VOUCHERS FOR RELIGIOUS SCHOOLS: THE DEATH OF PUBLIC EDUCATION?

SHARON K. RUSSO*

Those who say that religion has nothing to do with politics do not know what religion means.[1]

—Mohandas K. Gandhi

To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves (and abhors), is sinful and tyrannical.[2]

—Thomas Jefferson

I. INTRODUCTION

In the landmark case of *Brown v. Board of Education*,[3] the Supreme Court held that segregated education was unconstitutional, thereby overruling the long-established principle of "separate but equal."[4] The first private academies were established as a result of "white flight" from soon-to-be integrated public schools.[5] *Brown* essentially mandated that public schools undergo a transformation, one that many whites did not welcome and therefore tried to escape by sending their children to private schools.[6] This, in turn, created a "de facto" segregation problem[7] — one that school districts have been struggling with for the past fifty years. Ultimately, the Supreme Court found in *Milliken v. Bradley* that de facto segregation is just a "fact of life" for which no judicial remedy exists, since, under the Court's principles, inter-district solutions are not allowed and intra-district solutions were not "fixing" the problem of segregation.[8]

In 1962, economist Milton Friedman argued that public education was inherently at odds with the fundamental principles of a free-market system.[9] Friedman's market model emphasized school choice, an idea

* J.D. Candidate, May 2004, University of Missouri at Kansas City; M.P.A. Candidate, May 2004, Cookingham Institute at the Bloch School at the University of Missouri at Kansas City; B.L.A. 2000, University of Missouri at Kansas City.

[1] MOHANDAS K. GANDHI, THE WORDS OF GANDHI 76 (Richard Attenborough ed., Newmarket Press 1996) (1982).

[2] Thomas Jefferson, *An Act Establishing Religious Freedom, in* THE CONSTITUTION AND RELIGION 34 (Robert S. Alley ed., Prometheus Books 1999) (1999).

[3] 347 US 483, 495 (1954).

[4] *See, e.g.*, Plessy v. Ferguson, 163 US 537, 551 (1896), *overruled by* Brown v. Bd. of Educ., 347 US 483 (1954).

[5] PETER W. COOKSON, JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION 27 (1994).

[6] *Id.*

[7] *Id.* at 27.

[8] *See generally* 449 US 870 (1980).

[9] COOKSON, *supra* note 5 at 28.

which, according to one scholar, "emerged from the back offices of policy think tanks" and later found a home in the policies of the Reagan administration.[10] During the Reagan era, new-right conservatives formed a coalition with Protestant evangelicals, gaining power in national politics and forging new alliances with the U.S. Department of Education and the Reagan administration.[11] Thereafter, the Department of Education "shifted its emphasis away from public education and . . . toward private education."[12] In 1992, the Department issued a booklet entitled "Getting Started — How Choice Can Renew Your Public Schools," as well as a report entitled "Civil Rights and Parental Choice," an unabashed endorsement of school choice, that called school choice "every American's birthright — every American's civil right."[13]

The Friedman marketing concept gained yet more steam with the 1990 publication of "Politics, Markets, and American Schools," co-authored by John E. Chubb and Terry M. Moe.[14] Chubb and Moe regarded school choice as a panacea, a cure for all the ills that had befallen public schools.[15] According to Peter Cookson, this market idea was consistent with a belief system that embraced market principles as a reflection of the "good life." He posits, "the melting-pot ideal that had animated belief in public education slipped from public consciousness, so that collective responsibilities were easy to deny."[16] The popularity of the market-concept further led to the rise of a large number of school-choice lobbyists.[17] The debate became part of the political landscape[18] and culminated in the decision of *Zelman v. Simmons-Harris*[19] in 2002, an apparent victory for the school-choice advocates and a defeat for public schools.

Part II of this Article traces the history of the Supreme Court's interpretation of the Establishment Clause. It then discusses the *Zelman* case and holding. The potential impact to individual states will be explored in the context of the "Blaine" amendments, which are included in many state constitutions.[20] In many states, it is unlikely that vouchers would pass muster under state constitutions.

In Part III, this Article discusses the implications of the *Zelman* decision, presenting sociopolitical and experiential data from jurisdictions that have used vouchers. This data reveals the current and past state of public school education, the results that can ensue when public schools lose funding, and, most importantly, what the *Zelman* decision will mean for the resegregation of public schools.

---

[10] *Id.* at 29.
[11] *Id.* at 29-30.
[12] *Id.* at 30.
[13] *Id.*
[14] *Id.* at 36.
[15] *Id.*
[16] *Id.* at 37.
[17] *Id.*
[18] *Id.*
[19] 536 US 639 (2002).
[20] *See infra* Part II (A).

This Article contends, and the data corroborate, that voucher programs will not improve student performance. Research demonstrates a disturbing problem of the lack of public accountability by private voucher schools. Given that desegregation efforts have been deteriorating over the past twelve years, the Article empirically shows that vouchers will only hasten the resegregation of public schools. Vouchers constitute poor public policy because, despite a few students benefiting from the use of vouchers, the overall impact to public education and to the long-held goal of desegregation in America is too high a price to pay. In short, vouchers are detrimental to the fundamental interests of the vast majority of students.

II. SUPREME COURT ESTABLISHMENT CLAUSE INTERPRETATION BEFORE *ZELMAN*

Everson v. Board of Education[21] is the baseline from which Establishment Clause jurisprudence has grown over the last fifty-five years. The Court held that "no tax in any amount, large or small, can be levied to support any religious activities or institutions . . . in whatever form they may adopt to teach or practice religion."[22] This baseline eroded to such an extent that, today, the Court finds that state taxpayer money may flow to sectarian schools in the form of indirect voucher payments for education without offense to the Establishment Clause.[23] The *Everson* holding is now a dead-letter. Separation between church and state is no more. Many commentators have termed this shift as "accommodationist,"[24] while others characterize it as little more than further politicization of the "least dangerous branch."[25] Some commentators warn that if religious

---

[21] *See generally* 330 US 1 (1947).

[22] *Id.* at 16.

[23] *See* Zelman, 536 US at 662.

[24] *See, e.g.*, Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 807 (2002) (arguing that failure to enact vouchers for religious schools constitutes a violation of religious liberty); Jesse Choper, *Symposium on Law in the Twentieth Century: A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1720 (2000) (arguing that pre-Zelman Establishment Clause jurisprudence lacked "neutrality" towards religion); Charles J. Russo & Ralph D. Mawdsley, *Vouchers Before the Supreme Court: Prediction and Implications*, WEST'S EDUC. L. REP. 555, 563 (June 6, 2002) (predicting that the Supreme Court would hold vouchers constitutional because vouchers give "poor" parents school choice).

[25] *See, e.g.*, Lawrence Hamermesh, *Zelman v. Simmon-Harris and the Politicization of Religion*, 20 DEL. LAW. 6 at n.16 (2002) (pointing out that vouchers will give rise to infighting between religious sects vying for public money, a phenomenon that is seen in countries with an established national religion and dissident groups); Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 265 (1999) (arguing that the school choice movement arises not from failure of school reform, but rather "from indifference to well-documented problems faced by other reform efforts"); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2048 (2002) (arguing that unless suburban schools are included within the scope of voucher programs, that is an interdistrict rather than intradistrict scope, vouchers will not solve racial and socioeconomic integration issues).

institutions accept public money they may be forced to become publicly accountable, which would be a "poison pill" for religious institutions.[26]

In *Everson*, the Court upheld a New Jersey law that reimbursed public and parochial school parents for the costs of transporting their children to school.[27] The Court viewed this benefit to parochial schools as equivalent to other government services that are provided to religious organizations, such as police and fire protection, sewers, highways, and sidewalks.[28] Justice Black, writing for the Court, stated that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[29] But, the Court indicated that it would not hesitate to defend the Jeffersonian "wall" of separation between church and state, warning that it would not "approve the slightest breach."[30]

In 1971, the Court articulated a three-pronged test for Establishment Clause jurisprudence in *Lemon v. Kurtzman*.[31] The Court found that the purpose of the Establishment Clause was to protect against government sponsorship of religion, financial support of religion, and "active involvement of the sovereign in religious activity."[32] The *Lemon* test has three requirements: first, the "statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster an excessive government entanglement with religion."[33] In *Lemon*, the Court found that the statutes being challenged violated the Establishment Clause because they subsidized and supplemented the salaries of parochial school teachers to teach secular subjects.[34] The third prong of the *Lemon* test was not satisfied because "the substantial religious character" of the benefited parochial schools gave "rise to entangling church-state relationships of the kind the Religion clauses sought to avoid."[35]

Committee for Public Education and Religious Liberty v. Nyquist[36] involved a challenge to a New York statute that provided for "direct money grants from the state to . . . nonpublic schools to be used for the maintenance and repair of school facilities and equipment" and additionally provided tuition reimbursements and state income tax relief to parents of

---

[26] *See, e.g.*, Stephen Macedo, *The Constitution of Civil Society: Religion and Civic Education Constituting Civil Society: School Vouchers, Religious Non-profit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 438 (2000).

