
RELIGIOUS LIBERTIES

SCHOOL VOUCHERS: PAST LESSONS AND FUTURE PROSPECTS THE IMPLICATIONS OF GOVERNMENT “STRINGS” ON VOUCHERS

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MS. SMITH: It certainly has been an interesting week for religion in the news. We heard from the 9th Circuit, at least a panel of it, that public school kids can't say the words "under God."¹ And now we've heard from the Supreme Court that at least certain kinds of school vouchers like the ones in Cleveland are constitutional in that they don't violate the Establishment Clause.²

Now comes the next round of debate and the next round of litigation. If vouchers are okay in private schools, what kind of strings can come with them? What must be done by religious schools that accept voucher money? I thought it was very interesting, even in the *Zelman* decision, that they noted that the Cleveland program places certain restrictions on private schools that accept that money.

Although this was not a topic of that decision, I think it will be an interesting part of the next round of debate. What they say is that private schools must agree not to discriminate based on race, religion or ethnic background, or to advocate or foster unlawful behavior or teach hatred of any person or group based on race, ethnicity, national origin or religion. It sounds pretty nice on its face, but as we get deeply into it, will this raise issues of unconstitutional conditions? For instance, can private schools that accept voucher money ask for the baptism records of kids? Can they ask for the religious denomination of the kids' parents? Can Catholic schools prevent Protestant kids from taking communion? Are all of those things hatred, or are they some sort of improper discrimination based on religion? That'll be the next round of constitutional questions, or some of them at least, that are likely to follow and be raised as vouchers are increasingly accepted by religious schools.

There is also the question of whether schools want to live by ordinary kinds of regulations the government can put on any kind of entity that accepts public money. If it is true that he who pays the piper can call the tune, what are the implications for religious schools? To help us unpack some of these questions and offer some insights into the next round of the debate, we have three speakers who have spent a lot of time thinking about these kinds of issues.

Our first speaker is Michael Stokes Paulsen, who is the Briggs and Morgan Professor of Law at the University of Minnesota Law School, where he has taught since 1991. He's a graduate of John Marshall Elementary School, Northwestern University, Yale Law School and Yale Divinity School. Professor Paulsen is a former federal prosecutor, former senior staff attorney for the Center of Law and Religious Freedom at the Christian Legal Society, and former Attorney Advisor in the Office of Legal Counsel of the United States Department of Justice. He has been involved as counsel or *amici* in dozens of free speech and religious freedom cases, including, most recently, *Peter v. Wedl*, a school choice case involving the right of children with disabilities to attend private religious schools without forfeiting special education benefits. He has also testified before numerous House and Senate committees on a variety of constitutional issues and has authored three dozen articles on various topics of constitutional law, especially issues of freedom of speech and religious liberty.

He will be speaking first and will help put some of the "strings" issues in the context of *Zelman* and of constitutional law more generally.

Our second speaker will be Professor Charles E. Rice, a Professor Emeritus of Law at the University of Notre Dame Law School, and also a visiting professor of law at Ave Maria Law School. His areas of specialization are constitutional law, jurisprudence and torts.

He is a graduate of the Holy Cross College, Boston Law School, and also has an LL.M. and J.S.D. from NYU. He was a lieutenant colonel in the U.S. Marine Corps Reserves. He has practiced in New York City and taught at other schools as well. For eight years, he served as Vice Chairman of the New York State Conservative Party. From 1981 to 1993, Professor Rice was a member of the Education Appeal Board of the U.S. Department of Education. He served as a consultant to the U.S. Commission of Civil Rights and to various congressional committees on constitutional issues, and is an editor of the *American Journal of Jurisprudence*. He has also authored numerous articles and books on constitutional issues.

Finally, to help us put all these issues in perspective is David P. Scott, who is Vice President of Development for Chancellor Beacon Academies, Incorporated, a nationally recognized education and management organization. He is also the founder and webmaster of www.charterschoolaw.com, a website dedicated to offering a collection of charter school

resources to the members of the charter school community. Mr. Scott has been involved with charter schools since 1996. He has assisted in the lobbying for the passage of charter school legislation and the organization of charter school resource centers and charter school operator associations.

He has actively participated in the preparation of charter school legislation and in drafting revisions of charter school laws. He is the founder and Chairman of the Board of St. Louis Charter School, the first charter school in St. Louis, Missouri, and has been instrumental in navigating the political obstacles facing the charter school movement in Missouri.

Prior to joining Chancellor Beacon Academies, Mr. Scott was a lawyer with several prominent firms, including Bryan Cave. His legal practice has focused on working with charter schools and education organizations. He is also the author of numerous publications and has spoken frequently on the topic.

Without further ado, I turn it over to Professor Paulsen.

PROFESSOR PAULSEN: Thank you very much. I passed out an outline. Like all good law professors, you have to pass out lecture notes so the students don't fall asleep during the middle and so they can follow along at home.

I've entitled this presentation "No Strings Attached," but probably a better title is "No Unconstitutional Strings Attached."

