The Magic of Vouchers is No Sleight of Hand: A Reply to Steven K. Green

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REPLY

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THE MAGIC OF VOUCHERS IS NO SLEIGHT OF HAND:
A REPLY TO STEVEN K. GREEN

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Professor Green’s opposition to private school vouchers is threefold:1 First, he asserts that existing private school voucher programs are an unconstitutional establishment of religion that is not cured by the private choice aspects of the programs;2 second, he predicts that the programs are not likely to achieve their goal of improving educational quality and opportunity;3 and finally, he claims that vouchers will actually exasperate educational inequality.4

Since the drafting of Professor Green’s Article, the Supreme

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1. This Article is a response to the Article, The Illusionary Aspect of "Private Choice" for Constitutional Analysis, 38 WILLAMETTE L. REV. 549 (2002), written by Associate Professor of Law Steven K. Green.
2. Green, supra note 1, at 551-52.
3. Green, supra note 1, at 551.
4. Green, supra note 1, at 551.
Court has obviously laid to rest the first contention; one might thus be tempted to ignore that aspect of his Article entirely so as to benefit unfairly from its timing. But my disagreement with his constitutional analysis goes much beyond the fact that I have the benefit of hindsight. Accordingly, in Part I, I argue that, properly understood, the constitutional questions he raises should not even have been a close call.

With regard to the two policy objections, Professor Green has fallen prey to a logical contradiction that is not altogether masked by his linguistic sleight-of-hand. As I explain more fully in Part II below, the argument that vouchers will exacerbate educational inequality simply cannot coexist with the argument that vouchers are not likely to increase educational quality. Moreover, both arguments are ultimately grounded on the incorrect view that the equality principle of the Fourteenth Amendment (or of the Declaration of Independence, from which it is derived) requires an equality of outcome rather than an equality of opportunity. Under a proper understanding of both the goals of voucher programs and the commands of the equality principle, Professor Green’s policy objections necessarily will suffer the same fate as his constitutional objections have already suffered.

I. PRIVATE SCHOOL VOUCHER PROGRAMS ARE PERFECTLY CONSTITUTIONAL

A. Even Before Zelman v. Simmons-Harris, the Trend in Supreme Court Precedent Strongly Favored the View that Private School Voucher Programs Were Constitutional

Professor Green marches his readers through the relevant Supreme Court precedent, from Committee for Public Education & Religious Liberty v. Nyquist to Mitchell v. Helms, making appropriate stops along the way at Mueller v. Allen, Witters v. Washington Department of Services for the Blind, Rosenberger v. Rector of the University of Virginia, and even a few ques-

tionable stops at, for example, *Grove City College v. Bell.* Yet despite the apparent thoroughness of his analysis, one is left with the distinct impression that Professor Green is trapped in a time warp, wishing that the Supreme Court’s Establishment Clause jurisprudence had been frozen in place with the 1973 decision in *Nyquist.* The unmistakable trend of the Court’s Establishment Clause jurisprudence over the past thirty years has been away from *Nyquist,* however, and toward a position that, as I argue in subpart (B) below, is more consistent with the original understanding of the Establishment Clause. Even before its ruling in *Zelman v. Simmons-Harris,* the Supreme Court itself had acknowledged that “Establishment Clause jurisprudence has changed significantly” since the *Nyquist* case. *Nyquist* was based on the then-new test of *Lemon v. Kurtzman,* for example, a test that several members of the current Court have repeatedly criticized. As the Court noted just five years ago in *Agostini,* “[w]hat has changed [since *Nyquist* was decided] is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.”

*Agostini* held “that a federally funded program providing supplemental, remedial *instruction* to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees[.]” The Cleveland Scholarship Program at issue in *Zelman* and other private school voucher programs now in existence are narrower than the law in *Agostini* because they do not go so far as to have government employees teaching on the campus of a sectarian school. Instead, government aid is available to parents, who can use that aid toward tuition at a number of private schools, including religiously affiliated schools. As a result, the governmental aid finds its way to sectarian institutions only as the result of the private, independent choice of individual parents. Moreover, most

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15. 403 U.S. 602 (1971).
17. *Agostini,* 521 U.S. at 223.
18. Id. at 234-35.
of the existing voucher programs include the protections for religious neutrality—including a provision that prohibits participating schools from discriminating on the basis of religion—which ensured that the more far-reaching program in Agostini was constitutional. It should have come as no surprise, then, that the Court upheld the Cleveland program in Zelman.20