[27] *See* 330 US at 18.

[28] *See id.* at 17-18.

[29] *Id.* at *18.*

[30] *Id.*

[31] 403 US 602, 612 (1971).

[32] *Id.* at 612 (*citing* Walz v. Tax Comm'n, 397 US 664, 668 (1970)).

[33] *Id.* at 612-13 (*citing* Bd. of Educ. v. Allen, 392 US 236, 243 (1968)).

[34] *Id.* at 607.

[35] *Id.* at 616.

[36] 413 US 756 (1973).

children attending elementary or secondary nonpublic schools.[37] The Court held that the maintenance and repair provisions were invalid under the Establishment Clause because they had a primary effect of advancing religion. Since "no attempt [was] made to restrict payments to . . . the upkeep of facilities used exclusively for secular purposes," the tuition reimbursement provisions were invalid for similar reasons.[38] Moreover, the tax relief provisions for parents of nonpublic school children were insufficiently "restricted to assure that [they would] not have the impermissible effect of advancing the sectarian activities of religious schools."[39]

The Court determined that the statute was not "sufficiently restricted to assure that it [would] not have the impermissible effect of advancing the sectarian activities of religious schools" and violated the First Amendment's Establishment Clause.[40] The state tuition reimbursement program to parents of children attending elementary or secondary nonpublic schools, without restrictions on the parents' use of the reimbursements, violated the Establishment Clause because "the challenged sections have the impermissible effect of advancing religion," specifically Catholicism.[41] Direct aid to sectarian schools was invalid "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds [would] be used exclusively for secular, neutral, and nonideological purposes."[42] Without such restriction, the state aid would amount to direct government support of religious schools.[43] Importantly, even though the tuition reimbursements were paid to the parents rather than to the sectarian schools directly, these payments were found to violate the second prong of the *Lemon* test because the effect of the reimbursement was to provide an unconstitutional government subsidy to religious schools.[44] The money paid to the parents was regarded as only one factor in the *Lemon* analysis because "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[45]

Nyquist was the last of the cases strictly construing the Establishment Clause, and, in 1983, *Mueller v. Allen* evidenced a trend toward allowing government money to flow to religious institutions.[46] The Court held that a state statute that allowed state taxpayers to deduct expenses incurred in sending their children to private, religious schools was constitutionally permissible because the deduction was "ultimately controlled by the private choices of individual parents [and was] neutrally available" to all parents.[47]

---

[37] *Id.* at 762.
[38] *Id.* at 774.
[39] *Id.* at 794.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 780.
[43] *Id.* at 786.
[44] *Id.* at 780.
[45] *Id.* at 783.
[46] 463 US 388 (1983).
[47] *Id.* at 400.

The Court reached this result because the program allocated resources on a neutral basis and the money flowing to religious schools was indirect even though 96% of the tax deductions were used by parents whose children attended religious schools.[48] This was the beginning of the end for the *Lemon* test.

The trend continued three years later in *Witters v. Washington Department of Services for the Blind*,[49] where the Court held that state funds which provided a blind student's seminary training at a Christian college did not violate the Establishment Clause.[50] In *Witters*, the recipient made a "private choice" to use his funds at this particular college and the program created no financial incentives for the recipient to use his funds at a religious school.[51] Utilizing the *Lemon* test, the Court found that the first two prongs were satisfied because the program was secular in nature and because "no more than a minuscule amount of the aid awarded . . . [was] likely to flow to religious education."[52] The money was used as one might expect a taxpayer to use a tax refund, in that "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[53] No evidence revealed a purpose to "finance religious education or activity," making the "link between the State and the school petitioner wishes to attend a highly attenuated one."[54] The Court chose not to address the "entanglement" prong at all because the court below had not addressed it.[55]

The Establishment Clause was further eroded in *Agostini v. Felton*,[56] where the Court held that a New York City program under which public school teachers were sent into parochial schools during regular school hours to provide remedial education was not a violation of the Establishment Clause.[57] The Court stated, "not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause."[58] The Court rejected the third prong of the *Lemon* test altogether, so that entanglement with religion is no longer considered unconstitutional in the Court's Establishment Clause jurisprudence. Writing for the Court, Justice O'Connor found that the mere presence of public employees on sectarian school grounds was not

---

[48] *Id.* at 409. (Marshall, J., dissenting).
[49] 474 US 481 (1986).
[50] *See id.* at 490.
[51] *Id.* at 488.
[52] *Id.* at 486.
[53] *Id.* at 488.
[54] *Id.*
[55] *See id.* at 483.
[56] 521 US 203 (1997).
[57] *See id.* at 208-09.
[58] *Id.* at 231.

an unconstitutional "union between government and religion."[59] The essential presumption that "all government aid that directly assists the educational function of religious schools is invalid" was replaced with a focus on neutrality and the "'independent and private choices of' individuals."[60]

A. *ZELMAN V. SIMMONS-HARRIS*: VOUCHERS TO RELIGIOUS SCHOOLS ARE NOW CONSTITUTIONAL

Zelman v. Simmons-Harris examined the constitutionality of the Cleveland school voucher program which had been in operation since 1996.[61] The program consisted of two components: a tuition-aid provision designed to provide "school choice" to parents in the Cleveland School District, and a tutorial aid provision for students who chose to remain in public school.[62] Pertinent to this discussion is the tuition-aid provision because it allowed "[a]ny private school, whether religious or nonreligious, [to] participate in the program."[63] In August 1999, the U.S. District Court for the Northern District of Ohio, issued a preliminary injunction barring further implementation of the program,[64] and, in December 1999, granted summary judgment for the plaintiffs.[65] The judgment was affirmed by the Sixth Circuit Court of Appeals in 2000 because the "program had the 'primary effect' of advancing religion in violation of the Establishment Clause."[66] The Supreme Court granted certiorari.

In a 5-4 decision, the Court found that the Ohio school voucher program did not offend the Establishment Clause because the government had a valid, nonreligious purpose. Tax money was distributed to individuals, thereby constituting only indirect aid to religious schools, and it was the parents' private choice regarding where to spend the voucher funds.[67] The decision was hardly a surprise, given the Court's Establishment Clause erosion over the last twenty years.[68] The *Zelman* decision essentially eliminates the effects test from Establishment Clause law:[69] "So long as the government has a valid and nonreligious purpose and distributes tax money to individuals, it does not matter whether they in turn spend this money at church schools."[70] Because the money flows to

---

[59] *Id*. at 222.
[60] *Id*. at 225-26 (quoting Witters, 474 US at 487).
[61] Zelman, 536 US at 646.
[62] *Id*.
[63] *See id.* at 645.
[64] Zelman v. Simmons-Harris, 54 F. Supp. 2d 725 (N.D. Ohio 1999).
[65] Zelman v. Simmons-Harris, 72 F. Supp. 2d 834 (N.D. Ohio 1999).
[66] *See* Zelman, 536 US at 648.
[67] Zelman, 536 US at 662-63.
[68] *See generally* Mueller v. Allen, 463 US 388 (1983) (speaking of the beginning of the elimination of the "Lemon" test).
[69] David Savage, *New School of Thought: Vouchers are Constitutional when Issued to Individuals Instead of Religious Groups*, 88 A.B.A. J. 34 (Aug. 2002).
[70] *Id*.

individuals rather than sectarian institutions, the tax money ultimately spent on religion is thereby rendered constitutional.