The way I'd like to start is with a map of the universe of school choice voucher constitutional issues. I think there are four major constitutional questions about vouchers and school choice proposals generally. They are, in the order in which they are likely to arise and receive their final judicial resolution, and in ascending order of difficulty and importance, as follows. The first question is, may religious schools and their students constitutionally be included in school choice programs? I call that the Establishment Clause question. That's the question that the Supreme Court decided yesterday by a vote of five to four; that's the *Zelman* question, and I'll leave most of that to the second panel, which is going to do an in-depth analysis of *Zelman*.

The long and short of it is that the Supreme Court has held that the Establishment Clause of the Constitution does not authorize or require discriminatory exclusion of religious schools from school choice programs. It does not violate the Establishment Clause to include religious schools as destinations for which people may use their vouchers.

The second big question is, may religious schools and their students constitutionally be excluded from voucher programs?

Now, some of you who are familiar with the various incarnations of the Wisconsin School Choice litigation might recall that originally the Wisconsin School Choice proposal did not include religious schools, and a challenge was brought on free speech and free exercise grounds to the exclusion of religious schools on the theory that this was discrimination against religion. That case was pending in the 7th Circuit when the Wisconsin legislature mooted the whole problem by extending the program to include religious schools.

I think the next issue on the horizon is, are religious schools constitutionally entitled to be included in voucher programs? Is it permissible for a city to devise a program that excludes private religious schools but includes other types of private schools? I think this question is also fairly easy and is the next one over the horizon. Cited there in my little outline is the case of *Rosenberger v. Rector and Visitors of the University of Virginia*,³ which is a 1995 case involving the funding of campus religious organizations at the University of Virginia.³ Virginia funded student organizations to compete for money, and a student organization wished to publish a religious newspaper. The University of Virginia said no, you can't do that. The Supreme Court held that where government has made a fund or program available, it may not discriminate or exclude based on the religious nature of the ideas conveyed.

This is a fabulously important case for school choice in that it establishes the principle, to my mind at least, that not only does the Establishment Clause not require the exclusion of religious groups, the Free Exercise and Free Speech clauses will not permit government to discriminate or exclude religious options within the context of genuinely neutral school choice programs.

The third situation or genre of constitutional issues on the horizon is whether school voucher programs may be loaded up with regulatory strings attached that expand government's control over private school curriculum and personnel decisions. I call this the poison pill or unconstitutional condition list issue. That is the issue that is framed for this panel, and I think this is an issue that is right around the corner. It is one on which I have written in the past; I actually brought along a couple of my old law review articles, left them over there so that somebody besides my mother reads these things — well, I actually doubt whether my mother gets through these things. I will talk about that more in a second.

PROFESSOR RICE: I read them.

PROFESSOR PAULSEN: Professor Rice says he reads them. He is a generous liar here. But I think that is the issue of the next 10 and 15 years.

Finally, the fourth big constitutional question about vouchers that I pose here is, are vouchers mandatory? Are private school voucher programs at some minimal level of funding constitutionally required? Now, this is a whopper of a

constitutional question, and it's not even over the horizon yet. This is a good 10 to 20 years away. If the courts were to address this issue now — is systematically funding public alternatives over private alternatives unconstitutional? — there is no way the Supreme Court would say that's a problem at all. But I think that there is a powerful intellectual case to be made down the road that a government program that discriminates against parents' choices of the religious or other private content of the education they wish imposes an unconstitutional condition on a very important government benefit program.

I have laid this argument out in speeches that I have given in other places — highly controversial positions. We are not there yet. Where we are is back on question number three, and that is what I want to talk about in the next ten minutes or so. That is, what strings may be attached once you have constitutionally permissible voucher programs? The answer here is a little less obvious, in my mind at least, than the answer to the first two questions. But in principle, it should be reasonably clear once it's been given a little bit of careful thought.

Here is my position. The acceptance by private schools of students taking advantage of a voucher or tax benefit program gives government no greater power to regulate private school, curricula or personnel choices, or any other aspect of private education than government would have had in any event. The acceptance of students carrying a voucher gives the government no more power than it otherwise would have had. The idea of consent really adds nothing to the analysis.

The scope of government's regulatory authority over private schools and private religious schools I think presents very interesting, important, and difficult questions of the freedom of speech and free exercise rights of religious and other private organizations, but I do not think that those questions are really at all affected — at least, not legitimately — by receiving a voucher. If government could not constitutionally impose a particular requirement on a school directly, it may not do so by the means of attaching a condition on receipt of a voucher. I think that's the correct constitutional analysis.

Let me briefly run you through why I think that is so. I think it's important to step back and look at what the government could do now without receipt of a voucher. What is the power of government to regulate religious or other private schools now? This is a function, I believe, of the freedom of speech and freedom of expressive association rights of private schools.

The core principle of the Free Speech Clause that I alluded to in talking about *Rosenberger* is that government may not discriminate based on the content of the ideas being expressed or the viewpoint of the ideas being expressed. Relatedly, a line of Supreme Court cases has established a freedom of expressive association; organizations get to band together in order to further their common messages.

