teachers and administrators, without being subject to the same bureaucracies that constrain public schools.²⁰³ Many states judge teacher quality by the level of education or the number of hours of continuing education they possess. However, a teacher is not qualified simply because he or she possesses a certain degree. Private schools should be able to pursue innovative teaching options. For example, they should be able to hire professionals and leaders from the community, such as lawyers, doctors, and businesspersons, to teach certain classes on a part-time basis. Many states have statutes that disallow this type of practice in public schools unless the person also has a teaching degree. Further, these schools should continue to be able to offer performance-based bonuses to teachers. Without autonomy, these schools would be handicapped by the same bureaucratic inefficiencies that restrict the progress of public schools.²⁰⁴ Moreover, private schools should not be restrained by public-school standards regarding their student discipline policy.²⁰⁵

While private schools should not be subject to government oversight regarding its means of producing student achievement discussed above,²⁰⁶ they should be accountable for the results they produce. To illustrate, while states and the federal government put varying importance on standardized tests,²⁰⁷ most, if not all, public-school students are required to take these tests. Although it is possible that the competitive market may correct or force the extinction of failing private schools even without standardized testing, this minimal amount of government oversight in exchange for receiving public funds is a fair trade-off. In addition, private schools should expect to give up some control regarding their admissions policies.²⁰⁸ For example, currently private schools may admit whom they choose, as long as they do not violate equal protection laws. While voucher-accepting private schools should still have primary control over whom they admit, if they have more applicants than spaces available, schools may have to accept a lottery system for a certain percentage of its admitted students.²⁰⁹

203. See Coons et al., *supra* note 155, at 100.

204. See GOODWIN & KEMERER, *supra* note 201, at 16.

205. Cf. *id.*

206. In this case, the means of producing student achievement include the school curriculum chosen, hiring standards, student discipline, and any other variable that helps contribute to student achievement.

207. Florida, for example, requires students to take the Florida Comprehensive Assessment Test (FCAT). Schools are given grades (from "A" through "F") based upon both the results of their students' scores and the improvement from the previous year of individual students.

208. See Coons et al., *supra* note 155, at 100.

209. See, e.g., Joseph O. Oluwole & Preston C. Green, III, *Charter Schools Under The NCLB: Choice and Equal Educational Opportunity*, 22 ST. JOHN'S J. LEGAL COMMENT. 165, 182-83 (2007) (describing how states require charter schools to admit students based upon a random lottery system when the school receives more applications than they have space available for incoming students).

Professor Forman overstates the likelihood that values-claim supporters will abandon the school-choice movement because of the rise of government regulation and accountability measures. It is likely they will be willing to accept a minimal amount of regulation if that is what it takes in order for school choice to become a more viable option around the nation. A one-size-fits-all approach to accountability is neither necessary nor prudent. Private schools should only be accountable to the government for the results they produce. The means of producing these results are best left to the discretion of the individual school. If the school does not meet the required standards, then the government may withdraw its funding.

CONCLUSION

This plan outlined above is a fair trade-off. Private schools accepting government vouchers will be accountable only for the results they produce. They will be free, as discussed, to adopt measures that they deem most appropriate in order to meet those goals, with limited government interference.²¹⁰ While the values claim supporters will not like giving up some control to the government regarding admissions standards, it is a sacrifice they will likely make in order to break the current monopoly on education. If state legislators and governors can be convinced to only hold voucher-accepting private schools accountable for the results they produce, then the school choice movement will thrive. Because of the diverse political and public support behind the movement, school choice can be a viable option that will improve not only the quality of education that voucher-receiving children will receive but also the quality of public schools. As Forman argues, the only thing standing in the path of values supporters and civil-rights supporters joining forces to challenge the status quo is the rise of the accountability movement. However, the school choice movement may get past this impediment under the plan above, and vouchers will become more ingrained into the American system.

David M. Powers

210. As previously discussed, the only government oversight regarding the means of achieving end results should be very minimal curriculum standards and oversight regarding admissions policies.