

School Vouchers

In *Zelman v. Simmons-Harris*, the United States Supreme Court declared Cleveland's school voucher program constitutional under the federal Establishment Clause of the First Amendment. The decision upholds the right of eligible Cleveland parents to use publicly funded vouchers to send their children to private religious schools. The decision also provides constitutional support for existing voucher programs in Wisconsin and Florida. This information brief:

- summarizes the legal debate over school vouchers in *Zelman v. Simmons-Harris*
- describes the Ohio school voucher program at the heart of *Zelman* case and other voucher programs in Wisconsin, Florida, Maine, and Vermont
- discusses arguments related to publicly funded school vouchers under state constitutions and laws, including Minnesota
- lists policy arguments for and against using school vouchers.

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The *Zelman* Decision and the School Voucher Debate

The United States Supreme Court found it constitutionally permissible to channel public aid to religious schools participating in Cleveland’s school voucher program.

On June 27, 2002, the U.S. Supreme Court in *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, declared Cleveland’s school vouchers permissible under the federal Establishment Clause of the First Amendment, which prohibits Congress from making laws establishing religion. In *Zelman v. Simmons-Harris*, the Court decided that a school voucher program of “true private choice” is constitutionally permissible when enacted for a valid secular purpose that incidentally benefits religious schools. The Court’s decision affirms the right of eligible parents to use publicly funded school vouchers to send their children to private religious schools. The decision represents an important legal victory for school voucher proponents seeking constitutional support for existing voucher programs in Milwaukee and Florida, and for expanding the voucher program in Ohio. It also may lead to voucher legislation in other states.

The school voucher debate focuses on whether to use public funds to subsidize tuition for eligible students to attend private and religious schools. The debate raises questions about how to interpret the federal and state constitutions and how best to educate children.

The Ohio Program at the Heart of the Case

Cleveland’s school vouchers are authorized under the Ohio Pilot Project Scholarship Program. Ohio enacted the program in 1995 to help failing school districts. The program, codified at [Ohio Revised Code Annotated, sections 3313.974 to 3313.979](#), provides up to \$2,250 in tuition and up to \$360 in tutorial aid to low-income families; recipient families must reside in a school district that is under a federal court order giving the state superintendent of public instruction administrative control of that district.

The program allows private schools in the affected district and public schools in adjacent districts to participate.¹ Participating private schools can charge low-income parents a maximum \$250 tuition co-payment. The program allows other families to receive 75 percent of private school tuition up to a maximum of \$1,875, without any co-payment limit, and tutoring aid if the scholarship fund is not exhausted.

At the time of enactment, the Cleveland school district was the only district under a federal court order giving district control to the state superintendent. The court issued the order in response to an exorbitantly high student failure and dropout rate discovered as a result of a district performance audit. In the 1999-2000 school year, 82 percent of participating schools were religiously affiliated, 96 percent of participating students attended private religious schools, and 60 percent of participating students were eligible to receive maximum program funding.

The 56 participating private, mostly parochial schools are prohibited from discriminating based on religion and must agree not to teach hatred of any individual or group based on religion, among other things. The state superintendent, who is appointed by the state board of education

composed of both elected and appointed members, is authorized to establish admission rules and procedures for participating schools. The voucher program is part of a broader Cleveland school district initiative to improve school choice that includes community and magnet schools, which receive two and three times the amount of funding available to private schools participating in the voucher program.

Before being appealed to the U.S. Supreme Court, the Sixth Circuit Court of Appeals struck down the Cleveland voucher program as a violation of the federal Establishment Clause.

Majority Opinion

The five-justice majority characterized the decision in *Zelman v. Simmons-Harris* as a logical outgrowth of Court decisions dating back to 1983. The Court determined that the Cleveland voucher program did not violate the Establishment Clause prohibition against government support of religion because parents, and not government officials, made the decision to spend voucher money at a religious school. The Court found precedent for its decision in a series of cases beginning in 1983 that allowed government to provide services and benefits to parents and students in private and religious schools. The Court upheld Cleveland's voucher program because it:

- was entirely neutral with respect to religion
- provided benefits directly to a wide spectrum of individuals defined only by financial need and residency
- permitted individual parents to exercise genuine choice among public and private, and secular and religious school options

The decision shows how the Court has gradually shifted from requiring strict separation between government and religion, to allowing interchange between government and religious organizations. In reaching its decision, the majority (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) relied on three previous Establishment Clause cases involving private individuals choosing to use public money to indirectly support private religious schools.