The cases that I cite there are the *Hurley* case from 1995 and the *Boy Scouts* case, the famous case from just a couple of years ago.⁴ *Hurley* held that the State of Massachusetts could not require private organizers of a parade to include a competing message that they didn't want. Specifically, the St. Patrick's Day parade in Boston did not wish to include a group of gay, lesbian and bisexual Irish that wanted to march under that banner. The holding of the Supreme Court unanimously was that government grants the parade permit, but that does not give it the authority to regulate the content of the expressive message being conveyed by the private group that takes advantage of the neutral government forum. Think about that. It doesn't give government the power to regulate the message. It's the Irish group's parade, not the government's parade, and they get to control the content of their own messages — nine-zip, 1995.

It became a little more controversial, two years ago, when in the context of the *Boy Scouts* case, the question is can the Boy Scouts exclude from their membership or leadership openly gay assistant scout masters. The Supreme Court again upholds the freedom of expressive association, but much more narrowly — five to four; in fact, the same five-four lineup that we had yesterday in *Zelman*, the conservatives, roughly speaking, against the liberals. What *Boy Scouts* stands for, again, is a reaffirmation of the principle that a private group gets to control the content of its messages, including those who speak on its behalf. What I infer from this is that as a matter of constitutional law, a religious or other private school must have the right to control the content, within very broad boundaries, and the viewpoint, very nearly absolutely, of its own educational program. Also, I infer that there is a constitutional right, a First Amendment right of private schools, to control the content of their curriculum. Private religious schools get to be religious. Now, this is all in the absence of a voucher.

In addition, once you add to that the freedom of expressive association, you also have the right of a private association — a private school, a private organization — to decide who constitutes that expressive community. I think this extends legitimately to matters of employment, the teachers they hire, and even to matters of admissions.

Now, there are some limits on this and the Supreme Court has not gone as far as my theory. These propositions that I am giving you about the First Amendment rights of the religious organizations, private schools, are contested. But the big point I want to make for you now is that they are contested whether or not a voucher program is in place. There is a dispute about how far government can intrude into private religious schools or private schools, but government is already trying to do that.

The big question is, does the receipt of a voucher affect those legal issues in any way? I argue that it does not. My second point is the legal irrelevance of acceptance of a voucher to government's authority to regulate. It is my position that there's no greater authority of government to regulate private schools by virtue of the indirect receipt of a voucher than it would have had in any event. There are several reasons for this.

First, acceptance of a voucher does not transform the private school into an arm of the state. It does not turn a

private school into a public school. Think about it. If accepting a voucher turned you into a public school such that government could regulate you in exactly the same way as it regulated its own schools, then the *Zelman* decision would have to be wrong. If acceptance indirectly of government money really does make you the equivalent of a government school, then inclusion of religious schools would be unconstitutional under the Establishment Clause.

A central premise of the *Zelman* decision and about a dozen others that preceded it is that in genuine private individual choice programs, the fact of a transmission of money to the private religious organization does not mean that the government is sponsoring what's going on. I think that has important implications for government's authority to regulate. The mere fact that government provides a voucher that someone then takes to a private school does not mean that the government owns the private school. It is not the case of the government directly funding a religious or other private organization.

My second constitutional issue is that if it is illegitimate to exclude religious schools from participation in a voucher plan on the ground that they are religious, then it is equally illegitimate to say that inclusion of those schools in a program may be conditioned on the schools' forfeiture of their right to maintain their distinctive religious identities in the program. That is the *Rosenberger* case; that's the *Mitchell v. Helms* case, talking about pervasive sectarianism.⁵ If it is unconstitutional for the government to exclude you because you are religious, then when it includes you, you still get to be religious. It just follows logically.

A constitutional lawyer would dress this up with a whole bunch of gobbledygook in terms of the unconstitutional conditions doctrine, which is, simplified drastically, that if you would otherwise have the right to a benefit, government may not condition that benefit on your relinquishment of a constitutional right you otherwise would have. That, I think, is the important rationale of challenging the restrictions that government may attempt to impose with voucher requirements.

Now, I will say a few words about David Souter's dissent in the *Zelman* case. Souter gives absolutely the wrong answer to absolutely the right question. At one point, Souter portrays himself as a champion of religious liberty because we must protect religious schools from themselves because if they start accepting this government money, there'll be all sorts of strings attached; look at the strings that are already being attached. Therefore, the program is unconstitutional under the Establishment Clause.

But the conclusion doesn't follow. The wrong answer is that this makes government voucher programs unconstitutional. The right answer is that when government has a voucher program, if a condition that comes attached is unconstitutional, it is open to the recipient to challenge the unconstitutionality of that condition — or not. First Amendment rights can be waived, and I think it's an important part of private schools to decide that, yes, we do not wish to discriminate. Yes, we wish to take all comers. And no, we do not have a problem with not advocating hate speech.

I think that, in principle, many of these restrictions would be unconstitutional. But the appropriate way for them to be challenged is in this next wave of litigation challenging the unconstitutionality of specific conditions as they arise.

I will stop there and give the others a chance. We will take questions a little later. Thank you.

PROFESSOR RICE: Thank you. I appreciate that. I really am one of the few people who read Mike Paulsen's articles, though. Mike and I and Mr. Scott have divided up the time. Mike has taken his 15 minutes and I will now take my hour and 45 minutes to explain these things in more detail.