The *Zelman* Court reached this conclusion despite the utterly opposite result in *Nyquist* where state tuition reimbursements to parents of children attending elementary or secondary nonpublic schools violated the First Amendment's Establishment Clause because its inevitable effect was to "subsidize and advance the religious mission of sectarian schools,"[71] the vast majority of which were Catholic.[72] Similarly, the tuition reimbursements in *Zelman* were directly paid to parents and then the parents endorsed them over to private, predominantly Catholic, sectarian schools.[73] The decision was also based in part on *Mitchell v. Helms*,[74] which held that "[i]f aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands . . . of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion' for Establishment Clause purposes."[75]

In his dissent in *Zelman*, Justice Stevens called the decision "profoundly misguided"[76] explaining that his views were 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."[77] Stevens expressed his concern eloquently, stating that, "whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[78]

Justice Souter, in an impassioned dissent, criticized the majority for giving "short shrift to the Establishment Clause"[79] and overruling clearly settled precedent in *Everson*.[80] Justice Souter found it a violation of the Establishment Clause to allow taxpayer money to be spent not only on secular instruction, but on "religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension."[81] Souter additionally criticized

---

[71] Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 US 756, 757 (1973).

[72] *Id.* at 780. The Zelman Court distinguished Nyquist because the New York statute did not permit any payments to public schools whatsoever. In the Ohio voucher program, voucher assistance is available for public school students receiving tutoring.

[73] *See* Zelman, 536 US at 707 (Souter, J., dissenting) (noting "96.6% of current voucher money going to religious schools").

[74] 530 US 793 (2000), *reh'g denied*, 530 US 1296.

[75] *Id*. at 816 (citing Witters, 474 US at 489).

[76] Zelman, 536 US at 685 (Stevens, J. dissenting).

[77] *Id*. at 686.

[78] *Id*. Justice Stevens also joined dissents in *Mueller v. Allen* and *Agostini v. Felton*. *See supra* text accompanying notes 46, 56.

[79] Zelman, 536 US at 686.

[80] *Id*.

[81] *Id*. at 687.

the majority for "ignoring the meaning of neutrality and private choice" in reaching a decision purportedly based on those two principles.[82]

B. ESTABLISHMENT PRINCIPLES IN THE STATES

In many states today, the state constitutions provide better protection against establishment of state religion than the Supreme Court has decided the U.S. Constitution provides.[83] These states have incorporated a "Blaine"[84] amendment into their constitutions that prohibits direct and indirect aid to religion from state funds.[85] Indeed, states are free to interpret their own constitution's Establishment Clauses more strictly.[86] In *Witters v. Washington Department of Services for the Blind*,[87] even though the Supreme Court found a program which provided publicly-funded services to aid a blind student attending a Christian College did not offend the Establishment Clause, the Court instructed the state was free to interpret its own constitution more strictly.[88] On remand, the Washington Supreme Court found the program violated the Washington Constitution and struck it down.[89] The Washington Supreme Court found that the state constitution "prohibits not only the appropriation of public money for religious instruction, but also the application of public funds to religious instruction."[90]

But one state having a constitution with a "Blaine amendment" has upheld vouchers for religious schools as constitutional under the state constitution and the U.S. Constitution.[91] Wisconsin Constitution Article I, § 18 provides that no money may "be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."[92] The court focused its state constitutional analysis on whether the money provided by the state voucher statute was "for the benefit of" such religious institutions.[93] The court explained that the "language 'for the benefit of' in art. I, § 18 is not to be read as requiring that some shadow of incidental

---

[82] *Id*.

[83] Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 WEST'S EDUC. L. REP. 1, 4 (1997).

[84] These amendments are called "Blaine" after James G. Blaine, the Maine representative at the Constitutional Convention who proposed a much stronger "establishment clause" be included in the Constitution — a proposal that was narrowly defeated. S*ee* Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137, 154 (1998). *See infra* text accompanying notes 109-112

[85] Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 123 (2000).

[86] *Id*. at 127.

[87] 474 US 481, 489 (1986).

[88] *Id*. *See also* Zobrest v. Catalina Foothills, 509 US 1, 16 n.1 (Blackmun, J., dissenting) (stating that the Arizona Attorney General, in a written opinion, concluded that under the state constitution, "interpreter services could not be furnished to petitioner").

[89] Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989) (en banc).

[90] *Id*.

[91] Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 US 997 (1998) (upholding a Milwaukee voucher program that allowed payments to flow to religious schools).

[92] *Id*. at 620.

[93] *Id*. at 621.

benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section."[94]

In Missouri,[95] the "Blaine" amendment requires that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religions, or in aid of any priest, preacher, minister or teacher thereof."[96] Few cases in Missouri have construed this Article, perhaps due to the unambiguity of the clause. The most recent Missouri decision construing the provision in regard to schools was *Paster v. Tussey*,[97] which held that a state statute requiring textbooks be provided to private schools and that funding for these textbooks come from public school funds was a violation of Article I and also a violation of an additional Missouri constitutional provision[98] that prohibits "payment from a public fund in aid of any religious creed, church or sectarian purpose."[99] Article I of the Missouri Constitution has also been construed in *Berghorn v. Reorganized School District No. 8*,[100] which held that religious schools are not entitled to support from public funds.[101] A later case held that parochial school children in Missouri are not entitled to transportation on a public school bus.[102]

The "religion" provisions in the Missouri Constitution are nearly identical to the Florida constitutional provisions that prohibit state funds be paid "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."[103] Indeed, an attempt at state vouchers in Florida has recently been found unconstitutional under the Florida Constitution.[104] In *Holmes v. Bush*,[105] the Florida district court held that, despite the finding of constitutionality of such vouchers under the U.S. Constitution in *Zelman*, state vouchers providing public money to sectarian schools in Florida violated the Florida Constitution. The Holmes court ruled the language in the Florida Constitution was "clear and unambiguous . . . [with] scant room for interpretation or parsing."[106] It cited the principle of statutory construction whereby "plain meaning" must be given to words and phrases being reviewed and that those construing such language must not "employ a strained construction to reach a result not intended"[107] by those who wrote the words.[108] If states with similar "Blaine" amendments construe their constitutions based on "plain-

---

[94] *Id.*
[95] MO. CONST. art. I, § 7.
[96] *Id*; FLA. CONST. art. I, § 3.
[97] 512 S.W. 2d 97 (Mo. 1974).
[98] MO. CONST. art. IX, § 8.
[99] 612 S.W.2d at 104 (*quoting* MO. CONST. art. IX, § 8).
[100] Paster v. Tussey, 260 S.W.2d 573 (1953).
[101] *Id.* at 584.
[102] Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (1974), *aff'd*, 419 US 888 (1974).
[103] FLA. CONST. art. I, § 3.
[104] Holmes v. Bush, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002).
[105] *Id.* at *1.
[106] *Id.*
[107] *Id.*
[108] *Id.*

meaning" principles, the same result as that seen in Florida can be anticipated in those states.

C. ANTI-ESTABLISHMENT AMENDMENT TO THE U.S. CONSTITUTION NARROWLY REJECTED

Representative James Blaine of Maine introduced a constitutional amendment into Congress in 1875 because he was opposed to the public funding of Catholic education.[109] The original amendment would have required that:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of the public schools or derived from any public fund therefor, shall ever be under the control of any religious sect, nor shall any money so raised ever be divided between religious sects or denominations.[110]

The Blaine Amendment was easily passed in the Senate but failed to pass in the House by only four votes.[111]

Even though the Blaine Amendment failed at the federal level, it led to an effort in the states to incorporate similar provisions into their own state constitutions. By 1890, twenty-nine states had inserted clauses in their state constitutions prohibiting the use of public funds for religious purposes.[112] In 1899, Congress divided the Dakota Territory into two states, Montana and Washington, and required the states to include "Blaine" provisions in their state constitutions.[113] Today, one-third of all U.S. states have "anti-establishment constitutional provisions that are more strictly worded than the Establishment Clause of the First Amendment."[114] Consequently, the enactment of voucher systems which allow tax money to flow to private sectarian schools in these states is highly unlikely, barring amendments to the state constitutions.[115]

In some states with strict anti-establishment constitutional provisions, however, the state supreme court has mandated that the Establishment Clause in the state constitution will be "coextensive with the religion clauses of the First Amendment."[116]

---

[109] Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 47 (1992). *See also* Kemerer, *supra* note 83 at 154.

[110] H.R. Res. 1, 44th Cong. (1875).

[111] Kemerer, *supra* note 83 at n.72.

[112] *Id.* at 154. *See also* Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 146-47 (1996).

[113] Viteritti, *supra* note 112. Viteritti argues that antipathy toward non-Protestant religions created a significant legacy in the states and territories of the United States that led to this Congressional requirement for statehood.

[114] Kemerer, *supra* note 83.