Even prior to Zelman, the Supreme Court had held repeatedly that a government education program does not violate the Establishment Clause if any incidental benefits to a religious group are the result of purely private individual choices.21 Simply put, as U.C.L.A. Law Professor Eugene Volokh has noted with his characteristic wit, "government doesn't necessarily endorse private choices that people make with government funds, any more than it endorses cabbage by letting people use food stamps to buy the food of their choice, which may include cabbage."22

In Mueller, for example, the Court considered a Minnesota law that permitted parents to deduct from their state taxes the amount of money they spent in sending children to private schools, including religious ones.23 The Court held that the deduction did not violate the Establishment Clause, and distinguished it from the law considered in Nyquist. "[U]nder Minnesota's arrangement," the Court held:

[P]ublic funds become available only as a result of numerous private choices of individual parents of school-age children. . . . [W]e recognized in Nyquist that the means by which state assistance flows to private schools is of some importance. . . . Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no "imprimatur of state approval," can be deemed to have been conferred on any particular religion, or on religion generally.24

Under the Cleveland Scholarship Program at issue in Zelman and comparable voucher programs elsewhere in the country, just as

20. Id. at 2461.
23. 463 U.S. at 391.
24. Mueller, 463 U.S. at 399 (citation omitted).
with the aid program upheld in *Agostini* or the tax deduction upheld in *Mueller*, "any money that ultimately [goes] to religious institutions [does] so 'only as a result of the genuinely independent and private choices of' individuals."25 The governments adopting such voucher programs no more endorse a religious viewpoint—or send a message of favoritism for a religious viewpoint—than they endorse cabbage by providing poor people with food stamps.

Professor Green, of course, discounts the private choice aspects of the voucher programs in Cleveland and elsewhere,26 but his several arguments, like those the Sixth Circuit relied upon in the *Zelman* case,27 suffer from what my former Professor Cass Sunstein fondly called a "baseline problem."28 Green contends, for example, that the programs are unconstitutional because they provide financial incentives for attending religious schools.29 His argument runs something like this: Without vouchers, students pay the entire cost of private school tuition, but with vouchers, they pay only twenty percent of the cost (or less), so the voucher program amounts to an eighty-percent subsidy (or more) and to that extent provides an incentive to attend private schools.30

The baseline problem in this argument should be obvious. Professor Green's argument assumes that the alternative to private school vouchers is no governmental education benefit at all, but that is clearly not the case. The alternative to the voucher benefit is continued receipt of the educational benefit provided via the public school, not the denial of all educational benefits.31 Even under a voucher program that pays one-hundred percent of the costs of pri-

26. Green, supra note 1, at 552-60.
27. See, e.g., Simmons-Harris v. Zelman, 234 F.3d 945, 959 (6th Cir. 2000), rev'd, 122 S. Ct. 2460 (2002) (finding the private choice aspect of the Cleveland program to be "illusory" because "82 percent of participating schools [were] sectarian").
29. Green, supra note 1, at 561-64.
30. Green, supra note 1, at 561-64.
31. Of course, one might argue that the value of a public school education in some public schools is zero, but that would only make the case for vouchers more compelling and completely undermine Professor Green's policy argument that vouchers are not likely to improve educational quality.
vate school tuition, the most that can be said with respect to incentives is that the voucher makes a student (or, more to the point, his/her parents) financially neutral as between the private school option and the public school option, all other things being equal. Vouchers that pay less than one-hundred percent of the private school’s tuition, such as the seventy-five percent vouchers in the Cleveland program,32 actually provide a financial disincentive for students and their parents to choose private school (albeit a lower disincentive than existed without the voucher). Students covered by such a program receive a “free” education if they remain at the public school,33 but must pay something if they choose to attend a private school. Any incentive to attend the private school must therefore be the result of something other than the voucher—such as a better quality education, or an education more suited to the particular student, or attendance at a school closer to home, or even education with a religious component.34

This baseline problem inherent in Professor Green’s argument does not disappear even if one-hundred percent of the participating private schools are religious schools (although none of the voucher programs now in existence are limited only to religious schools); the public school alternative would always remain an option for which there is at least as great, and in most cases a greater, financial incentive. Rather than addressing this obvious problem for his argument, Professor Green does not even acknowledge that the existing public schools are an alternative that must be considered, but instead further narrows the universe of available options that he would consider by excluding even nontraditional public schools such as charter and magnet schools.35

32. The Cleveland program pays seventy-five percent of the private school tuition, up to a maximum of $1,875. U.S. GEN. ACCOUNTING OFFICE, SCHOOL VOUCHERS PUBLICLY FUNDED PROGRAMS IN CLEVELAND AND MILWAUKEE, GAO-01-914, 6 (2001) [hereinafter GAO REPORT]. It pays ninety percent of the tuition, up to a maximum of $2,250, for low-income students, defined as those students whose family income is less than two-hundred percent of the federal poverty level. Id.

