

Chapter 2: Expanding Religious Freedoms with School Vouchers

By Eric Cullather

“It is true, of course, that this Court has long recognized and maintained the right to choose non public over public education... It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses... and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion.”

- Mr. Justice Powell, *Committee for Public Education & Religious Freedom v. Nyquist* (1973)

This chapter proceeds in several steps. First, it establishes a historical context for issues surrounding vouchers and the right to choose religious schools. Second, it examines important Supreme Court rulings that pertain to school vouchers and parochial schools, such as *Sloan v. Lemon* (1973) and *Committee for Public Education and Religious Freedom v. Nyquist* (1973) which declared government aid programs unconstitutional if they advanced a religion. In *Mueller v. Allen* (1983) the concept of “neutrality” is identified. Then the most current and important Supreme Court ruling for school voucher advocates, *Zelman v. Simmons-Harris* (2002), explores the concept of “true private choice” and how school vouchers that include religious schools are constitutional. Third, the chapter concludes by examining current legislation for vouchers as a solution for underprivileged students.

History

The concept of school vouchers may have begun with Thomas Paine. He was interested in obtaining an enlightened citizenry. Instead of educating the population within state sponsored schools, he proposed providing financial support for each individual to fund their own private education. Government funded public schooling was an alien concept before and after the American revolution. Most early American “public” schools were private institutions, and when state funded public schools began to emerge teachers were often ministers.¹ The idea of “Separation of Church and State” did not exist in the colonial period and exists nowhere in the constitution. As indicated in the introduction to this study, the phrase came from a letter written by President Thomas Jefferson in 1802 to the Baptists of Danbury, Connecticut, and then quoted by the U.S. Supreme Court much later in 1878.² The phrase survives in our public memory because it is often repeated as a simple standard for church/state relations. However, such a use serves voucher opponents who seek to maintain a wall between church and state.

¹ Bolick, Clint, *Voucher Wars: Waging the Legal Battle Over School Choice*. (Washington D.C.: Cato Institute 2003) p. 1-2.

² In Thomas Jefferson’s letter to the Danbury Baptist Association, he wrote, “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.” See Religious liberty in public life FAQ’s at http://www.firstamendmentcenter.org//rel_liberty/publiclife/faqdoc.aspx?id=13982&SearchString=thomas_jefferson_1802.

The Blaine Amendments

In the late 19th century, public schools were considered “nondenominational.” However, that term did not have the same secular connotation as it does today. It meant they did not teach the doctrine of any specific Protestant sect in school prayer, bible lessons and hymn singing. Of course, as more Catholics and other religious groups emerged, they created their own schools and lobbied for equal government funding.³ Private schools thereafter typically served two groups: the elite and those who dissented from the Protestant theology that dominated public schools. That phenomenon bitterly annoyed Protestant public school advocates, most notably Sen. James G. Blaine (R-Maine). Blaine tried in 1876 to enact a federal constitutional amendment that would prohibit any government aid to religious private schools thereby protecting the Protestant hegemony over public schools and taxpayer funding. Blaine came close, but failed to secure passage of an amendment to the federal Constitution. Undaunted, backers of the Blaine Amendments promoted their anti-Catholic agenda by requiring all new states to include the Blaine Amendments in their state constitution in order to join the Union.⁴ The amendment Blaine attempted to include in the federal Constitution, of which variations found its way into state constitutions, states:

No State shall make any law respecting an establishment of religion,
Or prohibiting the free exercise thereof; and no money raised by
Taxation in any state for the support of public schools, or derived from
Any public fund therefor, nor any public lands devoted thereto, shall
Ever be under the control of any religious sect; nor shall any money so raised
Or lands so devoted be divided between religious sects or denominations⁵

Today, 37 state constitutions include Blaine Amendments – all western states, and half of the states east of the Mississippi.⁶

Opponents of school vouchers use the Blaine Amendment to claim voucher programs are unconstitutional. However, many voucher advocates argue that the Blaine Amendments actually represent remnants of nineteenth-century bigotry impeding educational reform in the twenty-first century.⁷ For example, in a challenge to an Arizona tax credit for school choice, the Arizona Supreme Court remarked the “Blaine Amendment was a clear manifestation of religious bigotry; part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic Menace.’”⁸

The amendments are also vulnerable to challenges under the Federal Free Exercise of Religion clauses. To provide aid to families who send their children to non-religious private schools as opposed to sectarian private schools is a violation of that families’ right to freely exercise their

³ See: Institute of Justice’s “School Choice: Answers to Frequently Asked Questions About State Constitutions’ Religion Clauses” by: Richard D. Komer. Found at: http://www.ij.org/pdf_folder/school_choice/FAQ/legal_FAQ_state.pdf.