- In *Mueller v. Allen* (1983), the Court ruled permissible Minnesota's tax deduction for parents paying school expenses where, as a practical matter, only parents with children in religious school incurred those expenses (then Associate Justice Rehnquist authored the Court's opinion in *Mueller*).
- In *Witters v. Washington Department of Services for the Blind* (1986), the Court upheld a vocational scholarship program giving tuition payments to a student attending a religious institution to become a pastor.
- In *Zobrest v. Catalina Foothills School District* (1993), the Court allowed government funds to be used to pay for sign language interpreters for deaf children attending a religious school.

In making its decision, the majority rejected both claims that the public would perceive the Cleveland program as a state endorsement of religion and the applicability of *Committee for*

Public Education and Religious Liberty v. Nyquist (1973), a tax relief program for parents of New York nonpublic school students. In *Nyquist*, the Court struck down the New York program because it found the benefits were really tuition grants for parents of religious school students and not a genuine tax deduction available on neutral terms without reference to religion.

In *Zelman*, the majority found the Cleveland voucher program constitutionally neutral because it did not give any preference to religious schools and, in fact, created a disincentive to attend religious schools by providing, at most, only half the aid provided for students attending public charter and magnet schools. The majority maintained that the preponderance of religious schools participating in the program lacked constitutional significance because it did not result from the program's intent. Rather, it was a phenomenon common to many American cities. The proportion of participating students attending religious schools dropped from 96 percent to 16.5 percent when other publicly financed choice programs, including magnet and charter schools, were included in the calculation.

According to the majority, the number of education choices available to parents were sufficient to insulate government from concerns about violating the prohibition against government subsidizing or endorsing religion. The majority found it misleading not to count the Cleveland school children choosing to attend alternative publicly funded schools. The majority concluded that a government aid program that is neutral with respect to religion, and provides assistance to a broad class of citizens who, in turn, direct government aid to religious schools as a result of their own genuine and independent choice is not readily subject to an Establishment Clause challenge.

In a separate concurring opinion, Justice O'Connor, who provided the crucial fifth vote for upholding the Cleveland voucher program, wrote that the majority opinion did not represent a dramatic break with the past. Justice O'Connor argued that the support the Cleveland voucher program provided to religious institutions was neither substantial nor atypical of existing government programs that provide tax benefits to religious institutions and cause a significant decrease in government tax revenue.

Dissenting Opinion

The four dissenting justices characterized the decision as a fundamental break with the past and a major devaluation of the Establishment Clause.

Troubled by the scale of government aid being shifted from public secular schools to private religious schools, the four dissenting justices (Justices Stevens, Souter, Breyer, and Ginsburg) argued that the Cleveland voucher program represented a dramatic departure from prior church-state precedent originating in *Everson v. Board of Education of Ewing* (1947). In *Everson*, while upholding the public transporting of private school students, the Court declared, "No tax in any amount, large or small, can be levied to support any religious activities or institutions." The dissenting justices were further troubled by the kind of government aid being upheld that provided public money "to a core function of the church: the teaching of religious truths to young children" (the decision does not require voucher money to be spent only on the nonreligious aspects of a student's education).

The dissent also argued that students participating in the voucher program had no real choice because most of the participating schools (46 of 56) were religious schools and the \$2,250 tuition cap steered students toward religious schools charging tuition below that cap and away from secular private schools charging tuition above the cap. The dissent found misleading the majority's use of statistics that required counting as part of the voucher population those students attending alternative, tuition-free public schools and thought that the majority's definition of choice, as a criterion, screened out nothing. The dissent argued that the wide range of choices available to students within the public school system had no bearing on whether the state may pay tuition for students who attend religious schools.