33. That is to say, the parents incur no marginal cost by remaining in public schools. Taxpaying parents and their neighbors are, of course, already paying for the public school.

34. It is hypothetically possible, of course, that a voucher program would award to parents a sum greater than the private school tuition, and therefore truly provide a financial incentive for the parents to send their children to private schools. None of the programs currently in existence operate in such a fashion, however, and it is doubtful that such a program would be adopted.

35. Green, supra note 1, at 571-72.
Moreover, even if it were appropriate to exclude from the list of available options all public schools, Professor Green makes up a new legal rule out of whole cloth. "For parents who prefer a private school alternative," he asserts, "there must be a balanced secular-sectarian mix to guarantee a choice that is constitutionally significant." In other words, unless the number of secular and sectarian private schools participating in the program is kept exactly balanced—presumably through some sort of quota system—the program will constitute an establishment of religion.

The fact that most of the schools participating in a voucher program are religious is utterly irrelevant to the determination of whether the program establishes religion in violation of the First Amendment. By the same logic, one might declare that everything government does violates the First Amendment. After all, the vast majority of Americans are religious, so it must necessarily be the case that "the great majority" of people who benefit from police, or fire, education, or health care services "are sectarian." But the Supreme Court has rejected the attenuated view that every private action must become state action if the government has been involved at any point. For the same reasons, the private choices of parents do not become an establishment of religion when those choices are backed by funding that would have gone to educate the child anyway. In short, as the Ohio Supreme Court held when it considered the Cleveland voucher program, "[t]o the extent that children are indoctrinated by sectarian schools receiving tuition dollars that flow from the School Voucher Program, it is not the result of direct government action."

Professor Green does not cite any authority for his assertion that there must be a balanced secular-sectarian mix, but it appears to be based on his distinction between Nyquist and Witters earlier in the

36. Green, supra note 1, at 572.
39. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (warning against "holding[s which] would utterly emasculate the distinction between private as distinguished from state conduct").
Article. 41 “The necessary proportion of secular to religious options is unclear,” he noted, “but in Nyquist the Court condemned the lack of true choice where religious schools accounted for 85% of the private schools, whereas in Witters ‘only a small handful [were] sectarian.’” 42 Ipso facto, apparently, because eighty-two percent of the private schools participating in the Cleveland program, and ninety-six percent of the available student seats, were religious, 43 the Cleveland program must necessarily fail, just as the program in Nyquist did.

What Professor Green’s argument overlooks is that the very same contention was made, and soundly rejected, by the Supreme Court in Mueller. Indeed, the statistics argued in Mueller were identical to the statistics relied on by Professor Green and quoted above. Petitioners in Mueller argued that “notwithstanding the facial neutrality” of the Minnesota tax deduction at issue in the case, “in application the statute primarily benefits religious institutions” because “96% of the children in private schools” (the tuition for which would account for the bulk of the deductible education expenses) “attended religiously-affiliated institutions.” 44 Although the state countered by questioning the validity of the Petitioners’ statistics, the Supreme Court held in no uncertain terms that the statistical dispute was beside the point:

We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief. 45

The salient question from Mueller is not the relative number of religious schools that choose to participate in a program, but whether the program on its face is limited to or skewed toward such schools. The focus is on the permissible uses of the benefit under

41. Green, supra note 1, at 570-71.
42. Green, supra note 1, at 570.
43. Zelman, 122 S. Ct. at 2464.
45. Id. at 401.
the program, not the "available uses," as Professor Green claims.\textsuperscript{46} Thus, the relevant fact in \textit{Zelman} was that the voucher program was open to neighboring public schools as well as to both religious and nonreligious private schools.\textsuperscript{47} That the neighboring public schools boycotted the program, and that the lion's share of the private schools that did participate were religious, was immaterial to the Establishment Clause question. The relevant "universe,"\textsuperscript{48} to use Professor Green's term, is the group of schools that could participate in the program, not the more limited group of schools that actually choose to do so. The acknowledgment by the Sixth Circuit majority that the Cleveland "voucher program does not restrict entry into the program to religious or sectarian schools"\textsuperscript{49} should therefore have been dispositive under \textit{Mueller}; the Supreme Court's decision in \textit{Zelman} simply confirmed its earlier ruling.

