THE UNITED STATES SUPREME COURT AND VOUCHERS:  
EQUAL EDUCATIONAL OPPORTUNITY FOR STUDENTS IN ELEMENTARY AND SECONDARY SCHOOLS?

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I. INTRODUCTION

In Zelman v. Simmons-Harris (Zelman)\(^1\), a closely divided United States Supreme Court upheld the voucher portion of the Ohio Pilot Project Scholarship Program. The Court’s five-to-four ruling generated six different opinions on the program\(^2\), under which students can attend private schools, including religiously affiliated schools, at public expense. In so doing, the Court afforded poor inner-city parents the opportunity to send their children to the schools of their choice. The Court also adopted an approach that could be characterized as more European in the sense that in brushing aside concerns about the so-called strict

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2. Chief Justice Rehnquist’s majority opinion was joined by Justices O’Connor, Scalia, Kennedy, and Thomas. Justice O’Connor and Justice Thomas each wrote separate concurrences. Justice Stevens filed a dissent. Justice Souter’s dissent was joined by Justices Stevens, Ginsburg, and Breyer. Justice Breyer’s dissent was joined by Justices Stevens and Souter.

Persona y Derecho, 50\(^*\) (2004) 157-190
separation of Church and state, language that is not in the American constitution, it placed primacy on the right of parents to chose where their children should be educated.

Given the implications that Zelman raises, this article is divided into three major sections. The first part provides a brief overview of the legal history of vouchers in the United States. The second section examines the history of the Cleveland voucher program and includes an analysis of the judicial opinions in Zelman. The final portion reflects on the meaning of Zelman in the larger context of the Court’s ever-evolving jurisprudence with regard to the nexus between the Establishment Clause and equal educational opportunities.

Based on the Supreme Court’s having invalidated a program that would have allowed academically gifted students to receive assistance with post-secondary education, in Locke v. Davey (Davey), this article focuses on students in elementary and secondary education. In Davey, a student who wished to study for a degree in ministry challenged his initially being denied a “Promise Scholarship” from Washington state. The scholarship, which was based on academic excellence and financial need, would have allowed him to pursue a double major in Pastoral Ministries along with Business Management and Administration at Northwest College, a Christian school. After the Ninth Circuit


Believing with you that religion is a matter which lies solely between man and his God... 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 and state.

The Supreme Court first used the term in Reynolds v. United States, 98 U.S. 145, 164 (1879) (rejecting a Free Exercise Clause challenge to a federal polygamy statute).

reversed in the student’s favor on the ground that the state could not deny aid on the basis of religion, the Supreme Court disagreed. The Court struck down the program in decreeing that while it was permitted under the Free Exercise Clause it was not required under the Establishment Clause. In prohibiting the student from pursuing a degree that would have led to a career in religious ministry, the Court expressed its view that the State’s interest in not funding the pursuit of such studies was acceptable because it placed a relatively minor burden on scholarship recipients.

II. AN OVERVIEW OF LITIGATION INVOLVING VOUCHERS

As American educational leaders looked to improve schools, they considered vouchers, a controversial approach to provide greater educational opportunities for students. Initially advocated as a form of market choice by Nobel Laureate economist Milton Friedman almost fifty years ago⁵, vouchers supporters recognize that since many public schools, especially in urban areas, are in need of repairs, vouchers might help, at least in inner-city schools⁶.


Governments could require a minimum level of education which they could finance by giving parents vouchers redeemable for a specified minimum sum per child if spent on “approved” educational services. Parents would be free to spend this sum and any additional sum on purchasing educational services from an “approved” institution of their choice... The role of government would be limited to assuring that schools met certain minimum standards such as the inclusion of a minimum content in their programs, much as it now inspects restaurants to assure that they maintain minimum sanitary standards.

⁶. After years of languishing, vouchers received a boost in John CHUBB & Terry MOE, Politics, Markets, & America’s Schools (1990). See also, e.g.,
Courts have reached generally unfavorable results in litigation involving vouchers. The Supreme Court of Wisconsin upheld the use of vouchers in a case from Milwaukee wherein the program included student placements in religiously affiliated private schools.

Conversely, the Supreme Court of Maine and the First Circuit upheld a law from Maine that included nonsectarian schools but specifically excluded religiously affiliated schools from participating in a tuition vouchers program. The program provided vouchers for students whose school boards did not operate high schools. Similarly, the Supreme Court of Vermont affirmed the unconstitutionality of a state statute that would have permitted taxpayer support to reimburse parents for tuition for sectarian schools. The court wrote that “in the absence of adequate safeguards against the use of such funds for religious worship,” the statute violated the state constitution. Further, on remand after an appellate court in Florida rejected a facial


11. For an earlier, unreported, case with a similar outcome, see Asociacion de Maestros de Puerto Rico v. Torres, 1994 WL 780744 (Puerto Rico, 1994) (striking down a program that would have provided a voucher of up to $1,500 to defray educational costs for students to attend a variety of schools, including those that were religiously affiliated).

challenge to the constitutionality of a state voucher program that allowed students from public schools deemed as failing to receive scholarships to attend the private schools their parents selected, a trial court struck the statute down on the basis that it violated the prohibition in state constitution on taking revenue from the public treasury in indirect aid of sectarian institutions.

In the midst of the ongoing debate over vouchers, the Supreme Court agreed to hear an appeal in *Zelman v. Simmons-Harris*. It reversed the Sixth Circuit’s finding that the voucher portion of the Ohio Pilot Project Scholarship Program, under which students could attend private, including religiously affiliated, schools at public expense, violated the Establishment Clause. Rather than examine the broader controversies and considerable educational literature and related debates about the educational efficacy of vouchers, the remainder of this article focuses primarily on the dispute in *Zelman*.

13. The authors prefer the appellation non-public when referring to schools that are not state funded. However, the authors sometimes use the term private in this manuscript insofar as it is the term used in most statutes, most notably for the purposes of this commentary, Ohio.


III. ZELMAN V. SIMMONS-HARRIS.

A. LEGISLATIVE HISTORY

In 1992 Governor George Voinovich asked a panel of experts to investigate whether a voucher program could be implemented in Ohio\textsuperscript{18}. In March 1995 the Ohio General Assembly adopted the Ohio Pilot Project Scholarship Program (OPPSP) in response to a "federal court order requiring judicial supervision and operational management of the [Cleveland school] district by the state superintendent"\textsuperscript{19}.