[115] *Id.* at 155.

[116] *Id.*

Only the Michigan Constitution is so restrictive that all such vouchers would be strictly prohibited.[117] "Article 8, Section 2 [of the Michigan Constitution] prohibits the use of public monies by the state or its political subdivisions for the support of denominational or other nonpublic school,"[118] such that:

> No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.[119]

In *In re Proposal C*,[120] the Michigan Supreme Court found that the Michigan Constitution "bars voucher-like payments to parents of children attending private school."[121] Professor Paul G. Kauper from the University of Michigan Law School was cited therein for concluding that any voucher system paid for by public funds would be unconstitutional.[122] Moreover, Kauper noted that this constitutional assessment would be applicable to any "credit, tax benefit, exemption or deduction."[123] Therefore, barring a constitutional amendment, vouchers are unlikely to be allowed in Michigan.

The state constitutions in Florida,[124] Georgia,[125] Montana,[126] New York,[127] and Oklahoma[128] prohibit both direct and indirect aid to sectarian private schools.[129] Other states include provisions that "prohibit . . . public monies '[to] support or benefit,' 'support or sustain,' 'support or assist,' or 'are used by or in aid of' any sectarian private school."[130] Still other state constitutions prohibit any indirect public aid to sectarian institutions. States with "indirect" constitutional provisions include California,[131] Colorado,[132] Delaware,[133] Illinois,[134] Minnesota,[135] Missouri,[136] North

---

[117] *Id.*
[118] *Id.*
[119] MICH. CONST. art. 8, § 2.
[120] 185 N.W. 2d 9, 14-17 (Mich. 1971).
[121] *Id.*
[122] *Id.* at 26.
[123] *Id.*
[124] Kemerer, *supra* note 83 at 163 (citing FLA. CONST. art. I, § 3,).
[125] *Id.* (*citing* GA. CONST. art. I, § 2, para. VII).
[126] *Id.* (citing MONT. CONST. art. X, § 6).
[127] *Id.* (citing N.Y. CONST. art. XI, § 3).
[128] *Id.* (citing OKLA. CONST. art. II, § 5).
[129] *Id.*
[130] *Id.*
[131] *Id.* (citing CAL. CONST. art. XVI, § 5).
[132] *Id.* (citing COLO. CONST. art. IX, § 7).
[133] *Id.* (citing DEL. CONST. art. X, § 3).
[134] *Id.* at 164. (citing ILL. CONST. art. X, § 3).
[135] *Id.* (citing MINN. CONST. art. XIII, § 2).
[136] *Id.* (citing MO. CONST. art. IX, § 8).

Dakota,[137] South Dakota,[138] and Wyoming.[139] Hawaii[140] and Kansas[141] have constitutional provisions that restrict the use of public monies for sectarian institutions.[142] If these provisions were strictly interpreted, they would constitute a flat prohibition against publicly-funded vouchers that benefit sectarian institutions. Given the precedent set in Missouri and barring a constitutional amendment, vouchers will probably not be found to be constitutional in Missouri. As noted above, Florida recently found vouchers unconstitutional under its constitution's "Blaine" amendment, which is nearly identical to Missouri's "Blaine" amendment.[143] Thus, in states with "Blaine" amendments, state legislature approval of vouchers paid to religious institutions will almost certainly be found unconstitutional under state constitutions. Constitutionality issues aside, the implications of vouchers to the public school system merit further consideration for public policy interests.

III. THE IMPLICATIONS OF ZELMAN FOR PUBLIC SCHOOLS — WHAT'S AT STAKE

A. VOUCHER PROGRAMS WILL NOT IMPROVE STUDENT PERFORMANCE

As discussed briefly above, Milton Friedman initially introduced the concept of parental choice based on a market-driven model: i.e., if public schools are forced to compete, they will improve.[144] Later in 1990, John Chubb and Terry Moe who sought to find factual reasons for the disparity between student achievement in public and private schools expanded upon this idea.[145] All three authors advocate school vouchers and have heavily influenced the currently favorable reception of school vouchers. However, the Chubb-Moe interpretation has recently been called into question. In fact, many studies now directly refute the Chubb-Moe findings that private schools achieve better student performance than public schools.[146]

The most recent empirical data have shown that vouchers will not be a panacea for the student achievement problems purportedly plaguing public education.[147] When analyzing Chubb and Moe's data, Valerie Lee and

---

[137] *Id*. (citing N.D. CONST. art. VIII, § 5).
[138] *Id*. (citing S.D. CONST. art. VI, § 3).
[139] *Id*. (citing WYO. CONST. art. VII, § 8).
[140] *Id*. (citing HAW. CONST. art. X, § 1).
[141] *Id*. (citing KAN. CONST. § 7).
[142] *Id.*
[143] *See supra* text accompanying note 103-108
[144] *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).
[145] JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990).
[146] *See* Valerie Lee & Anthony Bryk, Washington DC: Economic Policy Institute, *Science or Policy Argument: A Review of the Quantitative Evidence in Chubb and Moe's Politics, Markets, and America's Schools* 17 (1991), *cited at* http://www.aft.org/research/vouchers/research/myths/myths.htm (last visited Jan. 3, 2003) [hereinafter AFT]; US Department of Education, National Center for Education Statistics, *The State of Mathematics Achievement: NAEP's 1990 Assessment of the Nation and the Trial Assessment of the States* 90 (1991) (on file with author).
[147] *Id*.

Anthony Bryk of the University of Chicago found the Chubb-Moe conclusions to be deeply "flawed, based more on ideology than on evidence,"[148] because "Chubb and Moe never directly compared the performance of public and private schools [but rather] assumed that the qualities of effective schools are associated with free markets and private schools."[149]

The National Assessment of Education Progress (NAEP) began to report student achievement results according to whether the students were attending public or private schools.[150] As of 1996, the private school students had only a very slim advantage on math proficiency.[151] Notably, since 1980, private school math proficiency scores have decreased while the scores for those in public school student have increased.[152] What seems to account for the disparity between the performance of private and public school students is the educational achievement of the parents rather than the type of school that their children attend.[153] Once these differences are accounted for statistically, the achievement gap seen in earlier grades vanishes completely.[154]

The Milwaukee voucher experiment corroborates the NAEP findings of the nonexistent student performance gaps. The Milwaukee program provided vouchers for as many as 950 low-income, public school students to use at non-religious private schools.[155] However, the private schools have not been willing to sign on to the voucher program. Almost 400 students who were eligible for benefits under the program were unable to find a school that would accept them for admittance.[156] Only eleven of twenty-one eligible private schools were willing to take voucher students.[157] In the second year, voucher students lost ground in reading but

---

[148] *See id.*

[149] *Id.*

[150] *Id.*

[151] *See* U.S. Department of Education, *NAEP 1999 Trends in Academic Progress: Three Decades of Student Performance*, National Center for Education Statistics (2000), *available at* http://www.nces.ed.gov/programs/coe/2001/section2/tables/t12_4.asp (last visited Oct. 18, 2003).

[152] *See* U.S. Department of Education, *NAEP 1999 Trends in Academic Progress: Three Decades of Student Performance*, National Center for Education Statistics (2000), *available at* http://www.nces.ed.gov/programs/coe/2001/section2/tables/t10_4.asp (last visited Oct. 18, 2003). The 1980 reading proficiency results were 284 for public schools and 298 for private schools.

[153] For all schools in the aggregate, the reading proficiency results were 297 for students whose parents had attended college. When parents had graduated from high school but had not attended college, the reading proficiency results were 267. *See* U.S. Department of Education, *NAEP 1999 Trends in Academic Progress: Three Decades of Student Performance*, National Center for Education Statistics (2000), *available at* http://www.nces.ed/gov/programs/coe/2003/section2/tables/t13_2.asp (last visited Oct., 18, 2003). There was a wider gap in performance based on parents' education level than the gap in performance based on type of school.

[154] *See* ALBERT SHANKER & BELLA ROSENBERG, *Do Private Schools Outperform Public Schools? in* THE TASK BEFORE US: A QUEST READER 40-43 (1993), *available at* http://www.aft.org/research/vouchers/research/myths/myths.htm (last visited Jan. 20, 2003).

[155] American Federation of Teachers, *Myths and Facts about Private School Choice*, AFL-CIO, *available at* http://www.aft.org/research/vouchers/research/myths/myths.htm.