Although Professor Green does not proffer a counter to this argument, the Sixth Circuit did attempt to do so, and its argument warrants a response. For the Sixth Circuit, the facially neutral voucher program did not survive Establishment Clause scrutiny because it was not really neutral, based on the court's claim that religious schools "often have low overhead costs, supplemental income from private donations, and consequently lower tuition needs."\textsuperscript{50}

In other words, because religious schools are cheaper, a program that grants benefits \textit{equally} to religious and nonreligious schools is made \textit{unequal} precisely \textit{because it does not discriminate}. This definition of neutrality is either Orwellian or meaningless, and it is contrary to the Supreme Court's repeated holding that religious and nonreligious organizations should be treated equally, regardless of whether the church involved happens to be better situated to benefit from the equal treatment. By the Sixth Circuit's reasoning, a religious student organization that has access to the resources of its affiliated national religious society might better be able to publish a student newsletter without receipt of student activities fees, but the Supreme Court held in \textit{Rosenberger} that the Establishment Clause

\textsuperscript{46} Green, \textit{supra} note 1, at 570.
\textsuperscript{48} Green, \textit{supra} note 1, at 571.
\textsuperscript{50} \textit{Id.} (citing Martha Minow, \textit{Reforming School Reform}, 68 \textit{Fordham L. Rev.} 257, 262 (1999)).
does not compel depriving the group of equal access to the forum provided by the fees.\textsuperscript{51}

Because the voucher programs in Cleveland and elsewhere are open to nonreligious schools on an equal basis, they cannot be characterized as an establishment of religion under the test the Supreme Court employed in \textit{Mueller}. The fact that secular schools do not choose to participate to the same extent as religious schools may be due to any number of factors—for example, the greater dedication that religious associations traditionally have had to the upbringing of children, or the fact that most Americans happen to be religious.\textsuperscript{52} The private choices that lead a religious association to participate in the program deserve as much respect as the private decision of parents to participate in the program at the other end. In neither case is there any discriminatory process by which the state chooses to foster one religion over another, or religion in general over irreligion. Just as in the racial discrimination cases such as \textit{Washington v. Davis},\textsuperscript{53} disproportionate impact without discriminatory intent cannot violate the Equal Protection Clause, so too when a voucher program provides an equal opportunity for religious and nonreligious groups to participate, the fact that most participants happen to be religious cannot violate the Establishment Clause (especially in a nation where most people are religious).

Finally, before turning to what I consider to be the most profound aspect of the \textit{Zelman} decision, I must respond to Professor Green’s attempt to compare the school vouchers movement to the racist attempts to re-segregate the South in the wake of \textit{Brown v. Board of Education}\textsuperscript{54} by use of private school “freedom of choice” plans.\textsuperscript{55} Quite apart from the fact that one of the primary groups benefiting from the school voucher programs that have thus far been adopted are inner city minority students seeking to escape the failed public school system,\textsuperscript{56} the comparison between the two efforts fails

\textsuperscript{51} Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 819-46 (1995).
\textsuperscript{52} U.S. CENSUS BUREAU, \textit{supra} note 37.
\textsuperscript{53} 426 U.S. 229 (1976).
\textsuperscript{54} 347 U.S. 483 (1954).
\textsuperscript{55} Green, \textit{supra} note 1, at 565-66.
\textsuperscript{56} See, e.g., GAO REPORT, \textit{supra} note 32, at 4 (“During school year 1998-99, well over two-thirds of the students enrolled in Cleveland’s and Milwaukee’s voucher programs and public schools were minority group members,” most of whom “were African-American.”); see also Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079, at *3 (Fla. Cir. Ct. Aug. 5, 2002) (recognizing that the salutary purpose of the Florida voucher program
in its legally relevant particulars for at least two reasons. First, unlike the "whites only" private schools that were set up in the post-
Brown South, religious schools are not the only private schools eligible to participate in the recently enacted voucher programs, so the nexus between the government action of providing a voucher and the use to which the voucher is put is much more attenuated. Second (although for reasons discussed below I believe this aspect of the existing programs is not constitutionally compelled), all of the existing voucher programs require that participating schools not discriminate on the basis of religion. Professor Green's attempt to tarnish the voucher movement with the brush of racial segregation might have rhetorical appeal, but it is simply not grounded in fact. In Milwaukee, for example, the number of students attending racially isolated schools is significantly lower among religious schools participating in the voucher program than among public schools (30.1% versus 50.3%). Indeed, it is widely believed that the reason the school voucher initiative failed in California was because it included suburban school districts whose mostly white middle-class voters opposed opening their schools to inner-city students. If anyone, therefore, it is the opponent of vouchers, not the proponent, who is the heir of post-Brown segregationists.