⁴ Bolick, Clint, *Voucher Wars: Waging the Legal Battle Over School Choice*. (Washington D.C.: Cato Institute 2003) p. 2.

⁵ Cohen, Louis R. and C. Boyden Gray, *The Need for Secular Choice*, from *The Future of School Choice* ed. by Paul E. Peterson. (California: Hoover Institution Press 2003) p. 98.

⁶ See: Institute of Justice’s “School Choice: Answers to Frequently Asked Questions about State Constitutions’ Religion Clauses” by: Richard D. Komer. Found at: http://www.ij.org/pdf_folder/school_choice/FAQ/legal_FAQ_state.pdf.

⁷ Cohen, Louis R. and C. Boyden Gray, *The Need for Secular Choice*, from *The Future of School Choice* ed. by Paul E. Peterson. (California: Hoover Institution Press 2003) p. 101.

⁸ *Kotterman v. Killian*, 92 P.2d 606, 624 (Ariz. 1999).

religion as well as equal protection to do so. Furthermore, under the supremacy clause of the U.S. constitution, a state must not infringe upon federally protected rights. As we will see in the cases leading up to a landmark decision in *Zelman v. Simmons-Harris* (2002), the U.S. Supreme Court has included religious schools in voucher programs as constitutional.⁹

Precedents for the Contemporary Context

Sloan v. Lemon, 413 U.S. 825 (1973)

In the 1970's a widespread closure of private Catholic schools created a crisis for public school systems that had to absorb the displaced students, particularly in states with high Catholic populations. Pennsylvania, for example, instituted the "Parent Reimbursement Act for Nonpublic Education."¹⁰ The program provided annual reimbursements to parents of \$75 for each dependent enrolled in nonpublic elementary school and \$150 for each dependent in nonpublic secondary schools.¹¹ By providing financial assistance to private school parents, the government hoped to ease financial pressures caused by integrating such a high volume of students into its state schools. All private school students received aid reimbursements, including students attending parochial schools.

In delivering the opinion of the Court in this legislation, Justice Powell argued that the law was unconstitutional because it violated mandates against "sponsorship" or "financial support" of religion or religious institutions.¹² By providing sectarian school students with funding specifically for nonpublic schooling, many of which were religious schools, the government was providing financial support to establish religion, or at least, re-establish it. The Court commented on the similarity of *Sloan* to *Everson v. Board of Education*¹³ because both cases involved indirect subsidies to parochial schools, but noted that *Everson* was on the "verge" of being constitutionally impermissible.¹⁴ In *Everson* the indirect aid provided to religious institutions was on the non-sectarian side of the institutions. That is, by providing transportation for students who attend religious schools, the government assistance ended at the curb before the students entered the schools. It did not provide funding for religious activity. To put it another way, if the government is to provide sewage removal, fire and police protection services, then to provide those services and transportation to all students *except* religious school affiliates would be to deny those student free exercise of their religion.¹⁵ Analyzing *Sloan* in terms of *Everson* set an important precedent: government aid which is enjoyed by all citizens must also be available to religious institutions that do not violate an

⁹ See: Institute of Justice's "School Choice: Answers to Frequently Asked Questions About State Constitutions' Religion Clauses" by: Richard D. Komer. Found at: http://www.ij.org/pdf_folder/school_choice/FAQ/legal_FAQ_state.pdf.

¹⁰ Bolick, Clint, *Voucher Wars: Waging the Legal Battle Over School Choice*. (Washington D.C.: Cato Institute 2003) p. 4-5.

¹¹ *Sloan v. Lemon*, 413 U.S. 825, 828 (1973).

¹² *Id.* at 832-833.

¹³ *Everson v. Board of Education* 330 U.S. 1 (1947). In *Everson* a New Jersey Law permitted school boards to make contracts for student transportation. Under scrutiny was a local city board reimbursing parents for the fares children incurred riding buses to religious schools. The court ruled the law constitutional because it is unconstitutional to exclude citizens from receiving benefits of public welfare legislation. "While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all citizens without regard to their religious belief" 330 U.S. 1, 16 (1947).