Designed to assist children in the failing Cleveland public schools, the primary goal of the statute was to "provide for a number of students... to receive scholarships to attend alternative schools, and for an equal number of students to receive tutorial assistance grants while attending public school..."\textsuperscript{20}. Other portions of the law were designed to provide greater choices to parents and children via the creation of community and magnet schools.

During the 1999-2000 academic year, Cleveland’s ten community schools, typically referred to as charter schools elsewhere, which cannot have a religious affiliation and are operated by their own boards, had great independence from state mandates on hiring staff and curricular content\textsuperscript{21}. The Cleveland Board of Education also operated twenty-three magnet schools that emphasized particular subject areas, teaching methods, and/or

\begin{enumerate}
\item \textsuperscript{18} Margaret A. \textsc{Nero}, Comment, \textit{The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause}, 58 \textit{Ohio St. L. J.} 1103, 1107 (1997).
\item \textsuperscript{20} Ohio Rev. Code Ann. § 3313.975(A).
\item \textsuperscript{21} Ohio Rev. Code Ann. §§ 3314.01 \textit{et seq.}
\end{enumerate}
services for students. Community schools were allocated $4,518 per pupil, whereas magnet schools received $7,717, including state funding of $4,167, for the year, far in excess of the funds available to children and families participating in the voucher program. Other than their discussion in Zelman, the portions of the statute that directed the state superintendent to provide selected students with tutorial assistance and that created the community and magnet schools have not been the subject of litigation.

The first, and more controversial, aspect of the statute, which went into effect during the 1996-97 school year, provides scholarships for students to attend an alternative school of his or her choice defined as “a registered private school located in [Cleveland] or in a public school located in an adjacent school district.” The selected private schools must be located within city boundaries; must not discriminate “on the basis of race, religion, or ethnic origin” or “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;” must enroll “a minimum of ten students per class or at least twenty-five students in all the classes offered;” and must “agree[] not to charge any tuition to low-income families participating in the scholarship program in excess of ten percent of the scholarship amount... [and] shall permit any such tuition, at the discretion of the parent,

22. Zelman, supra note 2 at 2464.
23. Id.
24. Ohio Rev. Code Ann. § 3313.975(A). In a previous section, the statute defined “tutorial assistance ‘as instructional services provided to a student outside of regular school hours approved by the commission on school choice...’” O.R.C. § 3313.974(H).
to be satisfied by the low income family’s provision of in-kind contributions or services”

The OPPSP created publicly funded scholarships, the amounts of which “shall not exceed the lesser of the tuition charges of the alternative school the scholarship recipient attends or an amount established by the superintendent not in excess of twenty-five hundred dollars”31. The amount of a scholarship, or voucher, was to be prorated for any portion of a school year that a child does not attend a registered private school32. More specifically, parents whose “family income is at or above two-hundred percent of the maximum income level established by the state superintendent...shall qualify for seventy-five percent of the scholarship amount and students whose family income is below two hundred percent of that maximum income level shall qualify for ninety percent of the scholarship amount”33. The net result is that parents of low income students receive a maximum of $2,250 while other participants can receive up to $1,875.

As an added safeguard, the statute calls for voucher checks to be made out to parents or guardians34 who were to endorse them before the schools could use the funds35. The voucher funds followed students regardless of where they attended school36. The most complete report on the OPPSP, published by the Government Accounting Office (GAO), revealed dramatic demo-

31. Ohio Rev. Code Ann. § 3313.978(C)(1). The statute also permits increases for students with disabilities. Ohio Rev. Code Ann. § 3313.978(C)(3). Similarly, the tutorial assistance program provides an amount that “shall not exceed the lesser of the provider’s actual charges for such assistance or a percentage established by the state superintendent, not to exceed twenty percent, of the pilot project school district’s average basic scholarship amount”. Ohio Rev. Code Ann. § 3313.978(C)(3).
35. GAO Report, supra note 8 at 5
36. Id.
graphic data about program participants. This report indicates that during the 1998-99 school year, the most recent year for which it had complete data, 70% of families with children participating in the OPPSP were headed by single mothers, with average family incomes of $18,750\textsuperscript{37}; 73.4% of the children who participated were minorities and 26.6% were white\textsuperscript{38}.

Since its implementation, only private schools participated in the OPPSP\textsuperscript{39}. The GAO Report reveals that approximately 3,400 voucher students\textsuperscript{40} were enrolled in 52 private schools\textsuperscript{41} which received about $5.2 million in publicly funded payments for the 1999-2000 academic year. During the same academic year, the Cleveland public schools had about 76,000 students in its 121 schools and received $712 million in public support\textsuperscript{42}.

The Supreme Court relied on even more recent data than the GAO Report. Chief Justice Rehnquist’s majority opinion pointed out that during the 1999-2000 school year, 46 of the 56 participating private schools were religiously affiliated and that 96% of the more than 3,700 students, 60% of whom came from families that were at or below the poverty level, attended religious schools\textsuperscript{43}. However, when placed in the larger context

\textsuperscript{37} Id. at 14 (Table 1: Characteristics of Cleveland Families with Students in the Voucher Program or Public Schools). The Sixth Circuit reported that 60% of these families were at or below the poverty level, Zelman II, supra note 17 at 949.

\textsuperscript{38} GAO Report, supra note 8 at 14 (Table 4: Racial and Ethnic Composition of Cleveland Public School Voucher School Students, School Year 1998-99).

\textsuperscript{39} Id. at 5.

\textsuperscript{40} The Sixth Circuit reported that of the 3,761 students enrolled in the program, 3,632, or 96%, were enrolled in “sectarian schools”. The court pointed out that at one point, “as many as 22% of the students enrolled in the program attended nonreligious schools”. Zelman II, supra note 17 at 949.

\textsuperscript{41} The Sixth Circuit indicated that of the fifty-six schools participating in the program, forty six, or 82%, were “church-affiliated”. Id.

\textsuperscript{42} GAO Report, supra note 8 at 5.

\textsuperscript{43} Zelman, supra note 1 at 646.
that included children who enrolled in community and magnet schools, he viewed the 96% "as but a snapshot of one particular school year [since during] the 1997-1998 school year, by contrast, only 78% of scholarship recipients attended religious schools"\textsuperscript{44}. Moreover, Rehnquist maintained that if one were to place the voucher program in the wider context of Cleveland's having 1,900 students in community schools, more than 13,000 in alternative magnet programs, and 1,400 in traditional public schools with tutorial aid, the overall percentage of students enrolled in religious schools drops to under 20%\textsuperscript{45}.