B. Properly Understood, the Establishment Clause Would Not Bar State Support of Religious Schools Even Without the Intermediary of Parental Choice

As noted at the outset, the pre-Zelman Supreme Court prece-
dent easily supported the Court’s decision in Zelman, but even that precedent is much more restrictive of state aid to education in religious schools than the original understanding of the Establishment Clause warrants. The most profound aspect of the Zelman decision, therefore, is Justice Thomas’s concurring opinion, in which, for the first time, a Supreme Court Justice has invited reconsideration of the wholesale incorporation of the Establishment Clause that occurred in *dictum*, without any reasoning, in the Supreme Court’s 1947 decision in *Everson v. Board of Education*.61

The reconsideration Justice Thomas invited is a natural outgrowth of the Supreme Court’s recent federalism decisions. The Court has often acknowledged that the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the states or to the people.62 As James Madison explained:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.63

Education is among the most important of those duties not delegated to the federal government but reserved to the states or to the people; and moral instruction, particularly including the kind of moral instruction fostered by religion, has been viewed for most of our nation’s history as an essential component of that core state function. America’s founders believed that the education of children was vital to keeping America a free and functioning society. “If a nation expects to be ignorant and free,” said Thomas Jefferson, “it expects what never was and never will be.”64 James Madison agreed: “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy;

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62. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995); *see also* U.S. CONST. amend. X.
or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.\textsuperscript{65}

By "education," the Founders did not simply mean the dissemination of scientific facts or history; they also meant the inculcation of moral character. Following Montesquieu's well-known admonition that education in a republic, unlike that in a despotism or a monarchy, must necessarily be designed to inculcate virtue in the citizenry,\textsuperscript{66} our nation's Founders repeatedly acknowledged the role that moral virtue had to play if their experiment in self-government was to be successful. For example, the Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776 provides that "no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."\textsuperscript{67} The Massachusetts Constitution of 1780 echoes the sentiment: "[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality."\textsuperscript{68} But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the fifty-fifth number of The Federalist Papers:

Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are], the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.\textsuperscript{69}

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. They were also fully cognizant of the fact that virtue must be fostered continually in order for republican institutions, once established, to survive. Many of the leading Founders, therefore, proposed plans for educational systems that would help foster the kind of moral virtue they thought necessary for self-government.

\textsuperscript{67} VA. CONST. of 1776, Bill of Rights, § 15.
\textsuperscript{68} MASS. CONST. of 1780, Pt. 1, Art. 3.
Perhaps the best example of this sentiment is expressed in the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Even Thomas Jefferson, who coined the phrase "a wall of separation between church and state," provided in his famous proposal for a public education system in Virginia that "[t]he first elements of morality" were to be instilled into students' minds.

As the Northwest Ordinance makes clear, the fostering of moral excellence was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals." Accordingly, he proposed a public school system whose curriculum included religious instruction, noting that such an education would "make dutiful children, teachable scholars, and afterwards, good apprentices, good husbands, good wives, honest mechanics, industrious farmers, peaceable sailors, and, in everything that relates to this country, good citizens."

In addition, several of the states explicitly provided for religious education in their constitutions. The Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning . . . shall be encouraged and protected."

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70. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. 3, 1 stat. ch. VIII 51, 53 n.a (July 13, 1787) (re-enacted Aug. 7, 1789; see also, e.g., MASS. CONST. of 1780, ch. V, § 2 ("[W]isdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties.").


76. PA. CONST. of 1776, § 45; see also VT. CONST. of 1777, ch. II, § XLI ("[A]ll
The Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 went even further. The Massachusetts Constitution provided: "The people of this Commonwealth have the right to invest their legislature with power to authorize and require . . . the several towns . . . or religious societies to make suitable provision at their own expense . . . for the support and maintenance of public protestant teachers of piety, religion and morality." New Hampshire's Constitution authorized the legislature "to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" because "morality and piety . . . will give the best and greatest security to government." While no State since the 1830s has supported such a starkly sectarian establishment of religion as is evident in the Massachusetts and New Hampshire constitutions' references to "protestant teachers," several continue to recognize the importance of moral-religious instruction in fostering the kind of citizen virtue the Founders thought necessary for the continued security of the republic. For example, the Nebraska Constitution provides: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature . . . to encourage schools and the means of instruction." 

Particularly where individual parents remain free to direct the state's tuition support to schools of their own choosing, any incidental benefit to religion would have been viewed by the Founders as an added benefit, not a constitutional impediment. Benjamin Rush addressed this point in his proposal for a public education system: "The children of parents of the same religious denominations should be educated together," he wrote, "in order that they may be instructed with the more ease in the principles and forms of their respective churches." "If each society in this manner takes care of its own youth," he noted elsewhere, "the whole republic must soon religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning, shall be encouraged and protected.".

79. Nebr. Const. art. I, § 4; see also Ind. Const. art. VIII, § 1; Iowa Const., art. IX, § 2; Vt. Const. ch. II, § 68; cf. Mass. Ann. Laws ch. 71, § 30 (Law Co-op. 2001) (providing that it is the "duty" of Harvard professors and other teachers of youth "to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice" (emphasis added)).
80. Rush, supra note 75, at 424.
be well educated."  