[156] *Id.*

[157] *Id.*

held steady in math, while public school students stayed constant in both reading and math scores.[158]

A more recent study of performance gaps also confirms the findings from Milwaukee and the NAEP study. A 1996 study by Adam Gamoran[159] found that private schools do not show better student performance when the data is statistically "normalized" to account for the effects of family background, school characteristics, and course-taking.[160] This study drew upon the National Educational Longitudinal Survey to assess achievement differences among urban students over the first two years of high school. The study included 4,000 students attending high schools in cities having a population of more than 50,000. It found that no advantage existed for secular private schools, and that Catholic schools only possessed a slight advantage in math.[161]

In 2000, a study spearheaded by the General Accounting Office (GAO)[162] yielded results that were ambiguous at best. Researchers from Harvard and Princeton joined private researchers in reviewing data from the Cleveland voucher program and the Milwaukee voucher program, but they disagreed with each other about what the data meant.[163] The private researchers conducted two studies of the Cleveland program and found no significant differences in scores between voucher and public school students in the first study.[164] In the second study, most voucher students scored higher in language, but voucher students in Hope voucher schools scored lower than public school students.[165] The Harvard researchers found statistically significant increases in language and science when testing achievement of voucher students in Hope voucher schools.[166]

---

[158] *Id.*

[159] *Student Achievement in Public Magnet, Comprehensive, and Private Schools, Educational and Policy Analysis* 18, No. 1, 1-18 (1996), *available at* http://www.aft.org/research/vouchers/research/gg/gg.htm (last visited Jan. 20, 2003).

[160] Data normalization is a statistical method whereby "like is compared to like" to enhance the validity of the statistics. For example, statistics that include "all men" or "all women" are unlikely to yield anything meaningful regarding public opinions towards school busing. While gender-only statistics are somewhat persuasive, a far more meaningful statistic will be derived if the data are normalized to account for race and gender and perhaps other factors including, but not limited to, religion, socioeconomic strata, and urban versus suburban respondents. The normalized data will be more reliable because school busing impacts all these different groups of people in highly individualized ways. In the context of school statistics, the data will only be meaningful if schools with similar demographics are compared with each other. One can imagine comparing a non-diverse public school in the suburbs with a very diverse urban school. Such a comparison would be nearly meaningless because it would not take into account the various real-life factors that affect the student populations nor consider that the monetary contributions and support for the two schools are widely disparate.

[161] *Id.*

[162] The GAO is the investigative agency of Congress.

[163] *See generally* US Gen. Accounting Office, *School Vouchers: Publicly Funded Voucher Programs in Cleveland and Milwaukee*, GAO-01-914, 8 (Aug. 2001), *at* http://www.gao.gov/new.items/d01914.pdf (last visited Jan. 20, 2003) [hereinafter GAO Report].

[164] *Id.* at 27.

[165] *Id.* at 27-28. The Hope schools were established specifically for the voucher program.

[166] *Id.*

The Milwaukee studies are equally divergent in their conclusions. A private researcher found no consistent evidence that voucher students did better or worse than public school students in math, while the Harvard researchers found the voucher students did better in reading and math and a Princeton researcher found the voucher students did better in math but not in reading.[167] Overall, the GAO concluded that previous finding of positive performance gains were called into question by their own research.[168]

If private schools hold a performance advantage over public schools, this contention is not borne out by the latest available data. Clearly, private schools are not a solution to improving student achievement overall. Despite the initial great hope of the market-driven concept to improve student achievement, the implicit goal of the market-concept — that of improving public schools — will not be achieved through the competitive model embraced by the "market-model" proponents.

B. PRIVATE SCHOOLS ARE NOT PUBLICLY ACCOUNTABLE

Since private schools are not, by law, required to regularly report to the state regarding student achievement, demographics of the student population, employee characteristics, teacher certification, compliance with state and federal wage law statutes, and many other items upon which public schools are required to report, the tax-paying public will have little or no visibility into how the funds are spent. In other words, the public will not know if taxes are being spent appropriately in support of the state legislation that created the voucher system. Additionally, private schools are not publicly accountable since they "do not have to obey the state's open meetings and records laws," "do not have to hire certified teachers," "do not have to release information on employee wages or benefits," and "do not have to provide data such as test scores, attendance figures, or suspension and drop-out rates."[169] Moreover, this lack of accountability has recently led to taxpayer scams being perpetrated on voucher parents.

The Milwaukee program represents an example of lack of public accountability and the problems that can arise from that absence. During the first year of the program, sixty-three voucher students, whose parents complained of problems such as poor food, poor transportation, a lack of books and materials, and discipline issues, actually returned to the public schools.[170] Problems reported included false inflation of student enrollment numbers amounting to taxpayer fraud,[171] badly deteriorating voucher

---

[167] *Id.* at 29-30.

[168] *Id.* at 31-32.

[169] Barbara Miner, *Vouchers, Where's the Public Accountability? Or: Public Dollars and Private Schools: A Bad Mix*, *at* http://www.aft.org/vouchers/mine.htm (last visited Sep. 14, 2003).

[170] *Id.*

[171] National School Board Association, *Vouchers: The Closer You Look, The Worse They Look* (2000), *at* http://www.nsba.org/site/docs/9100/9012.pdf (last visited Sep. 23, 2003) [hereinafter NSBA].

school facilities,[172] and unlicensed teachers, including one who had been convicted of first-degree murder.[173]

A 1999 investigation conducted by the People for the American Way Foundation (PFAWF) and the NAACP found that some voucher schools were both unlawfully instituting admissions requirements for voucher students and forbidding voucher students from opting out of religious activities.[174] The Wisconsin Department of Public Instruction (DPI) conducted an investigation in April 2000 and found it probable that seven voucher schools had unlawfully imposed admission requirements on voucher students.[175] Moreover, the 2000 Legislative Audit Bureau report found that nine Milwaukee voucher schools "had no accreditation, were not seeking accreditation, and administered no standardized tests."[176]

Similar problems are found in Ohio, where voucher schools are not subject to the state's public accountability system.[177] Voucher schools are exempt from Ohio proficiency testing, including the minimum standards set for awarding high school diplomas.[178] Voucher schools do not need to provide comprehensive information that is prepared annually on aspects of the public school district's operations.[179] This means that public money is being spent without any, or at most with little, accountability to the public for the areas or the results of those expenditures.

In 1997, the state of Ohio hired an independent auditor to evaluate the Cleveland voucher program.[180] The auditor found approximately $2 million in questionable expenses for the first year.[181] Additionally, the state was spending a wildly inflated amount of taxpayer money to provide transportation for the voucher students.[182] A 1999 audit also found that taxi companies were billing for absent students, costing the taxpayers about $419,000.[183]

---

[172] *Murderer on Staff of State-Funded Private School*, PLAIN DEALER, July 1, 1999, *in* NSBA, *supra* note 171 ("The 110-year-old building had no fire alarm, no sprinkler system, broken windows, lead paint flaking off the walls at dangerous levels, and little, if any, heat in the winter").

[173] *Id.*

[174] People for the American Way, *Facts About Vouchers* (2003), *available at* http://www.pfaw.org/pfaw/general/ (last visited Jan. 19, 2003) [hereinafter *Facts About Vouchers*].

[175] *Id.*

[176] Wisconsin Legislative Audit Bureau, *An Evaluation: Milwaukee Parental Choice Program* (2000), *in Facts about Vouchers*, *supra* note 174, *available at* http://www.pfaw.org/pfaw/general (last visited Jan. 19, 2003).

[177] OHIO REV. CODE ANN. § 3302.01 (2001).

[178] *Id.* at § 3313.976(A)(3) (mandating that voucher schools need only meet standards in place as of 1992).

[179] *Id.* at § 3302.03.

[180] *See Facts About Vouchers*, *supra* note 174.

[181] *Id.*

[182] *Id.* The auditor found that in its first year of operation $1.4 million had been spent to provide taxis for voucher students. The auditor found that this averaged out to be about $16 per voucher student while the average cost for transportation for public school students was a little more than $3.