B. JUDICIAL HISTORY

1. Lower Courts

The voucher program survived an initial challenge in state court when a trial judge granted the state's motion for summary judgment on the basis that since the aid to private schools participating in the OPPSP was indirect, the statute did not violate the Establishment Clause\textsuperscript{46}. On further review, an intermediate appellate court reversed in asserting that the statute had the impermissible effect of advancing religion\textsuperscript{47}. The Supreme Court of Ohio upheld the constitutionality of the OPPSP\textsuperscript{48}. The court found that the statute as a whole did not violate the Establishment Clause since it passed muster under

\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{48} Aff'd in part, rev'd in part, Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999); hereinafter cited as Goff.
Lemon v. Kurtzman⁴⁹, but did sever the section of the law that gave priority to parents who belonged to a religious group that supported a sectarian group. However, in deciding that the voucher program violated the state constitutional provision that requires every statute to have only one subject, the court struck it down. The court stayed enforcement of its order until June 30, 1999, to avoid disrupting the then current school year⁵⁰. The General Assembly of Ohio addressed the court’s concerns and re-enacted the statute on June 29, 1999⁵¹.

Dissatisfied at having lost in state court, and in light of the revised statute, opponents of the OPPSP filed two separate claims that were joined into one suit. A federal trial court in Ohio, relying largely on Committee for Public Education and Liberty v. Nyquist⁵², wherein the Supreme Court struck down a program from New York that, in part, provided tuition for low-income children whose parents wished to send them to religious schools, initially granted the injunction on the basis that the OPPSP

⁴⁹. According to this test: “Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive government entanglement with religion”. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) (Lemon).

Further, when addressing entanglement and state aid to institutions that are religiously affiliated, the Court took three additional factors into consideration: “we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority”. Id. at 615; hereinafter cited as Lemon.

⁵⁰. Goff, supra note 47 at 216.

⁵¹. Zelman I, supra note 16 at 740.

⁵². 413 U.S. 756 (1973). The statute at issue provided direct money grants to qualifying nonpublic schools, defined as those that served a high concentration of low-income students, to pay for the maintenance and repair of facilities as well as for equipment to ensure the health, welfare, and safety of students; hereinafter cited as Nyquist.
violated the Establishment Clause. Two days later the court partially stayed its own order, for one semester or until it rendered a final judgment on the request for permanent injunctive relief, applicable only to students already taking part in the OPPSP. The court was concerned that since its order was issued so close to the start of the school year, it might have had a disruptive effect on children. A divided Supreme Court granted another stay pending the final disposition of the Sixth Circuit. About six weeks later, a federal trial court issued a permanent injunction, subject to the Sixth Circuit’s review, prohibiting the state from administering the voucher program.

A divided Sixth Circuit affirmed the grant of summary judgment that struck the program down as unconstitutional since it violated the Establishment Clause. The program had the impermissible effect of advancing religion, the court said, resulting in governmental indoctrination of religious beliefs or creating an incentive to attend religious schools. After reviewing precedent from Lemon through the Court’s most recent aid case, Mitchell v.  

53. The two cases had the docket numbers CV 1:99 CV 1740 and 1:99 CV 1818. Zelman I, supra note 15.


55. Stay granted, Zelman v. Simmons-Harris, 528 U.S. 983 (1999). The application for a stay was presented to Justice Stevens who, along with Justices Souter, Ginsberg, and Breyer, would have denied the request.

56. Zelman I, supra note 17.

57. Zelman II, supra note 15. The majority opinion was written by Judge Clay and joined by Judge Siler. Judge Ryan dissented. For another Establishment Clause case involving the two judges in the majority reaching the opposite result, see Johnson v. Economic Development Corp. of County of Oakland, 241 F.3d 501 (6th Cir. 2001) (affirming a grant of summary judgment that the issuance of tax-exempt revenue bonds on behalf of a Catholic school in Michigan did not violate the Establishment Clause because it passed the Lemon test).
Helms, the Sixth Circuit followed the lead of the trial court in applying Nyquist since that case dealt, in part, with a tuition reimbursement program in which the majority of participating poor students attended “sectarian” schools.

In reiterating that Nyquist controlled, the court focused on what it described as the factual similarities: both programs were for low-income parents who received tuition assistance/ vouchers that permitted their children to attend religious schools and there were no restrictions on how the funds are used for such items as “religious instructions or materials as easily as for erasers and playground equipment.” The court rejected, almost out-of-hand, the state’s claim that, in light of the statute’s language, vouchers were a neutral form of aid.

The court disagreed with the state’s position: it held that the program lacked neutrality in that it discouraged participation by schools not religiously affiliated because nonsectarian schools had higher costs and public schools with average expenditures of $7,097 per child lacked a financial incentive to take voucher students since the law provided a maximum of $2,500 per pupil. The court concluded that since public, and most nonsectarian religious, schools chose not to participate in the OPPSP, the program had the impermissible effect of promoting sectarian schools. The court glossed over decisions of public and most nonsectarian schools not to participate in the program as a function of their own choices, an issue at the heart of the Supreme Court’s analysis, rather than the operation of the law.

58. 530 U.S. 793 (2000) (plurality upholding the constitutionality of Chapter 2’s permitting religiously affiliated schools to use publicly funded educational materials); hereinafter cited as Helms.

59. Zelman II, supra note 16 at p. 959.

60. Id.
In a dissent, Circuit Judge Ryan would have upheld the voucher program\textsuperscript{61}. After having rebuffed the majority’s analysis, he identified the only issue before the court as evaluating whether the program had the “primary effect” of advancing religion. He thus criticized the majority for relying on Nyquist rather than the first two criteria of the modified test enunciated in \textit{Agostini v. Felton},\textsuperscript{62} and so presaged the rationale of the Supreme Court. He contended that the only two issues properly before the court were to apply \textit{Agostini}'s “impermissible effect” test to determine whether the effect of Ohio’s voucher program is to advance religion, either because (1) the aid it provides results in governmental indoctrination, or (2) the program defines its recipients by reference to religion\textsuperscript{63}. Although not reviewing Judge Ryan’s dissent in detail, suffice it to say that he was content that the statute passed both parts of this test.