¹⁴ *Sloan v. Lemon* 413 U.S. 825, 832 (1973).

¹⁵ *Everson v. Board of Education* 330 U.S. 1, 18 (1947).

individuals' right to free exercise. Government aid to parochial institutions must stop at school doors and not flow to these schools for religious purposes. The government must not advance religion, while simply providing non-sectarian support for the mechanics of getting to school.

Committee for Public Education and Religious Freedom v. Nyquist, 413 U.S. 756 (1973)

The Court expanded *Sloan's* rationale with a companion case,¹⁶ *Committee for Public Education and Religious Liberty v. Nyquist*.¹⁷ In the early 1970's New York had publicly recognized a fiscal crisis in nonpublic education. Legislative findings concluded "... a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children" in low-income areas. The findings also determined that a safe school environment contributes to the stability of urban neighborhoods.¹⁸ In an effort to prevent overcrowding in public schools, New York lawmakers passed legislation helping poor students attend private school. Private and religious schools which served low-income families were granted federal assistance for maintenance and repair programs and tuition reimbursements were given to the parents of children attending such schools. The state legislature concluded New York had a responsibility to organize aid programs to create a healthy and safe urban environment.

The New York legislation provided aid to nonpublic elementary and secondary education schools by way of (1) grants to nonpublic schools for maintenance and repair, (2) tuition reimbursements for nonpublic school parents, and (3) tax relief for parents who did not qualify for the tuition reimbursement plan.¹⁹ The Court used the *Lemon* test to determine whether these provisions were constitutional. The *Lemon* test consists of three prongs:

- 1) The law in question must reflect a clearly secular legislative purpose;
- 2) The law must have a primary effect that neither advances nor inhibits religion;
- 3) The law must avoid excessive government entanglement with religion.²⁰

The Court paid less attention to the first prong because New York's intentions were to create a healthy and safe environment for urban school children. Regarding the second prong of the *Lemon* test, the Court argued that "maintenance and repair" is similar to other financial expenditures heard by the Court concerning aid to sectarian institutions. The line was most clearly defined in terms of *Tilton v. Richardson*.²¹ In *Tilton*, the Court determined that tax-raised funds may not be used to construct a facility utilized for sectarian purposes.²² "If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."²³ Furthermore, with

¹⁶ Russo, Charles J., *Reutter's the Law of Public Education 6th ed.* (New York: Foundation Press. 2006) p.34

¹⁷ *Committee for Public Education and Religious Liberty v. Nyquist* 413 U.S. 756 (1973).

¹⁸ *Id.* at 756.

¹⁹ *Id.* at 756. To qualify for the reimbursement plan, a parent's taxable income must be less than \$5,000.

²⁰ *Lemon v. Kurtzman* 403 U.S. 602 (1971). The case was about an Rhode Island Salary Supplement Act which provided a pay increase of 15% for teachers in private schools. Eligible teachers must teach courses only offered in public schools, using only instructional materials used at public schools, and must not teach religious courses. The Court found "excessive entanglement" between government and religion, thus violating the Establishment Clause. See First Amendment Center case summary for *Lemon v. Kurtzman* at http://www.firstamendmentcenter.org/faclibrary/casesummary.aspx?case=Lemon_v_Kurtzman.

²¹ *Tilton v. Richardson*, 483 U.S. 672, 683 (1971).

²² *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 776 (1973).

²³ *Id.* at 777.

regard to tax relief, the Court found that because the aid was restricted to private schools and those who patronized them, the primary effect of the New York law was to “advance religion.”²⁴ Whereas in *Everson* the Court found busing analogous to sewage and fire protection services – general state law services provided to all citizens that serve no religious function – here, tax subsidies which the parents pay directly to the school guarantee no such secular restrictions.²⁵ “Maintenance and repair” contributes to a religious establishment while services, i.e. busing, do not.

As for the third tenant of the *Lemon* test, the Court argued that due to the failure of the second prong of the *Lemon* test - advancing religion – it was not necessary to observe if such a law would yield entanglement with religion. However, the Court noted that aid in this sense would provoke “grave potential” for entanglement in a continuing strife over aid to religion.²⁶

Nyquist had put an end, for the time being, to the idea of school choice. However, it provided an important footnote to be used in later cases. “Whether the significantly religious character of the statute’s beneficiaries might differentiate the present cases from a case involving some form of public assistance (for example, scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of institution benefited.”²⁷ The concept that would be applied to advance school choice in future hearings – later dubbed “neutrality” – was born.