[183] *Id.*

Also in Ohio, five schools collected about $1 million in voucher payments before their applications had even been processed.[184] These schools were operating and receiving voucher funding, despite being in serious violation of fire code regulations and receiving citations for "health hazards, inadequate curricula and unqualified teachers."[185] At least one voucher school had a rather Draconian philosophy about discipline: tying children up with tape and putting paper bags over their heads.[186] Additional problems cited included falsifying records to collect voucher funds without actually accepting voucher students and conducting lessons through video rather than taught by actual teachers.[187]

Florida's voucher program has had similarly dismal problems due to a lack of public accountability. In Florida, the law does not require voucher schools to administer tests or report test scores to the public.[188] Because no oversight of the Florida program exists, voucher schools can spend voucher money on virtually anything, including renovations of rental properties owned by a private voucher school's owner.[189] For example, a Miami Herald investigation revealed that one non-profit agency which owned a private voucher school used $413,966 of taxpayer dollars to make improvements to an unrelated property that had no association with the private school, other than having the same owner.[190]

Many similar allegations of misconduct have been reported in the Florida voucher schools. Reported problems included "abusing students, misappropriating government funds, hiring unqualified teachers, and providing students with inadequate school supplies and services."[191] More specifically, one of Florida's largest voucher schools was accused of fraudulent accounting practices and was under investigation by the Florida Department of Law Enforcement.[192] Ultimately, in 2002, this school decided to halt acceptance of voucher students, presumably to avoid the continuing public scrutiny of their operations.[193]

Without any public accountability, voucher schools are not required to use funds in any particular way, nor are they required to conduct standardized testing, to hire qualified teachers, or follow the most basic safety and health codes. In light of these findings, the argument that vouchers benefit students rings hollow. It seems more apparent that vouchers benefit the private schools that can continue their practices, including religious indoctrination — all without any public accountability

---

[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] FLA. STAT. ANN. § 229.0537(4)-(5) (2001).
[189] *See Facts About Vouchers*, *supra* note 174.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*

for the way tax money is being spent — presumably in furtherance of the education of children.

Moreover, private schools may discriminate without consequences: voucher students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[194] Students, whose tuition is paid by taxpayers, do not have basic constitutional rights in voucher schools.[195] Such rights as freedom of religion, equal protection, and due process are not enforced in private schools because private school actions do not constitute state action.[196] For example, both Milwaukee and Cleveland voucher schools do not have to accept students with disabilities, including learning disabled children.[197] Nationwide, 68% of private schools in urban districts said they would "definitely or probably" not be willing to participate in a voucher program if they had to accept "special needs" students, such as those with learning disabilities or low academic achievement.[198] Additionally, voucher schools can choose which students to retain and which to expel. In other words, the schools themselves have absolute discretion with no oversight of their decisions.[199]

Although such rights initially were guaranteed to students in Milwaukee, the requirement was eliminated. Now, voucher schools are only "advised" to meet those rights.[200] The change in policy occurred after voucher schools and pro-voucher lawmakers complained about the requirement of enforcing constitutional rights in voucher schools.[201]

When a child enters a voucher school, he or she enters a whole new world in which the Constitution does not apply. No one must answer for educational achievement, or lack thereof, or for how money is spent. In addition, no one is required to ensure that buildings are safe for children or that teachers are qualified. Also, because no one is accountable for disciplinary methods, discipline may become abusive rather than reasonable and humane. Finally, if private voucher schools are not accountable for the education they provide, the market-driven voucher[202] concept fails because the voucher students are essentially disappearing into a "Wonderland," where education is secondary to religious indoctrination and plain greed.

---

[194] Tinker v. Des Moines Indep. Sch. Dist., 393 US 503, 506 (1969).

[195] JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM (Princeton Univ. Press 2000), *available at* http://www.aft.org/research/Vouchers/trackrecord.htm (last visited Oct. 11, 2003).

[196] *Id.*

[197] R. Kenneth Godwin & Frank R. Kemerer, *School Choice Tradeoffs: Liberty, Equity, and Diversity, in* NSBA, *supra* note 171.

[198] *See* NSBA, *supra* note 171. *See generally* US DEPARTMENT OF EDUCATION, BARRIERS, BENEFITS AND COSTS OF USING PRIVATE SCHOOLS TO ALLEVIATE OVERCROWDING IN PUBLIC SCHOOLS (1998), *at* http://www.aft.org/research/vouchers/research/usvoucher.html (last visited Sep. 23, 2003).

[199] *See* WITTE, *supra* note 195.

[200] *Id.*

[201] *Id.*

[202] *See* FRIEDMAN, *supra* notes 144.

C. VOUCHERS CAN POTENTIALLY UNDERMINE *BROWN V. BOARD OF EDUCATION*

Since private voucher schools are not subject to any desegregation order, they can be completely race-exclusive without suffering any consequences. If white students overwhelmingly avail themselves to voucher programs, a phenomenon that has actually occurred in the Cleveland voucher program,[203] the public schools will undergo a state-sanctioned and tax dollar-supported "resegregation" to a degree unseen since before *Brown v. Board of Education*. A "growing chorus"[204] of black educators and activists has "literally given up on integration and now press[es] for improving the quality of the one-race schools that most urban black children attend."[205] However, the failure of integration "cannot be entirely blamed on the Supreme Court and the decisions that ended judicial supervision of school districts that had achieved unitary status."[206]

School resegregation has already had a damaging impact on black students.[207] An August 2001 report issued by the NEAP showed that the math scores of black students, which had made steady gains since 1990, dropped off sharply between 1996 and 2000.[208] Education experts attributed this decline to the poor-quality schools most of the black students were forced to attend.[209] When the statistics are broken down by race, the NEAP study reveals a dramatic disparity in performance.[210] Studies have repeatedly demonstrated that "attending school with substantial numbers of white students improves the academic performance of black children."[211] This does not reflect any innate differences in the races but, rather, the reality that predominately white schools have financial advantages manifested by better teachers, better equipment, libraries, and availability of Advanced Placement courses.[212] Moreover, a major drawback of school reform proposals is that much credence is given to measuring results with scores from standardized testing.[213] One consequence of "teaching to the test" is that school officials "pressure teachers to rely on old-fashioned methods of rote learning,"[214] methods that were once considered the mainstay of "separate but equal" schools pre-*Brown*.

Voucher schools are free to discriminate in enrollments and in expelling students, all without constitutional consequences. Voucher options can permit families to select insular and homogenous educational

---

[203] *See* METCALF, *infra* note 215.
[204] PETER IRONS, JIM CROW'S CHILDREN 344 (2002).
[205] *Id.* at 343.
[206] *Id.* at 338. S*ee also* Missouri v. Jenkins, 515 US 70 (1995).
[207] *See* IRONS, *supra* note 204 at 340.
[208] *Id.*
[209] *See id.*
[210] *Id.*
[211] *Id.* at 341.
[212] *See* IRONS, *supra* note 204 at 344.
[213] *Id.* at 345.
[214] *Id.*

environments. The latest study of the Cleveland voucher program found that the program contributes to racially isolated education.[215] This study showed that voucher students are disproportionately white compared to their public school peers. For example, in the spring of 2000, even though whites represented just 14.4% of Cleveland public school non-voucher students, they represented 32.3% of voucher recipients.[216] In contrast, African-American students composed 74% of the public school non-voucher students but represented only 54.6% of voucher recipients.[217]

Similarly, in Milwaukee, the GAO reported that 96% of voucher students were minorities in 1994-1995, but by 1998-1999, the number of voucher students who were minorities decreased to 79 percent.[218] The official state evaluator of the voucher program found that this "program originally intended to aid poor, minority families in Milwaukee's inner city seem[ed] to be subsidizing what we may infer to be primarily white families."[219]

Voucher schools are already changing the demographic landscape of the public schools. In Cleveland, public non-voucher schools in the 1999-2000 school year were 19.5% white while the voucher schools were 29.9% white.[220] The trend of resegregation in Cleveland is relatively small thus far, but seems to be going in the direction of the pre-*Brown* demographic landscape. To elaborate, in 1996, 70.1% of the public non-voucher school students were African-American and 21% were white.[221] Only three years later, in 1999, the public schools were 70.4% African-American and 19.5% white.[222] This demonstrates that the voucher program is having the effect of "white flight" into the voucher schools while increasing the racial isolation of the public non-voucher schools. Since the surrounding suburban school districts refused to participate in the program, and since vouchers are awarded to white students in greater percentages than that of white students represented in the public school population, the trend will most likely continue and the public schools will become even more racially isolated.[223]

Moreover, a recent Harvard study found that private schools are generally more segregated than public schools. In 1997, "[Seventy-eight percent] of the private school students in the nation were white, but the

---

[215] Kim Metcalf, *Cleveland Scholarship Program Evaluation, 1998-2000 Technical Report*, INDIANA CENTER FOR EVALUATION, Sep. 2001, *available at* http://www.indiana.edu/%7Eiuice/documents/clev4techrep.pdf (last visited Sep. 23, 2003). This study was commissioned by the state of Ohio and conducted by researchers from Indiana University.