The dissent warned that the voucher decision would increase government regulation of religion and dilute religious freedom by attaching strings to government funding. For example, the Cleveland voucher program prohibits participating religious schools from discriminating on the basis of religion. It warned about impending mistrust and strife that could arise with as many as 55 different religious groups competing to influence voucher programs that finance the religious education of young people. The dissent also warned about the difficulty and entanglement government will face in mediating the competition between religious groups. Finally, the dissent pleaded with state legislatures not to adopt vouchers as a "quick fix" solution for needy students.

The decision in *Zelman v. Simmons-Harris* is available on the U.S. Supreme Court website at www.supremecourtus.gov.

School Voucher Programs in Other States

In addition to Ohio, several other jurisdictions have enacted school voucher programs, some of which allow vouchers to be used for religious schools.

Milwaukee Parental Choice Program

In 1990, Wisconsin enacted the Milwaukee Parental Choice Program, the country's first school voucher program. The program allowed eligible low-income parents to use public funds to send their kindergarten through grade 12 children in Milwaukee schools to secular private schools. Participating private schools needed to comply with state anti-discrimination and health and safety laws, provide minimum hours of instruction in specified curriculum areas, and undergo state academic performance reviews.

In 1995, the Wisconsin Legislature expanded the program to include private religious schools, attaching an opt-out provision allowing parents to request that their children be excluded from a school's religious activities. To avoid sending public funds directly to religious schools, the program requires a parent to identify the private school a child will attend, after which the state sends to the school a check made payable to the parent who endorses the check over to the school. The value of the school voucher equals the tuition cost at a private school up to the amount of per pupil state aid. Participating private schools must use a lottery to assign students if student applications exceed available spaces.

The Wisconsin Supreme Court has twice upheld the Milwaukee voucher program in response to legal challenges under the state and federal constitutions (*Davis v. Grover* in 1992 and *Jackson v. Benson* in 1998) (For information on the Wisconsin voucher cases, see *The Constitutionality of Education Vouchers under State and Federal Law*, House Research Information Brief, 1998).

Florida Opportunity Scholarship Program

In 1999, in response to a troubling on-time graduation rate below 60 percent, Florida enacted the Florida Opportunity Scholarship Program, the country's first statewide voucher program. The program under Florida Statute, section 229.0537, is not limited to low-income families and gives students in failing public schools throughout the state a voucher to attend private or higher performing public schools. All Florida public schools annually receive a letter grade based on student academic performance, and a failing school is one that receives a grade of "F" two years in any four-year period.

Participating private schools must accept the voucher amount as full payment of a student's tuition and fees regardless of the school's actual tuition rate, use a lottery to select students if student applications exceed available spaces, and adopt control and accountability measures to ensure that the state's obligation to educate is satisfied.

A student who uses a voucher to attend a higher performing public school may use the voucher through 12th grade. A student who uses a voucher to attend private school may use the voucher until the student: 1) returns to public school; 2) completes a K-8 private school program; or 3) begins high school and the school to which the student is assigned receives at least a "C" grade.

During the 1999-2000 school year, the first year vouchers were available, about 140 of 900 students in the two failing public schools elected to receive vouchers; 57 of the students enrolled in private schools. By the July 1, 2002, enrollment deadline, the parents of 659 out of 9,000 eligible students notified Florida's Department of Education of their intent to use vouchers in private and higher performing public schools during the 2002-2003 school year.

On August 5, 2002, a state district court judge ruled Florida's voucher program unconstitutional, citing Florida's constitutional prohibition against direct or indirect public funding of a sectarian institution.² The judge allowed Florida to temporarily continue the program, contingent upon the state setting aside \$2.5 million to repay public schools if the state appeals court upholds the decision. The decision is being appealed.

Secular Voucher Programs in Maine³ and Vermont⁴

To comply with the state's duty to provide a free public education, Maine and Vermont have voucher programs in effect in rural areas unable to maintain a public high school. Eligible students use the publicly funded vouchers to attend nearby public or secular private schools. The voucher programs are not primarily intended to expand students' educational choices. In 1999, the Vermont Supreme Court and the Maine Supreme Judicial Court ruled that religious schools could not participate in the state's voucher program.

Issues under State Laws and Constitutions

School voucher decisions are now left to state legislatures, voters, and state courts.