As could have been anticipated, the State of Ohio sought further review. The Supreme Court agreed to hear an appeal to resolve the split between the Circuits and state courts\textsuperscript{64}, upholding the constitutionality of the OPPSP.

\textsuperscript{61} Id. at 963 (Ryan, J., dissenting). Judge Ryan joined the majority opinion in agreeing that the trial court did not abuse its discretion in refusing to certify the question of collateral estoppel to the Supreme Court of Ohio. Judge Ryan is a supporter of religious freedom in a variety of contexts, such as in \textit{Coles v. Cleveland Bd. of Educ.}, 171 F.3d 369 (6th Cir. 1999) (dissenting against striking down a school board’s practice of praying before meetings).

\textsuperscript{62} 521 U.S. 203, 234 (1997) (upholding the on-site delivery of Title I services for children who attended religiously affiliated non-public schools); hereinafter cited as \textit{Agostini}

\textsuperscript{63} Id. at 968 citing Agostini, \textit{id.} at 234.

\textsuperscript{64} Cert. granted, supra note 16.
2. Supreme Court Analysis

a) Majority Opinion

Writing for the Court in his thirtieth term of service on the High Court, Chief Justice Rehnquist began his rationale by citing the Court’s most recent iteration of its Establishment Clause test in Agostini. The test asks “whether the government acted with the purpose of advancing or inhibiting religions [and] whether the aid has the ‘effect’ of advancing or inhibiting religion.” Noting the lack of a dispute over the program’s valid secular purpose in providing programming for poor children in a failing school system, he turned to the question of “whether the Ohio program nonetheless has the forbidden ‘effect’ of advancing or inhibiting religion.”

Chief Justice Rehnquist reasoned that in addressing whether a program has the effect of advancing religion, the Court has drawn a distinction between situations where the government provides direct aid to religious schools and situations involving parental choice, wherein public funds are used in religious schools via to the independent choices of private individuals. He noted that whereas the Court’s perspective with regard to direct aid has evolved dramatically, its attitude toward true private choice, as

65. For a news commentary to this effect, see Linda Greenhouse, Court Had Rehnquist Initials Intricately Carved on Docket, N.Y. Times, July 2, 2002 at A 1, 14.
67. Id.
68. See, e.g., Helms, supra note 58; Agostini, supra note 62.
reflected in Mueller v. Allen\textsuperscript{70}, Witters v. Washington Department of Services for the Blind\textsuperscript{71}, and Zobrest v. Catalina Foothills School District\textsuperscript{72}, has remained consistent. Taking these three cases into account, Rehnquist emphasized that as long as “a governmental aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to a challenge under the Establishment Clause”\textsuperscript{73}.

Turning to the Cleveland Program, the Chief Justice stated that it was constitutionally acceptable because, as part of the state’s far-reaching attempt to provide greater educational opportunities in a failing school system, it permits all city schools and adjacent suburban districts to participate. Further, he observed that the statute’s only preference is to aid low-income families, and the program does not provide an incentive to religious schools, since “the aid is allocated on the basis of neutral secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory

\textsuperscript{70} 463 U.S. 388 (1983) (upholding a state income tax deduction permitting parents to deduct part of the cost of tuition, transportation, and books) (Mueller).

\textsuperscript{71} 474 U.S. 481 (1986) (holding that the First Amendment did not preclude providing aid under vocational rehabilitation assistance program to a blind student who chose to study at Christian college to become a pastor, missionary, or youth director on the basis that the help was generally available without regard for the sectarian or non-sectarian nature of an institution), rehearing denied, Witters v. Washington Dep’t of Servs. for the Blind, 475 U.S. 1091 (1986); (Witters). The Supreme Court of Washington, in Witters v. State Comm’n for the Blind, 771 P.2d 1119 (Wash. 1989), cert. denied sub nom o Witters v. Washington Dept. of Servs. for the Blind, 493 U.S. 850 (1989) later found that language in the state constitution prohibited the use of public funds for religious instruction.

\textsuperscript{72} Supra note 69.

\textsuperscript{73} Zelman, supra note 1 at 652.
basis”74. If anything, he found that the program created a disincentive to religious schools since they received only one-half of the per pupil aid allocated for community schools and one-third of the assistance provided to magnet schools; suburban districts were eligible to receive double or triple the amount of per-pupil aid slated for religious schools. The program also costs parents who opt to send their children to non-public schools since they may have to supplement a small portion of tuition, not to exceed ten-percent of the “scholarship amount”75, while those who send their children to community, magnet, or traditional public schools pay nothing. In a footnote, the Chief Justice rebutted Justice Souter’s concern that the program was not neutral since voucher funds cannot be used at public schools: Chief Justice Rehnquist commented that the amount of aid allocated for children in public schools far exceeds that amount available to students who participate in the OPPSP76.

Rehnquist easily rebuffed fears that even in the absence of a financial incentive, the program created “a public perception that the State is endorsing religious practices and beliefs”77.

He posited that the Court has repeatedly recognized that reasonable observers would not think that a neutral aid program under which a genuinely private choice directs the assistance to a religious school involved government endorsement of the schools78. Such a fear is particularly misplaced in Zelman, he suggested, in light of the Ohio program’s history and context of service to poor children in failed schools; the program also offers a range of secular choices. He added that even though 46 of the 56 participating schools are religiously affiliated, no constitu-

74. Id. citing Agostini, supra note 62 at 231.
76. Zelman, supra note 1 at 654, note 3.
77. Id. citing Brief for Respondents Simmons-Harris et al. 37-38.
78. The Chief Justice relied on Mueller, supra note 70; Witters, supra note 71; Zobrest, supra note 69; and Helms, supra note 58.
tional problem exists since the state in no way coerced parents into making a private choice for their children’s school.

The Chief Justice next responded to Justice Souter’s concern that since most participating schools were religiously affiliated, private non-religious schools might be discouraged from taking part in the program. He was satisfied that this fact was of no concern because the rise of religious schools had nothing to do with the voucher program, since most non-public schools in urban areas are religiously affiliated. He pointed out that whereas 82% of participating schools are religious, this percentage corresponds almost identically to Ohio’s state-wide total, 81% of non-public schools being religiously affiliated. He was convinced that if the Court were to place constitutional significance on the figures that Justice Souter relied on, neutral school choice programs might have been acceptable in one part of a state but not another, depending on the proportion of different types of non-public schools in an area.