[216] *Id.* at 29.

[217] *Id.*

[218] *Id.* at 19.

[219] *See* WITTE, *supra* note 195.

[220] *See* GAO Report, *supra* note 163 at 42.

[221] *Id.*

[222] *Id.*

[223] *See* BRIAN P. GILL ET AL., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS xviii, 52, 213-14 (Rand Publications 2001), *available at* http://www.rand.org/publications/MR/MR1118 (last visited Jan. 18, 2003).

average black private student was enrolled in a school that was only 34% white."[224] In public schools, 64% of students were white while the average black public school student attended a school that was 33% white.[225] This means that racial isolation is as prevalent for black private school students as it is for white private school students.[226] Additionally, the 2002 Harvard Civil Rights Project study found that black-white segregation is greatest among Catholic schools.[227] The Harvard researchers showed that, on average, black private school students attend Catholic schools that are 31% white, non-Catholic religious schools that are 35% white, and secular private schools that are 41% white.[228] The researchers concluded that the underlying assumption that attending private schools will further school integration is simply false.[229]

One argument in favor of vouchers is that they will allow minority students greater access to schools, which, historically, have been predominantly white. "In fact, [however,] black students in the private sector are just as segregated from whites as in the public sector; white students in the private sector generally [still] attend overwhelmingly white schools."[230] In other words, the private schools in the nation are just as segregated as the public schools. The nation has come full circle back to the *Plessy* principle of "separate but equal." School vouchers will most likely exacerbate this *sub silentio* reversal of *Brown*.

Yet another recent study by the Harvard Civil Rights Project corroborates the contention that resegregation of the public schools nationwide has been increasing dramatically over the past twelve years.[231] This study reveals that the "desegregation of black students, which had increased continuously from the 1950s to the late 1980s, has now receded to levels not seen in three decades."[232] The authors also discovered the emergence of a large group of virtually 100% minority schools, dubbing these schools "apartheid" schools.[233] "One-sixth of the nation's black

---

[224] Sean F. Reardon & John T. Yun, *Private School Racial Enrollments and Segregation*, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT (2002), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/private_schools02.php (last visited Sep. 23, 2003) [hereinafter Reardon study].

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.* at 7.

[230] *Id.*

[231] Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT (2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (last visited Sep. 23, 2003). This study found that more black students were attending 90-100% minority schools in 2000 than in 1980. The exposure of black to white students in their schools has decreased across all regions from 1988-2000. In 1988, the average black student attended schools that were 36.2% white; in 2000, the typical black student attended a school that was 30.9% white.

[232] *Id.* at 4. Statistics from 2000 show that whites are the most segregated group in the nation's public schools, attending schools that are, on average, 80% white. Whites attending private schools are even more segregated than their public school counterparts.

[233] *Id.* at 5.

students and one-fourth of black students in the Northeast and Midwest" attend these apartheid schools.[234] Overall, "during the 1990s, the proportion of black students in majority white schools has decreased by 13 percentage points, to a level lower than any year since 1968."[235]

The data also reveals long-term trends in large central city school districts in Florida, Ohio, and Wisconsin — all states where voucher programs have been in operation for varying lengths of time. From 1967 to 2000, white enrollment in the Miami-Dade, Florida public schools decreased by 53%[236] — a percentage that is exceeded only by Dallas,[237] Milwaukee,[238] Santa Ana[239] and Boston[240] in the twenty-seven districts studied. Also, between 1967 and 2000, white enrollment in the Cleveland, Ohio public schools decreased by 24% while black enrollment increased by 15%.[241]

It seems demonstrably clear that voucher programs will only worsen the rapid resegregation that is occurring nationwide. The data above reveals a strong correlation between voucher programs and the resegregation of public schools. The states where vouchers are used reveal an alarming pattern of resegregation. For example, among public schools where the majority of the students are white, Wisconsin public schools are ranked as the tenth most racially isolated for black students in the nation,[242] while Massachusetts and Ohio public schools are ranked seventeenth and fourteenth, respectively.[243] Yet, the hallmark of the Cleveland voucher program is parental choice,[244] and commentators suggest that an unconstrained choice in a voucher or charter program will lead to higher levels of segregation than those currently seen.[245]

Additional data also confirm these findings. It is clear that resegregation is already occurring in Milwaukee. In 1990, the Milwaukee public schools were 55% African-American and 29% white.[246] However, in 1998, the public school enrollment of African-Americans increased to 61.4% while white enrollment dropped to 20.2%.[247]

If voucher programs are implemented in other cities, there is no reason to believe they would function any differently unless they are implemented in a "needs-directed" or "match the public school districts demographics"

---

[234] *Id.*
[235] *Id.* at 6.
[236] *Id.* at 57.
[237] *Id.* White enrollment in Dallas dropped 55% between 1967 and 2000.
[238] *Id.* White enrollment in Milwaukee dropped 54% between 1967 and 2000.
[239] *Id.* White enrollment in Santa Ana dropped 61% between 1967 and 2000.
[240] *Id*. White enrollment in Boston dropped 58% between 1967 and 2000.
[241] *Id.*
[242] *Id.* at 50.
[243] *Id.*
[244] Zelman, 536 U.S. at 651.
[245] *See* GILL, *supra* note 223 at xix.
[246] *See* GAO Report, *supra* note 163 at 20.
[247] *Id.*

method.[248] Thus, these vouchers represent a dramatic resegregation of the nation's public schools — all paid for with public tax dollars.

D. VOUCHERS WILL STRIP PUBLIC SCHOOLS OF FUNDING

An ongoing problem for public schools is a lack of funding. Voucher proponents argue that the funding of voucher schools and the funding of public schools are conceptually separate; increasing voucher spending is not directly correlated with decreased funding of public schools.[249] But, in fact, the funding of these vouchers is absolutely correlated to public school funding as enacted by state legislatures. By law, voucher funding is paid directly from state funds set aside for public schools. Vouchers thus conflict with the fundamental interest of the majority of children who cannot benefit from a quality public education.[250]

For example, the Milwaukee voucher program, with 10,789 students, cost an estimated $59.4 million in the 2001-2002 school year, with nearly half the cost paid by diverting state aid from Milwaukee Public Schools.[251] Moreover, Columbia University Professor Henry Levin found that Milwaukee voucher schools cost taxpayers almost $1,000 more per student than Milwaukee public schools when comparing the same grade levels, and factoring out transportation and special education costs, which vouchers schools are not required to provide.[252]

The Kansas City Charter school movement represents a case study of what may occur when funding is stripped from public schools.[253] The draining of funds due to voucher schools can be analogized to the Kansas city Missouri School District (KCMSD) situation because both involve the removal of much-needed funds from the public school district where such funds are more likely to benefit the majority of the students.

According to a study produced in 2001, charter schools have had a substantial financial impact on the KCMSD.[254] The funding for the KCMSD is based on student enrollment, a number that has steadily declined since the introduction of charter schools. In the fall of 1998, before charter schools opened, KCMSD had a total enrollment of 34,097 students.[255] As of September 2002, the Kansas City charter schools had

---

[248] *See infra* text accompanying notes 254-266.

[249] *See* JAMES G. DWYER, VOUCHERS WITHIN REASON 80 (Cornell Univ. Press 2002).

[250] *See* DWYER, *supra* note 249.

[251] *Funding for the Milwaukee Parental Choice Program*, WISCONSIN LEGISLATIVE FISCAL BUREAU, (2001), *available at* http://www.dpi.state.wi.us/dpi/dfm/sms/doc/mpc01fnf.doc (last visited Jan. 20, 2003).

[252] *See* WITTE, *supra* note 195.

[253] Charter schools differ from voucher schools in that they are strictly public schools that are publicly funded but generally privately managed — rather than under direct control of the target school district. In contrast, voucher schools are private schools which are privately managed, mostly sectarian, and can now be publicly funded due to the holding in *Zelman*.

[254] Research & Training Associates, *Charter School Performance Study: Kansas City Charter Schools* (2001), *available at* http://www.dese.state.mo.us/divimprove/charterschools/kcperformance.pdf (last visited Jan. 20, 2003) [hereinafter R&T Associates].