Given the Founders’ views on the subject, any argument that the Constitution they drafted and ratified mandates the exclusion of religious schools from the kinds of general tuition support programs at issue in Zelman is extraordinary. Indeed, from the Founders’ vantage point, such an argument would have been viewed as dangerous because it thwarts, rather than supports, the very kind of moral-religious education the Founders thought so necessary to the preservation of free government. This sentiment was echoed by the late Reverend Martin Luther King, Jr.: “Education which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason but with no morals. We must remember that intelligence is not enough. Intelligence plus character—that is the goal of education.” Thus, any proper interpretation of the Establishment Clause—at least as it applies to the states—simply must recognize the important part religion has always played in state efforts to undertake the core police power of fostering the welfare and morals of the people.

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was intended originally to apply only to the federal government, not to the state governments. “Congress shall make no law” meant precisely that. This is particularly true with respect to the Establishment Clause, whose language, “Congress shall make no law respecting the establishment of religion,” was designed with a two-fold purpose: to prevent the federal government from establishing a national church, and to prevent the federal government from interfering with the state-established churches and other state aid to religion that existed at the time. As

85. U.S. CONST. amend. I.
86. See, e.g., CONSTITUTIONAL LAW 1539 (G. Stone et al. eds., 3d 3d. 1996) (citing M. HOWE, THE GARDEN AND THE WILDERNESS 23 (1965); W. KATZ, RELIGION AND AMERICAN CONSTITUTION 8-10 (1964)); see also NEIL COGAN, THE COMPLETE BILL OF RIGHTS 1-8, 53-62 (Oxford University Press 1997) (reprinting the debates in Congress lead-
Justice Potter Stewart correctly noted in *School District of Abington Township v. Schempp*, “[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.”

Of course, the Fourteenth Amendment effected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that attempted to interfere with their fundamental rights. But the Establishment Clause is, on its face, different in kind from the other provisions of the Bill of Rights that previously had been incorporated and made applicable to the states via the Fourteenth Amendment. The Free Speech and Free Exercise Clauses, for example, are more readily described as protecting a “liberty” interest or a “privilege” of citizenship than is the Establishment Clause; yet when the Supreme Court held in *Evers*on that the Establishment Clause was incorporated and made applicable to the states via the Due Process Clause of the Fourteenth Amendment, it merely cited its prior cases incorporating the Free Speech and Free Exercise clauses without any analysis of the evident differences between them and the Establishment Clause.

Moreover, the application of the Establishment Clause to the states has allowed the federal courts and, via Section Five of the Fourteenth Amendment, the Congress to do the very thing the clause was arguably designed to prevent, namely, to interfere with state support of religion. Indeed, the constitutional prohibition on federal intrusion into this area of core state sovereignty is much more explicit than the prohibition on federal commandeering of state officials, the limits of federal power inherent in the doctrine of enumerated powers, or even the barrier to federal power erected by the doctrine of state sovereign immunity that the Supreme Court has held to be implicit in the Eleventh Amendment. Yet in each of

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these latter areas, the Court, in recent years, has given renewed attention to the limits of federal power.

It is not necessary to completely overturn the long-standing precedent incorporating the Establishment Clause, however, in order to give due consideration to that precedent’s effect on federalism. All that is required is to recognize, as Justice Thomas did in his Zelman concurrence, that the scope of activity prohibited by the Establishment Clause may well be narrower with respect to the states than with respect to the federal government.\textsuperscript{92} Such a distinction is particularly important in light of the fact that the states, rather than the federal government, have been viewed historically as the repository of the police power—that power to regulate the health, safety, welfare, and morals of the people.\textsuperscript{93} Thus, even if Professor Green’s “no-funding prohibition”\textsuperscript{94} were an appropriate interpretation of the Establishment Clause vis-à-vis the federal government, the application of such a rule in the incorporated Establishment Clause context intrudes upon core areas of state sovereignty in a way that simply finds no support in either the text or theory of the Fourteenth Amendment.

While a renewed appreciation of this core function of state sovereignty might well support even direct aid to religion (at least if it is offered on a nonsectarian basis), at the very least it clearly permits the religiously neutral programs already adopted in Cleveland and elsewhere. There any aid to religion is only indirect, the result of wholly independent decisions by parents who freely choose whether to send their children to their neighborhood public school, a participating public school in an adjoining district, a nonreligious private school, or a religious private school. Indeed, after Zelman, the new battleground will be whether inclusion of religious schools in the state education funding mechanism is required, not whether their inclusion is merely permitted.\textsuperscript{95}

\textsuperscript{92} See Zelman, 122 S. Ct. at 2481 (Thomas, J., concurring) (citing Walz v. Tax Comm’n of City of New York, 397 U.S. 664, 699 (1970) (Harlan, J., concurring)) (“[I]t may well be that state action should be evaluated on different terms than similar action by the Federal Government.”).