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

Ten years passed before the Supreme Court heard another case concerning government aid for attending religious schools. A Minnesota group of taxpayers sued the commissioner of the state department of revenue and several parents who had taken deductions for sending their children to parochial schools. The Minnesota statute granted all parents, of private and public schools, state income tax deductions for items such as tuition, books, and transportation. It afforded parents deductions of \$500 for children grades K-6 and \$700 for children grades 7-12.²⁸

The Minnesota statute was upheld in a 5-4 decision by the Supreme Court. The justices revised *Nyquist* for two main reasons: first, the tax deductions were not forcedly sent directly to the private schools. Included in the list of permissible expenses for the tax deductions were books and transportation. These items were not direct payments to the school – therefore it was up to the parents to decide how much of the benefit flowed into parochial schools. Also, the items were not religious in nature. Second, the tax deductions were “neutral,” meaning parents of public and nonpublic schoolchildren benefited.²⁹ As Justice William Rehnquist explained, “The historic purposes of the [Establishment] Clause simply do not encompass the

²⁴ Bolick, Clint, *Voucher Wars: Waging the Legal Battle Over School Choice*. (Washington D.C.: Cato Institute 2003) p. 5.

²⁵ *Id.* at 781.

²⁶ *Id.* at 758.

²⁷ *Id.* at 798 n.38.

²⁸ Center for Education & Employment Law, *U.S. Supreme Court Education Cases 12th Ed.* (Pennsylvania: Center for Education & Employment Law. 2004) p. 73

²⁹ Bolick, Clint, *Voucher Wars: Waging the Legal Battle Over School Choice*. (Washington D.C.: Cato Institute 2003) p. 11

sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.”³⁰

In satisfying all three of *Lemon*’s prongs, the Court determined the statute was secular in nature because it benefited the state by promoting the education of its citizenry while reducing the cost of public education.³¹ The Court also acknowledged the tax classifications were broad and not strictly for private or religious schools. There was no excessive government entanglement found in the statute because the aid was dispersed to parents, as opposed directly to the schools.

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

Cleveland’s public schools had continuously been ranked as some of the poorest in the nation. For example, only 1 in 10 ninth graders passed a basic proficiency exam.³² More than two-thirds of high schools students dropped out or failed before graduation. Of those who reached their senior year, one of every four did not graduate. In 1995, a Federal District court had placed the entire school district under state control, citing a “crisis of magnitude.”³³

In response, Ohio created the Ohio Pilot Project Scholarship Program (OPPSP). The Ohio program provides two types of aid: tuition aid (vouchers) that allows students to attend schools of their parents’ choosing – public or private, religious or nonreligious; and tutorial aid for students who choose to remain in public school.³⁴ Tuition aid was disbursed based upon financial need. Families with income 200% below the poverty line were given priority and eligible to receive a tuition grant (essentially a voucher) of up to \$2,250. Private schools were not allowed to charge these families more than \$250 co-pay for their child’s attendance. For all other families, up to \$1,875 was available with no co-payment cap.³⁵ For what school the families use their tuition aid was completely at their discretion. Checks are made payable to the parents, who then endorse the checks over to the chosen school. While in the 1999-2000 school year, 56 private schools participated in the program and no adjacent public schools elected to do so, 3,700 students were involved in the program, of which 96% were enrolled in religiously affiliated schools.³⁶

In a 5-4 Supreme Court decision, the Court ruled in favor of the program, citing it as a program of “true private choice.” Writing for the majority, Chief Justice Rehnquist said, “Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such

³⁰ *Mueller v. Allen*, 463 U.S. 388, 400 (1983).

³¹ Russo, Charles J. *Reutter’s the Law of Public Education 6th ed.* (New York: Foundation Press. 2006) p.35.

³² See: Pew Forum on Religion and Public Life’s *School Vouchers: Settled Questions, Continuing Disputes* at <http://pewforum.org/issues/files/VoucherPackage.pdf>. p. 2.

³³ *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002).

³⁴ Weinberg, Lawrence D., *Religious Charter Schools: Legalities and Practicalities* (North Carolina: Information Age Publishing, Inc. 2007) p. 47.