The Chief Justice almost summarily dismissed Justice Souter’s argument that, even if the Court was not concerned that most participating schools are religiously affiliated, it should worry that 96% of scholarship recipients attended such schools. Rehnquist said that the Court treated similar data in Mueller and Agostini, wherein the vast majority of parents had children in religious schools, as irrelevant since the “constitutionality of a neutral educational program simply does not turn on whether, and why, in a particular area, most private schools are run by religious organizations, or most recipients chose to use the aid at a religious school”79. Rehnquist maintained that the 96% figure Justice Souter relied on is misleading. He observed that if one were to place the voucher program in the wider context of Cleveland’s having 1,900 students in community schools, more than 13,000 in alternative magnet programs, and 1,400 in

79. Zelman, supra note 1 at 658.
traditional public schools with tutorial aid, the overall percentage of students enrolled in religious schools drops to under 20%\(^80\).

The Chief Justice advanced two reasons why the Sixth Circuit and voucher opponents misplaced their reliance on *Nyquist*. First, he explained that Ohio’s program differed greatly from the one in *Nyquist*. The New York statute prohibited participation of public schools, provided aid directly only to private schools regardless of the amount that parents spent on tuition, and was designed explicitly as an incentive for parents to send their children to religious schools. In distinguishing the two cases, the Chief Justice succinctly ruled that the Ohio program did not include any of *Nyquist*’s unacceptable features.

The second distinction that Rehnquist focused on between *Zelman* and *Nyquist* was that since the latter was handed down, the Court has affirmatively answered the question of whether some form of public assistance can be made available without regard to the religious or non-religious nature of the institution that received the aid. Consequently, he reasoned that *Nyquist* was not controlling in the present situation.

In closing, the Chief Justice concluded that the OPPSP followed an unbroken line of cases supporting true private choice that provided benefits directly to a wide range of needy private individuals. Thus, he reversed the judgment of the Sixth Circuit and, in so doing, upheld the constitutionality of the OPPSP.

b) *Justice O’Connor’s Concurrence*

Justice O’Connor concurred separately since she not only did “not believe that [*Zelman*] marks a dramatic break from the past” but also because she wished to elaborate on the Court’s discussion of the need to take parental choice into consideration.

80. *Id.* at 659.
when weighing “all reasonable educational alternatives to religious schools that are available to parents”81. As such, she analogized that the voucher program was not unlike a variety of publicly funded health programs, such as Medicare and Medicaid, and educational initiatives such as Pell Grants and the Child Care and Development Block Grant Programs, all of which permit public, albeit federal, funds to reach religiously affiliated programs without any constitutional limitations. In reviewing the Cleveland program in some detail, she rebutted Justice Souter’s arguments about how the Court has departed from its own precedent. Justice O’Connor ended her concurrence by reflecting that “I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause”82.

c) Justice Thomas’ Concurrence

Justice Thomas’ powerful concurrence began by echoing the words of Frederick Douglass and the promise of Brown v. Board of Education83 in observing that “[t]oday many of our inner-city public schools deny emancipation to urban minority students... [who] have been forced into a system that continually fails them”84. Recognizing the strong support for choice among blacks and other minorities85, he acknowledged that ten states have

81. Id., supra note 1 at 663 (O’Connor, J., concurring).
82. Id. at 676.
83. 347 U.S. 483 (1954) (striking down separate schools, based on race, as inherently unequal).
84. Zelman, supra note 1 at 676 (Thomas, J., concurring).
85. Justice Thomas wrote that “[j]ust 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.” Id. at 682. See also, e.g., Jim Carl, J. (1996). Unusual Allies: Elite and Grass-Root Origins of Parental
enacted some form of publicly funded programs to assist a disproportionate number of underprivileged urban students. Consequently, Justice Thomas wrote that a program involving religious schools would “appear unconstitutional only to those who would twist the... Fourteenth Amendment against itself by expansively incorporating the Establishment Clause [, thereby c]onverting [i]t from a guarantee of opportunity to an obstacle against educational reform [that] distorts our constitutional values and disserves those in the greatest need”86.

d) Justice Stevens’ Dissent

In a brief dissent, Justice Stevens continued his unabated opposition to state aid to religious institutions87. In describing “the Court’s decision as extremely misguided,” he raised the hyperbolic specter of “religious strife... in the Balkans, Ireland, and the Middle East...”, fearing that “[w]henever 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”88.


86. Id. at 684.

87. Id. at 684 (Stevens, J. dissenting). Since joining the Court, Justice Stevens voted against aid in all Establishment Clause cases involving K-12 schools: Wolman v. Walter, 433 U.S. 229 (1977) (opposing various forms of government aid to religious schools), PEARL v. Reagan, 444 U.S. 646 (1980) (permitting reimbursements to non-public schools for maintaining educational records); Mueller, supra note 70; School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 400 (1985) (opposing a shared-time program); Aguilar v. Felton, 473 U.S. 402 (1985) (prohibiting the on-site delivery of Title I services in religious schools); Zobrest, supra note 69, Agostini, supra note 62; and Helms, supra note 58.

88. Zelman, supra note 1 at 686.
e) Justice Souter’s Dissent

Justice Souter’s dissent, which was longer than the substantive portion of the majority opinion, was joined by Justices Stevens, Ginsburg, and Breyer. He criticized the majority for departing from principles first enunciated in *Everson v. Board of Education*, wherein the Court decreed that “no tax in any amount... can be levied to support any religious activities or institutions... whatever form they may adopt to teach religion” in *Everson*. Souter questioned whether the voucher program was either neutral or provided parents with free choice. After arguing that the Court misapplied its own law, he again raised the specter of religious strife over vouchers. In the closing words of his dissent Justice Souter mused: “I hope that a future Court will reconsider today’s dramatic departure from basic Establishment

89. Id. at 686 (Souter, J. dissenting). During his time on the Court, Justice Souter voted against state aid in all aid cases, *Zobrest*, supra note 69; *Agostini*, supra note 62; and *Helms*, supra note 58. Similarly, during her time on the High Court, Justice Ginsberg also opposed aid in both cases in which she was involved, *Agostini*, id. 62 and *Helms*, id. As discussed at notes 118-120 infra and accompanying text, Justice Breyer is not always opposed to aid.

90. *Zelman*, supra note 1 at 689, citing *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (upholding a statute permitting parents to be reimbursed for the cost of transporting their children to nonpublic schools).