Actually, I agree with a lot of what Mike said. The states have the authority to regulate private schools, even if they don't subsidize them, to some extent. Fire, safety, health regulations, Civil Rights Act on race, for example, which is a Commerce Clause-based thing.

But, I don't agree with Mike's analysis in terms of the subsidy because there really is a difference in the capacity of a state or federal government, as the case may be, to regulate when there is a subsidy involved. In *Wickard v. Filburn*, back in 1942, a man was prosecuted because he grew excess wheat on his farm and consumed it on his own farm. The Court said it is not lack of due process for the government to regulate that which it subsidizes. That is just common sense. There is no such thing as a free lunch. That is a basic natural law of possession.

By analogy — this is not in the same context at all — we have a principle in the Commerce Clause that when the state becomes a market participant rather than a market regulator, it is exempt from all of the restrictions of the Commerce Clause. So, when North Dakota goes into the cement business, it can refuse to sell its cement to citizens of other states. Why? Because it is in the business and it is putting state money into that business. When it puts state money into that business, it can act like any other entrepreneur.

When you get into the voucher routine, it does not matter whether you are talking about vouchers or tax credits. In the *Regan* case and earlier, in the *Bob Jones* case, the Court held that a tax advantage is a subsidy, just like a grant.⁶ So, when we look at this thing, we are talking about something that has a very human dimension.

If you take the money through the voucher, you are going to rely on it. And the result of this is that you are going to have three kinds of schools. First, you are going to have public schools — state schools — and the state school system is a failed system. Second, you are going to have authentic private schools — evangelical schools; Jewish schools; Catholic schools. And third, you are going to have state regulated private schools. Now, when you're a private school and you take

the voucher, don't kid yourself; you're going to rely on it. You're going to increase wages. You're going to incur debt. You're going to put a new program in. And you're going to be very reluctant to give that up. The uncompromising school down the street resists. The Lutheran schools in Milwaukee resisted the vouchers because of this. The uncompromising schools down the street will be put at a disadvantage just because they do not have the extra infusion of funds. Do not kid yourself.

This is a situation where you have a public school system that is sinking beneath the waves. The public schools have always been religious schools. In the mid 19th century, they had as a common denominator Protestantism. Starting in the 1960s with the school prayer decisions, the public schools have developed a secular religion, but they have always been religious schools.

The second point to keep in mind about public schools is that they do not do their job very well. They spend a lot of money but they do not do the job, particularly with the kids who need it most. So, you have that situation.

What would you think of the judgment of a passenger on the Titanic, as the Titanic is starting to go down by the bow and he's off in a lifeboat and he suddenly climbs back onboard. You would say, wait a minute; that is not very good judgment. He says, I want to stick with the ship. Why? I don't know. You wouldn't really respect his judgment very well. The Titanic here is the failed system of state schools, just at the point where we have a remarkable development in the growth of these authentic little schools — Evangelical schools; Catholic schools, Jewish day schools. And we have the home school movement, which has about 2 million kids in it.

Twenty-seven percent of the kids in the national spelling bee and geography bee were home-schooled kids. They are going to be the leaders of the future. Do you know why? Because they can read and write. And just at the point you have this great development, which is an application of subsidiarity, and if the Federalist Society ought to be in favor of anything, it ought to be in favor of Federalism and subsidiarity, things being done by families and by smaller groups.

Just at the point where we have these things taking off and you have a guy like James Dobson saying things like take your kids out of the public schools — just at this point, we're going to translate a good 1st Amendment constitutional decision in *Zelman* into the really mistaken prudential judgment that we ought to get vouchers. There are two questions. Are vouchers constitutional? Second, should we have them? It is really a very misconceived approach. Don't get the idea that somehow, you can resist, you can avoid these kinds of things.

There is a natural law operating here. There's a guy named Chuck Chvala, who is the Majority Leader of the Wisconsin State Senate. A couple of weeks ago, there was a story in the paper that he is supporting a measure to reduce the voucher from \$5,300 or whatever it is to \$2,000. Why? Because he says it is a Rolls Royce program — and he is a politician. What he is saying is that these schools are not accountable. They do not have accreditation. Their teachers do not have to be certified. They do not have to report in the same way as public school and so on and so forth. Do you see the picture? Don't kid yourself that you are going to get this kind of public money without some kind of public control.

And if you say, well, that's all right; listen, what we will do is have the school that will do the public school thing until two o'clock or three o'clock, and then we will switch and do the Evangelical or Catholic thing. No. In a private religious school — I don't care what the denomination — religion is supposed to permeate everything.

If you take the position, as for example in New York where they have public school textbooks, which is a great constitutional victory — the textbooks that are usable in the Catholic schools in New York have to be the public school textbooks. And the tendency there is for the Catholic education to be basically a public school education with holy water sprinkled on it, with a class in religion here and there. So this is not something that is an esoteric imagining on my part, I don't think. This is just a natural law.

There's a kid, Mark Hull, up in a Toronto suburb. Just a couple of months ago, this happened. He is a student at a Catholic school in a Toronto suburb. He went in to buy a prom ticket and they said, "Oh, who's your date?" "Jean Paul." And the school said, "Nothing doing. We're not going to allow a boy to bring a date who is a boy to the prom." The court said, yes you will, because they were taking government money. That's no surprise. Don't kid yourself. There is no such thing as a free lunch.