[255] Lynn Franey, *Enrollment Rises at KC Charter Schools*, KANSAS CITY STAR, Oct. 10, 2002.

enrolled 6,685 students while the district had an enrollment of only 27,239 students.[256] Thus, charter enrollment represented almost 20% of the total students enrolled in Kansas City "public" schools (charter and public schools combined). According to the Center for Education Reform, Kansas City is among the leaders in charter school enrollment.[257] Missouri is cited as a "model" for charter school reform because it targets "at-risk students and other special populations."[258] But this also raises the "issue about whether specifically targeting minority and/or low-income children is the equivalent of segregation or a means by which equity in academic achievement may be attained."[259] According to the Missouri enabling statute, the charter schools must reflect the demographics of the public schools in the city in which the charters are implemented.[260] About 83% of the current population in the KCMSD is of minority descent, as compared to 85% in charter schools.[261] But this does not reflect the reality that many of the individual charter schools are far less integrated.[262]

Dr. Bernard Taylor, the current superintendent of the KCMSD, cites charter schools as a direct cause of budgetary problems in the district.[263] The district loses $5,300 per student who attends a charter school instead of attending the KCMSD.[264] When this amount is projected, it "means [the KCMSD] can expect to lose up to $10 million to charters and other districts."[265] Based on enrollment percentages, the inescapable conclusion is that 80% of the students are paying for "alternative" education being offered to 20% of the students by charter schools.

Perhaps this impact to the public schools could be justified if charter schools were achieving a resultant, correlated increase in student performance. But such is not the case. In fact, student performance at charter schools is meaningfully and statistically worse than student performance in the public schools of KCMSD, despite charters being managed and staffed by "expert" educators who have an "educational vision" and "higher standards."[266]

To date, the Cleveland voucher program provides the most comprehensive and startling data of funding for school vouchers. In the

---

[256] *Id.*

[257] *Id.*

[258] *See* R&T Associates, *supra* note 254 at 15.

[259] *Id.*

[260] MO. REV. STAT. § 160.410 (2003).

[261] *See* R&T Associates, *supra* note 254 at 20.

[262] *Id*. Academy of Kansas City, Banneker Charter, Lee Tolbert Charter, and Genesis School are almost 100% African-American. Gordon Parks, Hogan Preparatory Academy, and Westport-Edison are 95% African-American. The Urban Community Leadership Academy is 90% African-American. This means that more than half of the charter schools are more "segregated" than the KCMSD overall.

[263] Tracy Allen, *Teacher Vacancy Cuts Considered in District's 2003 Budget Proposal*, THE CALL, June 14, 2002, *available at* http://www.kccall.com/News/2002/0614/Front_Page/026.html.

[264] *Id.*

[265] *Id.*

[266] *Id.* at 13.

2001-2002 school year, 4,266 Cleveland students received vouchers.[267] Funding for the program comes from Ohio's Disadvantaged Pupil Impact Aid program.[268] These funds were earmarked to provide benefits for disadvantaged public school students, as well as for pre-schools, all-day kindergartens, smaller class sizes, and reading improvement programs.[269]

The voucher program has largely benefited students already enrolled in private schools.[270] This fact alone demonstrates that sorely needed money is being drained from public schools to fund vouchers for students who already attend private school. As of September 2001, the estimated cost of the Cleveland voucher program was more than $33 million.[271] This is money that could be used to improve public school education for the 94% of students who do not receive vouchers. Furthermore, the Cleveland public schools have not seen a cost-saving from the withdrawal of students from public schools. A 1999 study by KPMG LLP found that the Cleveland School District's operating costs have continued to increase, despite having fewer students because voucher students come from all over the district.[272]

The lack of cost-savings makes perfect sense when one considers the reality that schools must still remain open even though the voucher-student no longer attends the facility. This is because the facility must still operate — without the money it once received — because the voucher student no longer attends. Since many voucher students were already enrolled in private schools before receiving the voucher, the cost to the district has actually increased while the funding funneled to the public school district has decreased through the awarding of vouchers. Almost 25% of the costs of the Cleveland program in its first year went toward tuition for students who were already enrolled in private schools and paying their own tuition.[273] A more recent study found that one in three voucher students were actually enrolled in private school before receiving the voucher.[274] The Cleveland voucher program diverts millions of dollars from the public school system while serving only a very small percentage of total students.

Similarly, in Milwaukee, after religious schools were added to the "voucher-eligible" list of schools in 1998, the voucher program

---

[267] *See* GAO Report, *supra* note 163.

[268] *Id.*

[269] *See* OHIO REV. CODE ANN. § 3314.08.

[270] *Cleveland School Vouchers: Where the Students Come From*, Policy Matters Ohio, *in* NBSA, *supra* note 171.

[271] *See* People for the American Way, *Five Years and Counting: A Closer Look at the Cleveland Voucher Program* 2, Sep. 25, 2001, *available at* http://www.pfaw.org/pfaw/general/default.aspx?iod=1381 (last visited Jan. 19, 2003).

[272] KPMG LLP, *Cleveland Scholarship and Tutoring Program: Final Management Study* 9-5 (Sep. 9, 1999), *cited at* http://www.pfaw.org/pfaw/general/default.aspx?oid=5444 (last visited Dec. 31, 2003).

[273] American Federation of Teachers, *The Cleveland Voucher Program: Who Chooses? Who Gets Chosen? Who Pays?* iii (1997), *available at* http://www.aft.org/research/reports/clev/lawdoes.htm (last visited Jan. 20, 2003).

[274] Zach Schiller, *Cleveland School Vouchers: Where the Students Come From*, *in* AFT, *supra* note 148.

experienced its largest growth in enrollment of students receiving vouchers who had already been attending private schools.[275] In 1998-1999, 46% of the new voucher students were already enrolled in private schools before receiving a voucher.[276]

From a strictly utilitarian perspective, vouchers are bad public policy because the majority of the students must remain behind in public schools with ever-decreasing funding and ever-increasing segregation while a small number of voucher students benefit at their expense. "A justice-driven education system requires that all children have an equal share"[277] in limited public funds available for education. Instead of "No-Child Left Behind," vouchers result in most children left behind.

IV. CONCLUSION

It can be inferred that voucher programs will have a similarly deleterious impact on funding available for public schools as seen in the Milwaukee, Cleveland, and, by analogy, in Kansas City Charter Schools.[278] Voucher schools do not achieve great performance gains for their students while money is continually being drained away from the public schools for the miniscule number of voucher beneficiaries. Even if the voucher schools are found to achieve performance "superiority" over the public schools at some future time, it will be at a net cost to the public schools that simply cannot be sustained in a democracy. The few voucher schools should not be allowed to benefit when the cost is so high to the majority. Even though the parties who benefit from vouchers are sympathetic, in the long run, vouchers will be harmful to the state of American public education. Perhaps most importantly, vouchers will do nothing to stem the increasing tide of the resegregation of public schools — indeed, vouchers will only accelerate the trend already deviating from the promise of *Brown*.

Just as significantly, the *Zelman* decision flies in the face of one of the founding principles of the United States: strict separation of church and state. A program cannot arguably be neutral when the vast majority of its funding flows to sectarian institutions. Even if the program is neutral on its face, its operation is clearly partisan because its principal effect is the support of religious institutions to the near exclusion of private school alternatives. It is unavoidable that the voucher programs will eventually lead to entanglement of church and state because an institution that receives private funds must be publicly accountable in some fashion. If religious institutions are allowed to discriminate freely, the public will demand accountability. Religious institutions will likely argue that if the public is

---

[275] *See* Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program Facts and Figures for 1998-1999, Breakdown of Choice Enrollment by Where Enrolled in Prior School Year, available at* http://www.dpi.state.wi.us/dpi/dfm/sms/mpscfnf.html (last visited Jan. 20, 2003).

[276] *Id.*

[277] *See, e.g.*, COOKSON, *supra* note 5 at 127.

[278] *See supra* text accompanying notes 254-266.

allowed to oversee their institutions, that oversight will violate their own religious tenets.

These positions are irreconcilable from both a public accountability and a democratic perspective. Fighting through the accountability, funding, and philosophical perspectives might be worth the struggle if studies found that private schools have greater success with student achievement. But this is simply not the case. Vouchers are a bad bargain in the aggregate for the public and for the individual voucher student who has received the false promise of a "better education." The payment of public money to private, sectarian institutions, which are not publicly accountable, should be abandoned in the best interests of education in America.