91. Just as in *Helms*, supra note 58 at 902 (“... the more generous the support, the more divisive would be the resentments of those resisting religious support...”), Justice Souter continues to raise concerns over divisiveness that might arise due to aid:

“Justice Breyer has addressed this issue in his own dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition”. Id. at 2501.
Clause principle”92. Given the Court’s evolving Establishment Clause jurisprudence, it may be that the day Justice Souter hoped for has arrived, but did not end in the way that he would have wished.

f) Justice Breyer’s Dissent

Justice Breyer’s dissent was joined by Justices Stevens and Souter93. He began by declaring that although he joined Justice Souter’s dissent and substantially agreed with Justice Stevens, he thought it important “to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict”94.

IV. DISCUSSION

Whether Zelman is, as President Bush95 and some commentators are suggesting96, the most significant case addressing

92. Zelman, supra note 1 at 717.
93. Id. at 717 (Breyer, J., dissenting).
94. Id. In addition to language in Justice Stevens dissent, supra notes 87-88, Breyer’s remarks echo the sentiments of Justice Souter who, in Helms, supra note 58 at 872, n. 2, feared that “[t]he Court may well have moved away from considering the political divisiveness threatened by particular instances of aid as a practical criterion for applying the Establishment Clause case by case...”. In the same dissent, id. at 902 he worried that “the more generous the support, the more divisive would be the resentments of those resisting religious support, and those religions without school systems ready to claim their fair share.”
95. Elisabeth Bumiller, Bush, in Cleveland, Applauds Court’s Voucher Decision: President Says Court Decision Is Comparable to its Ban on Segregation in Schools, July 2, 2002 at A1, 15. Bush said: “The Supreme Court in 1954 declared that our nation cannot have two education systems... [l]ast week the court declared that our nation will not accept one education system for those who can afford to send their children to a school of their choice and for those
equal educational opportunities for all children since Brown remains to be seen. Regardless of whether it ever reaches the lofty status of Brown, Zelman has clearly made equal educational opportunities and choices more readily attainable to poor inner-city parents and their children.

The Zelman Court’s reliance on basic precedent setting principles of educational equity set forth in cases involving the Establishment Clause and the Child Benefit Test may make references to Brown appropriate, albeit perhaps overstated. Comparisons between Zelman and Brown aside, the Court has firmly addressed the dismal record of the Cleveland public schools. Finding that the voucher program satisfied the Establishment Clause standard it enunciated in Agostini, the Court afforded poor, typically disenfranchised, parents a greater range of educational choices for their children. It is nothing short of amazing that opponents of vouchers, the vast majority of whom undoubtedly have genuine choices about where their children can be educated, ignore the data in the GAO Report. According to this report, 73.4% of the children who participated in the OPPSP were minorities, 70% of whose families were headed by single mothers with average family incomes of $18,750. If such urban who can’t. And that’s just as historic”. See also Scott Stephens, Mark Naymik, & Susan Ruiz Patton, President Hails School-Voucher Ruling in Cleveland Speech, The [Cleveland] Plain Dealer, July 2, 2002, A 1, 4.


97. The Ohio Department of Education (Dec. 15, 1999) reports, for example, that on its 2000 Local Report Card District Ratings, covering the 1998-1999 school year, the Cleveland public schools failed to meet any of 27 state mandated performance objectives. See also Will, id., reporting similar results. The Ohio Department of Education’s 2002 Local Report Card, reflecting data for the 2000-2001 academic year, reveals that the Cleveland schools improved to meet four of their performance standards.

98. See notes 36-37 supra.
parents are to help their children escape the vicious cycle of poverty, this voucher program may be their last best hope since it offers an opportunity to take their children out of a failing school system and place them in educational environments where they can succeed.

Arguments from the dissent and media opponents, likely to be followed by academic critiques, about the potential divisiveness of vouchers and fears of their having violated the Establishment Clause are little more than red herrings at best, and subtle forms of racial and religious bigotry at worst. Clearly, reasonable minds can, and do, differ over the appropriateness of vouchers. Yet, the dissent’s charges that public funds are squandered on religious purposes verge on “Know Nothingism”: their no so veiled accusations reflect that they do not fully understand the value of providing parents with choice and/or know what happens in religiously affiliated schools. Their words can be interpreted as serving little other purpose than stirring up anti-religious sentiment.

Two excerpts from the editorial in the New York Times the day after Zelman evidence its hostility both toward religion, particularly Roman Catholicism, and vouchers. The editorial feared


100. For an example of a earlier, representative academic critique of vouchers, see Sheila SUESS KENNEDY, Privatizing Vouchers: The Politics of Education, Phi Delta Kappan, 450, 452 (Feb. 2001): “Louis Mahern, an Indiana Democrat who favors vouchers, notes that they allow Republicans to appeal to lower-middle-class white resentments without overt racism and still offer something to inner-city African Americans”. The data, reflected in notes 36-37, infra and accompanying discussion, in the GAO report clearly refute such accusations with regard to Zelman.

101. The Know-Nothings was an anti-foreign, anti-Catholic political party in the United States during the 1850s. For a discussion of this group, see Tyler Anbinder, Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850s (1992).
that "[O]nce students enrolled in those schools, they are subjected to just the sort of religious training the First Amendment forbids the state to underwrite. In many cases, students are required to attend Mass or other religious services. Tax dollars go to buy Bibles, prayer books, crucifixes and other religious iconography"102. Such language, which clearly misunderstands what takes place in Roman Catholic schools103, for example, is reminiscent of Justice Brennan’s majority opinion in Aguilar, later


103. For an earlier example of a symbiotic relationship between special interest groups that oppose to aid at least in part based on fright tactics that the Roman Catholic Church stands to be the greatest beneficiary, see Sheila SUESS KENNEDY, Privatizing Vouchers: The Politics of Education, Phi Delta Kappan, 450, 452 (Feb 2001) (reiterating “charges that the cooperation between the Catholic Church and holders of public office went beyond an acceptable political response to a valued voting constituency...”). The selective criticism is interesting insofar as n voucher opponents who question the political motives of other groups ignore that fact that “[d]uring the 2000 election, more than 66 percent of the NEA’s [National Education Association’s] political contributions went to Democratic campaigns” and candidates who opposed vouchers. Ken WARD, Editorial: Risky Schemes in Nevada, Florida. Las Vegas Rev. J., Nov. 29, 2000 at 11B; available, 2000 WL 8216075. See also, Josetta SACK, Teachers Unions Pull Out Stops for Gore, Educ. Week, Aug. 17, 2000 at 43; Jeff ARCHER, Unions Pull Out Stops for Elections, Educ. Week, Nov. 1, 2000 at 1, 31, 33-34 (reporting that two of the NEA’s political actions groups contributed all but $11,000 out of $1.05 million between January 1999 and June 2000 and all but $40,000 out of $1.1 million to Democratic candidates through late August 2000). See also People for the American Way, Five Years and Counting: A Closer Look at the Cleveland Voucher Program 7 (2001) (questioning how vouchers might affect religious liberty).
trumped by Justice O'Connor's majority opinion in *Agostini*\textsuperscript{104}. In the absence of any allegation of inappropriate activity, Justice Brennan struck down the on-site delivery of Title I for poor children with identifiable educational needs simply based on the unsubstantiated fear of excessive entanglement.