And when Charles Glenn was in the Bush Education Department, he did a survey of the educational systems in other countries. He did six countries — England, France, Holland, etc. I could read it to you. But basically, he said what happens is that the religious character of those schools is watered down. Estelle James, who was a World Bank economist and a professor at the State University of New York, did a study of 35 developing and developed countries and came to the same conclusion. This is simply a natural law. That's the way it works.

So please do not translate the constitutional victory — and it is that in *Zelman* — into a prudential decision that, therefore, vouchers are good. There are alternatives. You see, we have this private school and home school movement developing. Instead of climbing back onboard the Titanic and instead of trying to hook these private schools up to the public trough (incidentally, if you did that, vouchers would discourage home schools, which really is the wave of the future) instead of doing that, think about this: In 1948, the Internal Revenue Code enacted the personal tax exemption of \$600. That meant that for each individual, the first \$600 of your income was not taxed. That didn't mean you saved \$600; it was taken off your income. Now, if that had kept pace with inflation and tax rates, instead of it being — what is it now? About \$2,750 or

something like that — it would be significantly over \$10,000. If you did that, that would mean a family consisting of a husband, wife and three children would have \$50,000-plus of their income off the tax rolls.

That is a limited-government, Federalist, free solution. That's not a solution of trying to hook us up to the public trough. No, that's not the answer. The answer is to continue with these great developments that are happening. You have, for example, the growth of private scholarships, which are simply 501(c)(3) entities that give scholarship money to other 501(c)(3) entities. And they don't involve the state education department in that sense.

We have all kinds of creative things that we can do. But the most significant thing is the restoration of family control over education; families taking control of education through home schools and through the small religious and other schools. I think we ought to seize that moment and say, "Okay, how do we increase the ability of those schools to provide that education to the people who are really short-changed by this Titanic that is sinking beneath the waves?"

There are ways to do it. It's totally negative; it's unimaginative. On the other hand, it's very imaginative in thinking that you're going to take the money and not get the regulations. That's Disney Land. That's contrary to human nature and the record of every system that's done it. The constructive thing to do would be to continue with these authentic family-oriented private developments. Thank God for that Supreme Court decision, yes, but realize that the answer to this is not to hamstring the private school movement and the home school movement by trying to hook them up to the failed public system.

The last thing I want to say is this. There was a guy writing in the *Freeman* magazine back in July, 1986. His name is Dwight Lee. It was a very prophetic statement. He wrote an article on vouchers, and he said, if the voucher movement ever begins to take off, we will find that it is growing and it is being utilized by the public school bureaucracy. That was a prophetic statement.

He said, the voucher movement is going to be the last defense of the public school bureaucracy because that's the movement by which they are going to keep themselves in business by reaching out and taking control of these aided schools. It was a very prophetic statement, and it's true. So please don't translate the approval, which we ought to have, of the Supreme Court decision into the prudential decision, which in my opinion would be certifiably nuts, that we ought to hook our schools up to the public system, the state system.

Thank you.

MS. SMITH: David Scott.

MR. SCOTT: These guys are going to be a tough act to follow, but we'll see how we can go from here. I'm going to talk about two things. First, I think, from my introduction, I can tell you I'm not a voucher person. That's not where the depth of my experience lies. I'm a charter school person. I was asked to come here today to talk about educational reform in general, and then look at charter schools and the strings that are attached to them to see what lessons we can learn, evidence there is for what kinds of strings might be appropriate or inappropriate in a voucher setting.

I'm a big fan of school reform and school choice. You've heard the example of the public school as a Titanic that's sinking. Unfortunately, I think that's probably more accurate than any of us would like it to be. There are many people out there who see the existing system as being a failed system or a failing system or an inadequate system. And at the same time, many of those people want that system to work. I'm a big fan of public education. I think public education is a great strength for this country.

So, you've got the Titanic and it's sinking. Well, maybe we ought to be looking at how can we fix the Titanic. Can we pull the Titanic back up above the waves? Can we repair the hole created by the iceberg? Is it possible? I see some people shaking their heads; maybe some people nodding. I think you can fix the existing system by doing things to try to reform it. And how can you possibly do that?

Charter schools are one public example of how you can have a new kind of school. You take some kids away from the existing system, take five percent of their students, put them in a different system. Vouchers can be a way of creating competition. Take some of the kids away and put them in another system so that the system has to realize that it's sinking. People are jumping off of our ship. People are getting on these lifeboats that are floating around out there. They're going to charter schools. They're going to parochial schools. The people who can afford to do so send them to the best private schools out there, the best parochial schools. But we need to have a reform mechanism that can reform the system. I think that's kind of a patchwork quilt.

I have seen several scholars remark that charter schools are the most important educational reform initiative in the country today. I had the pleasure of speaking with Professor Green, who is on the next panel, out in Oregon earlier this year, and he made the remark that no educational reform initiative can succeed unless it is capable of reforming the entire system. So, when I look at education reform, I look at a large patchwork quilt of how can we impact the system. How can we make the folks who are driving that Titanic realize that they need to start steering before they hit the iceberg? Well, too late. How can we make them realize they have hit the iceberg? What can we do to try to help patch that hole?