\textsuperscript{94} Green, supra note 1, at 561-63.

\textsuperscript{95} Compare Davey v. Locke, 299 F.3d 748, 760 (9th Cir. 2002) (holding that the Washington Constitution’s prohibition on aid to religion could not be applied constitutionally to prohibit students from using an otherwise neutral scholarship for religious studies), with Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079, at *3 (Pla. Cir. Ct. Aug. 5, 2002)
II. Professor Green’s Policy Arguments Are Self-Contradictory and Based on An Erroneous View of Equality

Private school vouchers "will likely fail to achieve its purported goals of improving educational quality and opportunity," Professor Green writes, noting that "[r]ather than promoting educational equality, vouchers will exacerbate educational inequality." 96 With all due respect to Professor Green, the argument that vouchers will exacerbate educational inequality is based on the assumption that the education received by the recipients of vouchers will be of higher quality than that which had been received in the inner-city public school from which the voucher program allowed the student to escape. If there is no change in quality, as Professor Green claims, then it is hard to fathom how educational inequality is exacerbated. Professor Green and the other opponents of private school vouchers cannot have it both ways.

The fact of the matter is that American public schools are facing a crisis. Every day in many public schools children are threatened by violence, drug abuse, and sexual pressures; test scores are continually falling; and students are failing to graduate. The effects are particularly harsh on minorities. Sixty-nine percent of black high school seniors scored below basic proficiency levels on math tests in 2000; forty-three percent scored below basic proficiency levels in reading. 97 More than thirty-eight percent of job applicants lack basic reading, writing, or math skills, which "portends higher unemployment and lower pay . . . and certainly is a major contributor to poverty." 98

The public schools in Cleveland, Ohio—those covered by the voucher program at issue in Zelman—have only a thirty-eight percent graduation rate, and only twelve percent of sixth-grade students passed the state’s mathematics proficiency test in 1999. 99 Many parents wish to escape the ailing public education system by placing their children in private schools, but some cannot afford that alternative. In response to this problem, a number of states have set up school choice programs allowing parents to designate a school for

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96. Green, supra note 1, at 551.
98. Id.
their children to attend. If parents choose to send their child to a private school, the state then helps those parents by contributing toward the tuition a certain amount of the money that the state was already going to spend on the student in a government school. This increases the number of choices available to parents, and the theory underlying the voucher programs is that schools will improve their quality as a result of competition for students.100

Indeed, existing voucher programs have resulted in improved test scores, a greater number of scholarships for students, and increased parental satisfaction. A 2001 Pacific Research Institute for Public Policy study found, for example, that Catholic schools in inner cities spend less than half the amount per student as public schools spend, yet achieve higher test scores.101 Two studies out of Harvard’s highly-respected Kennedy School of Government echo these findings: New York City’s school choice plan resulted in safer campuses and increased test scores, especially among minority students,102 and the Cleveland Scholarship Program at issue in Zelman achieved greater parental satisfaction and an average test-score increase of about forty percent.103

Professor Green discounts these and similar studies, citing instead studies by avowed opponents of vouchers that find no improvement and concluding that the various studies are therefore “inconclusive.”104 There are at least two methodological problems with Professor Green’s conclusion. First, if the range of statistical study conclusions is between “no improvement” by the most ardent of voucher opponents and “significant improvement” by proponents of vouchers, it is a pretty safe bet that there is at least some improvement in achievement among voucher recipients—none of the studies concluded that achievement declined as a result of the voucher pro-

100. See, e.g., GAO REPORT, (“Some advocates have claimed that voucher programs . . . will promote greater competition among schools, forcing them to become more effective in order to remain viable.”).


104. Green, supra note 1, at 552 (citing, e.g., Ctr. for Educ. Policy, School Vouchers: What We Know and Don’t Know—And How We Could Learn More (June 19, 2000)).
grants.

The second—and much more serious—methodological problem lies in what the various studies are trying to measure. The General Accounting Office study, for example, which Professor Green touts as having been “prepared at the request of a pro-voucher senator,”105 carefully selected for its review studies that controlled for various differences such as classroom size, nonrandom selection to the voucher program, and interest in alternative educational services.106 While the statistical regression analysis conducted in those studies is undoubtedly the correct methodology for determining how much of the observed achievement gains are attributable solely to the fact that someone had a voucher, the whole point of the voucher program is to open up to students in failing public schools additional educational opportunities where improved achievement is a possibility precisely because of differences such as classroom size. Controlling away the benefits offered by the schools participating in the voucher program renders the conclusions of such studies meaningless for the question at hand.