Rather than end the school choice debate, the Cleveland voucher decision moves the debate to state legislatures, state ballot boxes, and state courts. Choice program proponents, many of whom see marketplace competition as an effective way to force public schools to improve, are expected to support voucher legislation in a number of states, including Colorado, Florida, Pennsylvania, Texas, and Ohio; voters in Michigan and California recently rejected voucher initiatives.

The continuing growth of school choice programs, the public's interest in private schools for safety and academic reasons, and a clarification of constitutional issues may lead other state legislatures to explore voucher plans. State legislatures interested in voucher plans may base students' eligibility on family income and district residency, like the plans in Cleveland and Milwaukee, or on enrollment in failing schools like Florida's plan.

There are unresolved legal issues under the various state constitutions.

Many state constitutions specifically prohibit using public funds to support or benefit religious schools or institutions. The language of these state constitutional prohibitions varies widely and in many cases appears more restrictive than the First Amendment Establishment Clause.

[Minnesota's Constitution, Article XIII](#), Section 2, contains a provision titled "Prohibition as to aiding sectarian schools" that reads: "In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any. . . religious sect are promulgated or taught."⁵ Although Minnesota's constitutional prohibition appears to be more restrictive than that of the federal Establishment Clause, voucher proponents may argue that the language in the Minnesota Constitution prohibits support of religious schools but does not prohibit aid to students attending a religious school.

In a concurring opinion in [Zelman v. Simmons-Harris](#) that emphasized the role of school choice in providing opportunities for poor urban children, Justice Thomas wrote that states should be freer than the federal government to experiment in order to arm minorities with the education to defend themselves against the effects of racial discrimination. If consistent with the Court's neutrality principle requiring a state to neither encourage nor discourage religion, the distinction between aid to religious schools and aid to students could be drawn under many state constitutions.

State supreme courts in Wisconsin, Ohio,⁶ and Arizona upheld education voucher or education tax credit programs for private or religious schools under state religious establishment provisions (for a discussion of the 1999 Arizona Supreme Court decision in [Kotterman v. Killian](#), sustaining a state income tax credit for contributions to private scholarship funds, see [Income Tax Deductions and Credits for Public and Nonpublic Education in Minnesota](#), House Research

Information Brief, 2001). However, if a Minnesota court interprets the state's constitutional prohibition restrictively, voucher proponents may have to seek to amend the state constitution or challenge the prohibition under the federal Free Exercise,⁷ Free Speech, and Equal Protection⁸ Clauses. Other court challenges may involve whether the state may attach strings to its voucher program funding in the form of nondiscrimination requirements, minimum state graduation standards, or other state policies applicable to public schools.

The Arguments For and Against Vouchers

The effect on educational outcomes is unclear.

Tied to the legal debate on school vouchers is a corresponding debate about the effect of the many varieties of school choice on educational outcomes. Those choices include magnet schools, open enrollment, charter schools, tax credits and deductions, and school vouchers. Researchers have reached some consensus about certain characteristics of school choice but much controversy remains. For example, while the dominant school choice method for parents remains school choice made by residential choice,⁹ parents can be constrained in their residential choices by limited income and transportation, and in their school choices by district criteria for assigning students to particular schools. More low-income and minority parents support and use school choice programs because of their dissatisfaction with existing schooling arrangements. Parents focus mainly on academic programs and high student performance when selecting a school choice program for their children, although parents also are concerned about school facilities, small class sizes, student safety, and good teachers.

Parents who enroll their children in a school choice program appear more satisfied with their children's education and tend to be more involved in their children's school. Highly involved and motivated parents with more education are more likely to use school choice programs regardless of whether income restrictions apply; such parents are more likely to get more accurate information about school choice programs.

The evidence is mixed¹⁰ as to whether school choice programs improve student performance over time and as compared with nonparticipants. Student performance can be measured by test scores, student dropout and transfer rates, high school graduation rates, and college attendance. Researchers have not found that school choice programs significantly lower student performance. Charter schools, which Minnesota introduced in 1991, currently are the most rapidly growing public choice option.

School vouchers have generated much debate.

School vouchers, like charter schools, became popular school choice options in the 1990s. As a school choice option, school vouchers have generated much debate. The issues include:

- whether to use public funds for religious schools;
- what criteria private schools may apply when selecting students;
- the degree to which private schools are publicly accountable for student performance;

- the extent of autonomy private schools enjoy in determining curriculum or other pedagogical or financial matters.