With charter schools, you get the competition. With vouchers, you create some competition. When I started the

first charter school in St. Louis, I wanted to compete with the existing system; I wanted to beat the existing school district at their own game, take their kids away and make them realize that they were failing these kids. And who are the kids who were failing? The affluent families can send their kids to private schools. Middle-income families can send them to the parochial school at the corner that's a little bit less expensive.

Who can't make a choice right now in a system that doesn't have a voucher or doesn't have charter schools? The people who cannot make the choices are the kids who, quite frankly, need it the most. It is those inner-city urban families and kids, lower-income families that can't afford to make a choice. I look at vouchers and charter schools as ways of getting those people involved in this process of agitating to change the system. So I'm a fan of vouchers to the extent that they do that, but in the context of using them as a tool to try to fix the existing system. Take Washington, D.C., as an example, which has a horrible school system. Twenty percent or so of their students have left to go into charter schools, and that has had the impact of making the District try to do things to start competing with these new schools — magnet programs and starting to offer different services to families so that they can feel like they are getting a good value for their educational dollar.

How can vouchers do this? What we have heard today is that you are going to get money, give it to parents with some parameters on how that money can be spent; it is theirs to choose; it is a private choice, which is now constitutional, which is good news for saving public education in America. But what kind of strings come with that money and with charter schools? I will talk about charter schools first.

When you open a charter school, it's a public school, whatever that means. I think it means that it's a creature of statute. There is a law that allows charter schools to be created. And I also think that they are public because they get public dollars. And I also think they're public because they have to be open to every student who resides in the state of Indiana. They are public; they cannot discriminate; they are subject to all of the same kinds of rules that are set forth from an admissions standpoint on the traditional public schools. They are very public schools, and they are subject to certain rules and regulations.

But, charter schools are exempt from many of the strings that are imposed on the existing district. The charter school receives some freedom from many of the rules and regulations — like collective bargaining agreements and having to teach a fixed curriculum — so they have some freedom to teach in a different way, teach a different curriculum, and take a different approach to energizing their students to learn. In exchange, they are held accountable for the results that they produce with the taxpayer money that they get.

So, you have the charter schools trying to create reform and provide choice. And they are public in the way that I just described. With public funds and being a public school, they do have strings. They have to comply. The previous speaker mentioned the things that the state can do to regulate schools. You have to comply with health and safety laws; you have to comply with local zoning ordinances; you have to comply with the Americans with Disabilities Act; and you have to provide special education services to the students. So, even though there are freedoms in charter schools, there are still many requirements that the government imposes as part of the agreement that you make to get this license to run a school — a bargain for freedom in exchange for funds. But you're held accountable, and there are some strings that you have to comply with.

When you start to look at vouchers, and you can look at the Cleveland example, there are strings that are attached, even in the case in the statute that was found constitutional, about not teaching hatred toward certain groups or doing certain other things. I think we are going to see certain levels of strings that are attached to these dollars out there. The basis of the Court's opinion was to look at the purpose and effects test and go from there.

One of the strings that will have to be attached is to make sure that the purpose of the voucher program is a constitutional one and is not a discriminatory purpose. There are going to be strings that weren't really even addressed in the *Zelman* opinion that you're going to have to look at. Can you have a voucher program that gives lots of money to rich people to subsidize them to send their kids to schools that they're already attending? If you had a program that did something like that or was that wide open, I think there might have been a little bit more scrutiny on examining whether the purpose of the statute was a constitutional one.

When you look at the purpose side of the purpose and effects test, you are going to see some strings that are going to be attached in that area like they were in the Cleveland case about what kind of program we can have. What kind of voucher program even had the right kind of purpose, and how can we frame that to make sure you're providing a constitutional program?

There was a conversation earlier about the money going directly to the private hands, and whether you can put some strings on that money once the parents choose where that money is going to go. I have to think that you can. Whether we're going to be able to have certain strings or other strings is something that we don't know today, but I think you're definitely going to be able to see the schools that receive these monies being required to comply with health and safety kinds of law, education-related laws. Some of these schools, I believe, might be subject to making sure that the kids are passing certain state tests that they may or may not be taking, before they get these voucher programs.

I think there are going to be some areas, especially in the academics and state testing and things like that, where you're going to see these schools be subject to some form of regulation going forward. And the depth and breadth of those

is something that I think we'll see going forward.

With that, I will turn it back over to our moderator. Thank you.

MS. SMITH: We got started a little bit late, so I want to leave plenty of time for audience questions.

The first question I want to ask: is there a real danger that private religious schools who accept voucher money will lose their uniquely religious nature? Is there any way that they can keep their souls and still accept government money, or is it just inevitable that they'll have to lose some of that unique character?

PROFESSOR RICE: Yeah, let me take about 30 minutes to discuss that. The answer is yes. Yes, definitely. You know what's going to happen? It's going to happen not so much by formal litigation and law suits; it's going to happen by the human tendency to want to avoid problems. I mean, in Milwaukee after the second voucher system was put into effect, they put the opt-out provision in. The head of the Catholic schools in Milwaukee said, we do opt-out anyway. We don't proselytize in Catholic schools.