³⁵ *Id.* at 646.

³⁶ *Id.* at 647.

challenges.”³⁷ The court re-emphasized three criteria in *Zelman* which constitute a program as one of “true private choice”:

1. The program must be neutral with regard to religion.
2. Any monies flowing to religious schools flowed through individuals rather than as direct payments from the state.
3. The program offers parent genuine secular options for their children’s schooling.³⁸

The Court did not object to the fact that 96% of students in the program were enrolled in religiously affiliated schools. This number is irrelevant; it is simply the circumstances of that particular district. The Court noted that in states like Maine and Utah, less than 45% of private schools are religious while in Nebraska and Kansas that number is over 90%. It would be illogical to hold a voucher program constitutional in one state and not the other³⁹ because the preponderance of religious schools would vary from year to year, location to location.

The Supreme Court has made it clear that educational benefit programs that include religious schools under a range of options do not violate the First Amendment. In fact, *Zelman* officially removed the Establishment Clause from the legal arsenal of school choice opponents. To satisfy the First Amendment, school choice programs must be neutral and support parents’ true, private choice. All legal school choice programs involving parochial schools share three common features:

- 1) Parents or students (not the state) decide which school to attend: Funds are transmitted from the government to religious schools through the decisions of a third party. As a result, public funds are not subsidies to schools, which is impermissible, but aid to students, which is permissible.
- 2) The program does not create a financial incentive to attend parochial schools: Private school options must be a part of an existing array of public school programs. Neutrality is enhanced when public schools are among the options and/or private school options are a part of broader education reform.
- 3) The program does not create an ongoing state presence in religiously affiliated schools: The state’s regulations should be limited to those necessary to ensure the program’s educational mission is achieved. It should not include any state oversight of curriculum, personnel, or administration – extensive involvement is an unconstitutional “excessive entanglement.”⁴⁰

Solutions

The Institute for Justice is the premier organization in handling legal issues concerning school choice. The Institute was successful in *Zelman* case, and has subsequently achieved success in state rulings overturning Blaine Amendments. However, some states have stricter provisions against any form of religious funding. For example, Vermont’s constitution forbids any

³⁷ *Id.* at 649. The three cases being referred here are *Mueller v. Allen*, 463 U. S. 388 (1983); *Witters v. Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1 (1993).

³⁸ See: Pew Forum on Religion and Public Life’s *School Vouchers: Settled Questions, Continuing Disputes* at <http://pewforum.org/issues/files/VoucherPackage.pdf>. p. 2.

³⁹ Weinberg, Lawrence D., *Religious Charter Schools: Legalities and Practicalities* (North Carolina: Information Age Publishing, Inc. 2007) p. 48.

⁴⁰ See: Institute for Justice’s “School Choice: Answers to Frequently Asked Legal Questions. 5th Ed.” By: Clint Bolick and Richard D. Komer. Found at http://www.ij.org/pdf_folder/school_choice/FAQ/legal_FAQ_federal.pdf.

spending of government tuition aid on religious schools.⁴¹ In Maine, the State Supreme Judicial Court ruled that it is both legal to allow school voucher funding for religious schools, *and* legal to ban the use of public funds for religious schools. The State Legislature chose to ban subsidies that supported religious schools to avoid “excessive entanglement between religion and state.”⁴² Each state is a case-by-case basis.

Distinguishing between what does or does not violate either the Establishment Clause or the Free Exercise of Religion is difficult. On the one hand, the government may not advance any religion while it may also not inhibit any individual from their exercise thereof. However, school vouchers have the capacity to reform our education system. Today, school vouchers are less about free market opportunities than they are about social equity.⁴³ Fortunately, the Supreme Court has recognized the importance of supporting underprivileged students despite the somewhat residual effect of supplementing the income of religious schools. However, in some cases like those in *Zelman* where the majority of the school choice participating schools *were* parochial, students have no other choice. *Zelman* is a recent case, and definitely not all cases make it to the U.S. Supreme Court. Ruling in favor of supporting underprivileged children by allowing them a voice in their educational arrangements through pilot programs and vouchers is a commonsense approach to helping students by expanding religious freedoms – with virtually nothing to lose. One must wonder how many children have been denied their right to a decent education in the past because their legislatures were not ingenious enough to meet Supreme Court standards.