Underlying this debate is a tension between concerns for personal empowerment and the collective good.

Proponents for personal empowerment argue that school vouchers give poor families educational opportunities similar to those enjoyed by wealthy families and ensure, through market forces, that parents have sufficient choices to provide their children with an education consistent with their beliefs and values. They also prefer to use market forces rather than state regulations to achieve accountability.

Proponents for the collective good argue that school vouchers negatively impact the democratizing function of public schools by exacerbating economic, ideological, and racial segregation across schools. They also argue that a marketplace approach to education leaves the state abdicating its responsibility to educate children by exposing them to academic content and democratic values shared throughout American society.

Proponents' argument: School vouchers expand educational opportunities.

School voucher proponents, who frame the issue of school vouchers in terms of expanded educational opportunities for children, argue that school vouchers:

- lead to better educational quality in all schools by creating competition between public and private schools
- allow parents to choose the school their children attend
- offer students currently enrolled in poorly performing public schools a timely and well-established educational alternative
- help defray parents' educational costs
- require significant community involvement by parents, school officials, clergy, and local leaders, which makes the program more responsive to the needs of all constituents

Opponents' argument: School vouchers are subsidies for private schools.

School voucher opponents, who frame the issue of school vouchers in terms of subsidies for private schools, argue that school vouchers:

- further impoverish public schools facing severe economic constraints that leave them unable to fund new programs
- undermine efforts to promote teacher quality, raise educational standards, increase professional development, increase access to technology in the classroom, provide safe and modern buildings, and reduce class sizes
- leave the neediest students to perform less well in poor public schools
- offer inconsistent socialization experiences, leading to intolerance and an inability to respectfully deliberate issues of democracy as a community

- are available to only a small number of students who are limited in their school choices by the schools that participate and the voucher amount

Endnotes

¹ Adjacent suburban school districts did not volunteer to enroll students eligible to participate in Cleveland's voucher program, although the legislation establishing the voucher program permitted such an option.

² In 2000, parents and others challenged Florida's school voucher program on constitutional grounds. The Florida First District Court of Appeals reversed a lower court decision and held that Florida's school voucher program did not violate Article IX, Section 1 of the state constitution, which requires Florida to adequately provide in law for "a uniform, efficient, safe, secure and high quality system of free public schools that allows students to obtain a high quality education. . . ." The Florida court ruled that the state constitution did not prohibit the state from using public funds to send students to private schools in order to provide students with a high quality education. The court refused to hear other state and federal constitutional issues that the trial court did not decide and remanded the case to the trial court to hear those issues. The Florida Supreme Court in 2001 denied a motion to reconsider the court of appeals decision.

³ Maine adopted a law in 1873 allowing public school students residing in a town without a public high school to attend private high schools at state and district expense. Currently, about 5,600 students participate in the program. State law prevents districts from paying tuition for religious schools.

⁴ Vermont adopted a law in 1869 allowing public school students residing in a school district without a public high school to attend private high schools, with the student's resident district paying the student's high school "tuition." Currently, 88 of Vermont's 290 school districts do not operate a public high school; about 6,500 students attend secular private schools.

⁵ In 1877, Minnesota voters approved a referendum by a greater than two to one margin that amended the state constitution to prohibit public aid for sectarian schools.

⁶ The Ohio Supreme Court found the Cleveland voucher program permissible on federal and state constitutional grounds but struck down the program because the legislation establishing the program violated the "one-subject rule" under the Ohio Constitution.

⁷ The Free Exercise Clause, which is the second of two religion clauses under the First Amendment to the U.S. Constitution, prohibits government from regulating religious beliefs, penalizing or discriminating against an individual or group based on their religious views, or compelling people to affirm particular beliefs.

⁸ The Equal Protection Clause under the [14th Amendment to the U.S. Constitution](#) requires the laws of a state to treat an individual in the same way as others are treated in similar conditions and circumstances.

⁹ Residential choice has resulted in income stratification and racial segregation, especially in large urban areas.

¹⁰ While the best studies seem to suggest that school choice enhances student performance, more unambiguous evidence is needed to quell disagreement.