You know, the Second Vatican Council said the Catholic school is supposed to permeate the entire school day with the Gospel truth — the whole thing is permeated. And you cannot say, hey, we will be a state school for six periods, and then we're going to have a period of religion. No. That is hostile to the mission because that implies that you can separate history, science, whatever, from the ultimate principles and the ultimate questions.

There is no doubt about it; this is something where the tendency is going to be that you say, look, Justice Stevens went on at great length in the Supreme Court in one of the abortion cases, saying that the Catholic position that life begins at conception is a merely theological position. That's what he said. So, if you're going to talk about abortion, the school will say, go easy because we don't want to be in a position of discriminating religiously. Under Catholic teaching, the Eucharist can be given only to Catholics. Those who are not Catholics are welcome to participate in the Mass and so on, but the Eucharist is a sign of doctrinal unity. What is going to happen here, if you have Mass at Catholic schools receiving vouchers? What do you say to the kids who are not Catholic. There are all kinds of problems that come up.

Look, folks, there's no such thing as a free lunch. I don't think there's any question that that's the way it's going to operate. You're going to have three levels of schools; public, private and state-regulated private schools. Just at the time when we're on the threshold of breaking free with the authentic private school movement and the home school movement, we're going to climb back onboard the Titanic.

MS. SMITH: Professor Paulsen, you have some comments?

PROFESSOR PAULSEN: Sure. I actually agree with a lot of what Professor Rice said. I think that it is the case that religious schools will be tempted by Screwtape to compromise. The question is, what follows from that? Does that mean that voucher programs should be unconstitutional? No. We agree on that. Does that mean that voucher programs should not be implemented? Professor Rice says yes, we should not do these things. I think what follows from it is that voucher programs should be implemented and government should be stopped from playing Screwtape. That is the best way for private schools to maintain their autonomy.

Now, can I just take two minutes to respond to a couple things Charlie said?

MS. SMITH: One minute.

PROFESSOR PAULSEN: He says there's a difference between government's authority to regulate generally, and to regulate what it subsidizes. I think there is a mistaken premise, and thus it's very important for those who are aggressively in the vanguard of the school choice movement to seize on it. The premise of the *Zelman* decision is that receipt of a voucher is not government subsidization. If it were, there would be an Establishment Clause problem. It is a neutral program. For the same reasons that neutrality does not equal establishment, neutrality does not mean that you are now subject to government regulation that you otherwise wouldn't have been. That is my first point, that that is contrary to *Zelman*.

Second, government can regulate now, as Professor Rice agrees. So, we are not in any different situation in terms of the things that government tries to regulate. They can, right now, under the guise of civil rights law, attempt to impose on private schools a requirement of gay prom dates or using state-mandated textbooks. The question is, can they constitutionally do so or does the religious or other private school have the constitutional right to control its own curriculum decisions, personnel decisions, and school discipline policies? I think that question is not affected by the receipt of a voucher, once you accept *Zelman's* premise that receipt of a voucher is not itself government sponsorship or subsidization.

The third point is that there are these horror stories, and actually, Charlie, I want you to give them to me because I want to represent some Catholic schools challenging the New York requirement that the Catholic schools use the state-mandated textbooks. I can win this case. I really can. Once you have *Rosenberger* saying you cannot discriminate against religion, *Mitchell*, where the plurality says that a religious school gets to be religious and there's no pervasively sectarian

disqualification, *Zelman* and the *Boy Scouts* case, I think that equals the right of the religious school to control the content of its curriculum and its own decisions. I can win the gay prom dates case, too.

For every one of these private schools, government-attempt-to-regulate horror stories, I can give you ten public school horror stories because that's what I used to do for a living, is represent school kids who were being forbidden. I have cases of the kid who cannot pray at lunch; forbidden to pray silently and hauled to the principle's office. I represented a girl who was given a zero because the term paper topic she chose was the life of Jesus Christ. And she was given a zero. The Supreme Court denied cert because, of course, public schools get to control the content of their curriculum. I've had cases where sex education curriculum brought eighth graders up on stage in front of an assembly to simulate masturbation. The list goes on and on.

The difference between a public school system and a voucher-enabled, bigger private school system is that in the public school system, these kids can't get out. They don't have a voucher, they can't get out, and then they're subject to whatever government curriculum control or regulation it wishes to impose on its own schools. That is a lot greater restriction. Once they're in a private school context, we have other weapons that we can use to defend their autonomy rights.

MS. SMITH: Great. Let's take questions.

AUDIENCE PARTICIPANT: This is a terrific panel. Let's spend the rest of the day just discussing what they have brought up. I'm going to start by challenging Professor Rice. You said that the state schools are a failure, and you are right. But 50 years ago, we moved into a public school system in order to get to Shortridge High School, a very fine college preparatory school in that day. They all got a fine education and they all went on to fine colleges. Today, we have two grandchildren in Washington, D.C., and they can't find a decent education without going to a Catholic school, which we're in favor of, of course.

Professor, those were state schools then and they still are today, but something has happened. Why don't we identify what has happened and attack those problems so that we do not leave out those who do not have vouchers and who cannot choose where they want to go.