But the real proof that educational quality is improved as a result of voucher programs comes with a fact that Professor Green himself acknowledges as one “on which all sides can agree”: “Greater parental satisfaction.”107 Voting with one’s feet is often a better measure than all of the regression models that clever statisticians might devise to prove one or another side of an argument, particularly where, as with these programs, the satisfied parents are actually having to incur out-of-pocket costs to participate in the program. Even if the program does not produce measurable increases in test scores (although the studies that find significant increases appear much more credible to me), there are other measures of educational quality (such as lower risk of dropping out, lower risk of being the victim of crime, etc.) that these parents are clearly observing or they would not continue to participate.

More fundamentally, Professor Green’s play on words—substituting “equality” for “quality”108—highlights a fallacy in the anti-voucher arguments that is rooted in the age-old dispute between the equality-of-opportunity and equality-of-result interpretations of

105. Green, supra note 1, at 552-53.
107. Green, supra note 1, at 553.
108. Green, supra note 1, at 554-60.
the Equal Protection Clause of the Fourteenth Amendment. By expanding the options available to public school students, private school voucher programs necessarily expand the educational opportunities available to all such students, whether or not they choose to avail themselves of the new opportunities (or even whether the education provided as a result of the new opportunity is of a superior or merely a different quality). The proper question is whether the new opportunity is equally available, not whether all students equally avail themselves of it or equally benefit from it. Indeed, under the Cleveland, Ohio program that was the subject of the Supreme Court’s decision in Zelman, even students who chose not to participate in the voucher program were better off, at least by the traditional measure of per-capita spending, because the per-capita state funding for the existing public schools increased every time another student left with a voucher that covered only a portion of the departing student’s share of state education resources. 109 The only change in educational equality being created by private school voucher programs is the loss of monopoly power by the public educational establishment; but that is a change toward greater equality, not greater inequality. Anyone truly concerned about quality education for children should embrace vouchers, not lambaste them.

Some contend, of course, that voucher programs merely steal the cream of the crop from the public schools, leaving those who remain worse off than they were before implementation of the voucher program, apparently based on the same kind of social science theories that underlay the long-since discredited Clark study of Brown v. Board of Education footnote fame. 110 The available data disproves that contention, however. As the General Accounting Office has noted:

Research indicates that Milwaukee voucher students already had low academic achievement when they entered the voucher program. During the first 5 years of the program, voucher students had lower prior achievement test results—as measured by the

109. See, e.g., Zelman, 122 S. Ct. at 2463 n.1, 2465; see also id. at 2464 (“The number of tutorial assistance grants offered to students in a covered district must equal the number of tuition aid scholarships provided to students enrolled at participating private or adjacent public schools.”).

110. Compare Brown v. Bd. of Educ., 357 U.S. 483, 494 n.11 (1954) with Yodef, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, 42 LAW & CONTEMP. PROBS. 57, 70 (1978) (“Virtually everyone who has examined the question now agrees that the Court erred [in relying upon the Clark study]. The proffered evidence was methodologically unsound.”).
Iowa Test of Basic Skills, a standardized math and reading test given in first through eighth grade—than the average public school student.\textsuperscript{111} Giving such students an opportunity to enhance their own achievement, while leaving in public schools students with a higher average in academic achievement, necessarily reduces rather than increases the inequality in educational outcome.

III. CONCLUSION

In his concurring opinion in \textit{Zelman}, Justice Thomas quoted from a speech delivered by Frederick Douglas near the end of the Nineteenth Century: “Education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.”\textsuperscript{112} By expanding the opportunity for education, today’s voucher programs aim at bringing a little more light and liberty to the largely poor and minority students of our inner cities. As a matter of policy, that is a very good thing. As a matter of constitutional law—both recent Supreme Court precedent and as an original matter—the Establishment Clause clearly permits states to include religious schools in their voucher programs. Indeed, as Justice Thomas noted in his concurring opinion in \textit{Zelman}, any interpretation that would convert “the Fourteenth Amendment’s guarantee of individual liberty into a prohibition on the exercise of educational choice” would be a tragic irony.\textsuperscript{113} Happily, after \textit{Zelman}, it is a tragic irony that will be debated only in the academic journals rather than at the expense of children seeking the promised land of light and liberty that only a good education can bring.

\textsuperscript{111} GAO REPORT, \textit{supra} note 32, at 15.


\textsuperscript{113} Id. at 2482.