Despite the fears that funds may be misappropriated, in *Zelman* there were, and are, no allegations of inappropriate use of resources for religious purposes. In fact, as a safeguard against such a possibility, tuition checks are sent to parents, who sign them over to school officials. Moreover, vouchers did not necessarily cover either full tuition or the cost of educating each child; one can only wonder at voucher opponents' worry that religious schools might have diverted large portions of their resources to religious instruction or religious materials while continuing to provide a broader range of secular instruction. Even conceding arguendo, that a portion of funds may be used to purchase an occasional religious item, one wonders how schools would function if so much money were spent on religious artifacts instead of paying such mundane expenses as teacher salaries and heating bills.

Fears about misuse of funds for religious “iconography” become even more baseless when one considers the cost of tuition in Cleveland’s Roman Catholic schools. The average amount of tuition and fees in Catholic schools in the Cleveland Diocese during the 1998-99 school year was $1,245 for all elementary schools and $1,300 in its seven inner-city schools, as opposed to average costs per pupil of $1,916 for all schools and $2,167 in the inner-city\textsuperscript{105}. Given these figures, it is difficult to

\textsuperscript{104} Justice O'Connor laid the groundwork for her opinion in *Agostini* in her vociferous dissent in *Aguilar*, supra note 87 at 421 (O'Connor, J., dissenting).

Imagine that these schools have much room for discretionary spending on non-essential, non-educational items.

The *New York Times* editorial further betrayed the writer’s anti-religious sentiments in suggesting that “[i]n the religious schools that Cleveland taxpayers are being forced to sponsor, Catholics are free to teach that their way is best, and Jews, Muslims and those of other faiths can teach their coreligionists that they have the truth on their side”\textsuperscript{106}. It is disappointing that, in a newspaper that ordinarily and appropriately champions open-mindedness and diversity of opinion, that the editorial writer would have such intolerance for religious freedom and for parental choice of impoverished inner-city residents. The editorial is all the more amazing when one considers that the underlying issue in *Zelman* is an attempt to improve the quality of education for underprivileged urban children.

The fears of voucher opponents notwithstanding\textsuperscript{107}, the Court’s permitting aid in *Zobrest*, *Agostini*, and *Helms*, did not and should not lead to the demise of public education, which serves the nation very well in all but a hand full of localities such as Cleveland; neither will the decision in *Zelman* harm public education. Some resources are directed toward religious schools – the cost of the voucher program as of June 2000 was about $5.2 million and the Cleveland schools had a total resources of $712 million – but the direct impact is negligible. Critics ignore the fact that the existence of non-public “schools saves government

\textsuperscript{106} Supra, note 102.

nearly $39 billion,” because of differences in per-pupil costs. Since the program funds voucher students at a lower level of per-pupil cost than allocated for their peers in public schools, there should be no loss of resources for public education; there may even be additional funds. To the extent that the funds in *Zelman* are increased, should legislatures create larger, more generous and far-reaching voucher programs, it will be interesting to see whether they place limits on the amount of money that can be earmarked for children who attend religiously affiliated schools. If legislatures do not set a limit, it is likely that an additional round of litigation will ensue.

In a related issue, if nothing else, *Zelman* has made educational consumers more aware of the per-pupil costs of educating children. It will be interesting to observe whether the debate on educational equity takes these issues into account amid the search for genuine school reform. One can only hope that opponents of vouchers and school choice will stop relying on the same tired arguments, often couched in Establishment Clause terms, about aid being diverted away from public schools.

108. Joseph M. O'KEEFE, *What Research Tells Us About the Contributions of Sectarian Schools*, 89 U. Det. Mercy L. Rev. 425, 428 (2001) citing per pupil costs of about $6,500 per pupil as indicated in the Digest of Education Statistics (2000), U.S. Department of Education, National Center for Education Statistics (T.D. Snyder C.M. Hoffman). Unfortunately, the article did not report the figure for non public schools. See also National Center for Education Statistics in the United States. Private Schools in the United States: A Statistical Profile 1993-1994 (1997), Table 1.5: Percentage of private schools charging tuition, percentage allowing tuition reductions, and average tuition, by level and affiliation: 1993-94, indicating that the average cost of educating a child in a non-public school was $3,084 as opposed to $5, 513 in a public school. The Supreme Court recognized as much in *Lemon, supra* note 48 at 625. Speaking about “church-related elementary and secondary schools”, Chief Justice Burger wrote that “Their contribution has been and is enormous... Taxpayers generally have been spared vast sums of money by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents”.

Perhaps the debate will shift to focus on the substantive matter of outcomes and for ways to best provide urban minority students with opportunities to excel, as Justice Thomas so powerfully described it, rather than remain mired in failing schools systems.

The Court’s focus on parental choice may have a dramatic impact of the role of parents who have long been overlooked by the judiciary in disputes with school officials. In many ways, Zelman is the ultimate manifestation of parent choice. Courts have repeatedly rebuffed parent efforts in the past\textsuperscript{109}, couched in the language of the liberty clause to direct the education of their children or to make curriculum demands on public schools\textsuperscript{110}. Courts have been more disposed to use parent choice, not as a vehicle to enhance their rights to education for their children in public schools, but as a means of justifying government assistance to nonpublic schools, an activity not directly related to parents and public schools\textsuperscript{111}. Zelman, for the first time, defines parent choice in terms of empowerment to make meaningful educational decisions for their children. Parents now have the

\textsuperscript{109} See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a state law that prohibited the teaching of a foreign language in any grade lower than the ninth); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that Oregon’s compulsory attendance law, which required all students to attend public schools, violated the Fourteenth Amendment’s Due Process Clause); Wisconsin v. Yoder, 406 U.S. 205 (1972) (permitting Amish families to complete the education of the children in their community following the completion of eighth grade).