There are still many groups opposing school choice programs today. Teacher unions are among the most powerful, afraid of losing students to private schools. Fewer students mean less government funding. Less government funding means fewer teachers in unions, and less money ultimately means less power. Creating more competition for union-run districts means a less regulated system where the unions would have far less power and control. In this complex web, we need to acknowledge that other groups with congressional interests, such as the NAACP and the ACLU receive a substantial amount of funding from teacher unions in exchange for support.⁴⁴ The public schools system spends around \$400 billion every year, generating millions of jobs, which gives public teachers a tremendous amount of clout.

That clout was evident in the amendments the teachers unions were able to achieve in 2002 in President Bush’s No Child Left Behind Act. The law rejected funding for private school vouchers, instead allowing children at low-performing schools to send their children to adjacent public schools.⁴⁵ However, most of the under-performing schools were from poor, urban districts, and suburban schools were hardly opening their doors to these students, often claiming ‘overcrowding.’ In the program’s first year, for example, in Los Angeles where

⁴¹ Bolick, Clint, *Voucher Wars: Waging the Legal Battle Over School Choice*. (Washington D.C.: Cato Institute 2003) p. 207.

⁴² “Maine High Court Reaffirms Ban of State Funds for Parochial Schools.” *The Associated Press* 27 Apr. 2006. [Firstamendmentcenter.org: news](http://www.firstamendmentcenter.org/news.aspx?id=16821), First Amendment Center. 28 July 2008 <http://www.firstamendmentcenter.org/news.aspx?id=16821>.

⁴³ Moe, Terry M., *The Future of School Vouchers*, from *The Future of School Choice* ed. by Paul E. Peterson. (California: Hoover Institution Press 2003) p. 148.

⁴⁴ Moe, Terry M., *The Future of School Vouchers*, from *The Future of School Choice* ed. by Paul E. Peterson. (California: Hoover Institution Press 2003) p. 138-139.

⁴⁵ Brownstein, Ronald. *Implementing No Child Left Behind*, from *The Future of School Choice* ed. by Paul E. Peterson. (California: Hoover Institution Press 2003) p. 213.

200,000 students were eligible in 120 schools, only 50 students changed schools.⁴⁶ Parents were reluctant to upset routines, friendships, and drive the extra distance for a school which may not be performing much more adequately. Many believe this is one reason the President's program has failed.

There was a positive outcome of No Child Left Behind. The government is using the information gathered about underperforming schools to determine which districts are most desperate for voucher programs. President Bush proposed \$300 million in his 2009 budget for a voucher program called Pell Grants for Kids. The program allows parents whose children attend poorly performing public schools to receive tuition aid for private schools, including parochial schools.⁴⁷ Perhaps the push for more voucher programs is a result to the widespread success these programs have had. Since 2000, 21 school voucher programs have been created in the states. Ten were enacted in the last three years. Almost 190,000 students attend private schools using vouchers.⁴⁸

In his book *Voucher Wars*, Institute for Justice's attorney Clint Bolick argues for three D's of school reform: "deregulation, decentralization, and depoliticization." Federal mandates are crippling public schools. More options, like charter schools, tutoring, and home schooling should be explored. Schools should be allowed to enforce behavioral standards – not stringent outdated due process requirements from the 1970's. Neutral vouchers are slowly winning in the courtrooms – unfortunately unions and government bureaucracies are keeping educational reform from occurring more rapidly.

Conclusion

The Supreme Court has been all over the map on school vouchers, but seems finally to have reached a consensus in the *Zelman* case. It requires "true private choice" – that the government gives aid to parents, not the schools directly. There must be "neutrality" – options for parents that may include religious schools. And finally there cannot be "excessive government entanglement" – the state cannot oversee curriculum or administration. For allies of voucher programs, this is a very workable solution. The *Zelman* case removed the Establishment Clause from voucher opposition by declaring vouchers for parochial schools as federally constitutional. Courts have begun to rule out Blaine Amendments because of their grounding in Catholic bigotry. And finally, voucher programs are gaining recognition as alternatives for children deprived of a respectable education.

⁴⁶ *Id.* at p.216

⁴⁷ Fagan, Amy. "School choice on the rise, but with setbacks; Report cites 150,000 U.S. children enrolled in programs." The Washington Times 11 Feb. 2008: A08.

⁴⁸ Enlow, Robert C. "Don't write them off; Vouchers are an effective tool to boost performance, assist families." USA Today 12 Feb. 2008: 11A.