\textsuperscript{110} See, e.g., Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6\textsuperscript{th} Cir. 1987), cert. denied, 484 U.S. 1066 (1986) (denying parental challenges to a reading series); Brown v. Hot, Sexy, and Safer Productions, 68 F.3d 525 (1\textsuperscript{st} Cir. 1995), cert. denied, 516 U.S. 1159 (1996) (denying parental challenges to a mandatory highly explicit sex education program); C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198 (3\textsuperscript{rd} Cir. 2000), cert. denied sub nom Hood v. Medford Township Bd. of Educ., 533 U.S. 915 (2001) (permitting the removal of a child’s poster of Jesus from a class display and preventing him from reading a story with religious content to classmates).

\textsuperscript{111} See, e.g., Zobrest, supra note 69; Agostini, supra note 62; and Helms, supra note 58.
possibility of directly accessing the resources necessary to enable them to choose an educational venue for their children.

In upholding the OPPSP, the Court followed its precedent in *Mueller, Witters, Zobrest, Agostini, and Helms*, cases which not only relied on private choice but also reinvigorated the Child Benefit test. At the same time, the Court eschewed the Sixth Circuit’s talisman-like reliance on the outdated *Lemon* test as applied in *Nyquist*. The Court thus may have laid to rest the unworkable *Lemon* test and Jefferson’s often misapplied, metaphor calling for a “wall of separation”\(^\text{112}\), at least with regard to state aid to religious elementary and secondary schools\(^\text{113}\).

In further demolishing the “wall of separation,” Chief Justice Rehnquist’s opinion, particularly in rebutting the dissent, did not indicate much concern that instruction occurred in religious schools. He was satisfied that the aid was limited to parents who had access to a variety of schools, but exercised individual choices in sending their children to religious institutions. Moreover, since some public, and nonsectarian private, schools opted out of participation in the OPPSP and since the funds are earmarked for tuition, the Court had little difficulty in upholding the statute’s constitutionality since it was able to avoid excessive entanglement.

As polarized as the Court continues to be on a wide array of educational and non-educational issues such as state aid to religious schools\(^\text{114}\), drug testing of students\(^\text{115}\), the death

\(^{112}\) See note 3 supra.


\(^{114}\) See discussions of *Zelman* and preceding cases throughout this commentary.

penalty\textsuperscript{116}, and treatment programs for sexual abusers\textsuperscript{117}, a final noteworthy development in \textit{Zelman} relates to the role of Justice Breyer. Usually viewed as a liberal, along with Justices Stevens, Souter, and Ginsberg, his status in that camp, with regard to religion, has been uncertain. For example, prior to dissenting in \textit{Zelman}, Justice Breyer had joined the majority in \textit{Santa Fe Independent School District v. Doe}, joined Justice O’Connor’s concurrence in \textit{Mitchell v. Helms}, and concurred separately in \textit{Good News Club v. Milford Central School}\textsuperscript{118}. Yet, this term he joined the conservative core of Chief Justice Rehnquist along with Justices Scalia and Thomas, as well as Justice Kennedy in upholding random drug testing of students who wish to participate in extracurricular activities in \textit{Earls}. It will be worth continuing to observe Justice Breyer to see whether he becomes more of a swing vote.

In the wake of \textit{Zelman}, three important reminders are in order. First, as in \textit{Davey}, states are, of course, not obligated to adopt voucher programs or similar approaches that aid students who pursue religious studies. Second, since Cleveland’s voucher program was part of a larger initiative including magnet and community schools, reform efforts elsewhere should adopt such a broad-based approach. Third, states that do adopt programs like the one in \textit{Zelman} will need to target similar disenfranchised students who wish to participate in extracurricular activities; the dissenters were Justices Stevens, O’Connor, Souter, and Ginsburg).

\textsuperscript{116} Atkins v. Virginia, 534 U.S. 809 (2002) (holding, by a 6-3 margin that the execution of the mentally retarded violates the Eighth Amendment; the dissenters were Chief Justice Rehnquist, Justice Scalia, and Justice Thomas).

\textsuperscript{117} McKune v. Lile, 536 U.S. 24 (2002) (holding, by a 5-4 margin that a prison program requiring an individual to admit to having committed earlier offenses does not amount to self-incrimination; the dissenters were Justices Stevens, Souter, Ginsburg, and Breyer).

\textsuperscript{118} 533 U.S. 98, 127 (2001), Breyer, J. concurring in part (upholding the right of a religious group to use facilities in a public school after classes ended).
populations if they are to withstand challenges at least in federal courts\textsuperscript{119}. Put another way, despite the fears of critics to the contrary, \textit{Zelman} is highly unlikely to open the door to make voucher programs available to middle and upper class suburban families who wish to send their children to non-public schools at public expense. Rather, vouchers must be seen for what they are: an attempt to provide an alternative for poor, typically minority children to escape failing urban schools.

Following \textit{Zelman}, the challenge rests squarely on the shoulders of state law makers, especially those in urban settings, who will have to convince their colleagues and educational leaders in suburban districts and private nonsectarian schools to end their boycott of the voucher program. Educational leaders will need to join forces to afford a wider range of equitable educational opportunities for underprivileged urban children. If legislatures are truly interested in providing for all children, they will work with educational and community leaders to consider such incentives as increasing the amount of vouchers, or at least prorating them to encourage recalcitrant schools and districts to participate in such a worthy effort.

\textbf{V. CONCLUSION}

\textit{Zelman} has taken a large step toward giving poor parents a genuine choice in making one of the most important decisions of their lives, and those of their children, in being able to select where their sons and daughters will attend elementary and secondary school. By affording parents the ability to make real

\textsuperscript{119} Insofar as states typically have greater restrictions on whether public funds may be spent in religious schools, it is uncertain what would occur in such a venue. See, e.g., \textit{Witters, supra} note 71, wherein, on remand the Supreme Court of Washington ruled that language in the state constitution prohibited the use of public funds for religious instruction.
choices for their children, the Court may have done more than it can realize in helping to provide a true hope for the future for untold numbers of underprivileged urban students.