PROFESSOR RICE: Go back to John Dewey. What happened was the introduction into the public school system of a different concept of education. And it relates to the epistemology of the Enlightenment. We are at the tail end of the Enlightenment, which is the effort of philosophers and politicians over the last three centuries to build a society without objective moral norms, as if God doesn't exist. So, the epistemological basis of that, is a relativism, and that's what happening.

John Dewey in the 1920s was the architect of this sort of thing, so that the educational system is designed to promote not knowledge, not virtue, but adjustment. There are no absolutes. There are no rights and wrongs. The Supreme Court, in the *School Prayer* cases in *Torcaso v. Watkins* in the early '60s essentially declared the neutrality of all governments in this country on the basic question of whether God exists. So the government now is required to be neutral as between theism on the one hand and non-theism on the other hand.

So the kid asks the teacher, is the Declaration of Independence true where it says there's a God and if the teacher says yes, that's unconstitutional; it's a preference of theism. If the teacher says God died last week, it's unconstitutional because it's a preference of atheism. The only answer is "I, as the state, do not know." That's why, in the public schools, you have all these programs where you cannot introduce moral elements.

You cannot even talk about there really being moral norms. That is a large part of it. In addition, the reading business — the whole look-say method of reading — the whole thing is the Titanic and it's gone down the tubes. So that's why I think this is the last time for us to hook ourselves up to that sinking vessel.

AUDIENCE PARTICIPANT: I understand your point and I agree with you. But, sir, let me challenge you. You're part of the establishment of the school systems in a broad sense. Why aren't we fighting things like that? Political things? Philosophical things? Why aren't we simultaneously fighting them as well as finding answers for our kids?

PROFESSOR RICE: You know, the best way to fight this is family by family, individual by individual. Go and build your own schools and do your own thing and do it right. That's what's so encouraging about the situation today with the private schools and the home schools. And the last thing we ought to do is hook it up to the Titanic.

PROFESSOR PAULSEN: Let me make one follow-up comment on that. I think we are trying to fix those problems. All of these things that we're talking about — charter schools and vouchers — are ways to try to fix the system that is broken.

You asked the question, how did the system get broken? I think it's been breaking for a long time. What has happened is that the school district wasn't doing something that met a couple of families' expectations. Where the family had a higher expectation than the district would provide, they chose and left. They went to the suburbs. They went and left the

urban, inner-city schools. Then, the district got a little bit worse because there was a little bit less tax revenue and there was a larger percentage of slightly less gifted students, and then that crossed another threshold and even more people moved out to the suburbs.

Over time, what you are left with in the inner city, in a lot of situations, is the families who realize that the system is not good and cannot afford to leave it, or the families who just do not care. I think that the way to fix education in America — family by family is right at a certain level, and getting people to understand that educating their kids is probably the most important thing that we do; education is the most important thing to the future of this country. We've got to make education the number one priority at every level. Towns like Indianapolis trying to be a high-tech corporate or biotech gateway have to have the workforce. You've got to educate the kids. We do that by making that the number one priority.

MS. SMITH: We'll take the next question.

AUDIENCE PARTICIPANT: Yes, I have three questions that are essentially related. First of all, I think it was Professor Paulsen who said, isn't the whole point of *Zelman* that once the voucher creates a neutral mechanism for choice, the choice of that school is no longer state action?

Second, if government creates a food-stamp program, does it follow that it may constitutionally regulate the business conduct of a kosher deli?

Third, on the prudential basis, would you advise the literally thousands of independent, private, post-secondary colleges and universities in this country — and I sit on the board of one — to cease using Pell Grants, the G.I. Bill, and a litany of other similar aid programs, frankly on which the existence of most of these colleges now depend.

MS. SMITH: Can you answer this quickly?

PROFESSOR PAULSEN: Well, I'm in agreement with all of those questions, so I'll pass it off to Professor Rice.

PROFESSOR RICE: How did you state the first one again?

AUDIENCE PARTICIPANT: Isn't the whole premise of *Zelman* and the Wisconsin Voucher case that once the money is transmitted through a voucher, that cuts off the state action?

PROFESSOR RICE: No, state action is not really what's involved. The issue of state action comes up in terms of the 14th Amendment. It's clear from Supreme Court decisions such as *Rendell-Baker* v. Cohn*, that merely taking a state subsidy does not convert the private entity into state action. So, its action is not the action of the state for purposes of the 14th Amendment.

Remember that in the Grove City case, the Court held that if a college takes one kid with a Pell Grant, it is subject to all those regulations of the federal government on recipients of federal financial assistance. So the question then is not whether it's state action under the 14th Amendment but whether the federal administrators can impose regulations and restrictions on that entity, on the use on that money.

You mentioned the food stamps. Try using food stamps to buy beer or cigarettes. You can't do it. When we were talking about the Civil Rights Restoration Act, and I was involved in that, testifying on that in response to the *Grove City* case, the question came up, well, what about welfare checks that are endorsed to McDonald's? Suppose McDonald's took a welfare check? The opinion of both sides was, yes, that would subject them to these regulations.

This is not the state action thing. It's the question of whether having given the money, the state, the federal government, has the constitutional authority to supervise the way it's expended. That's a no-brainer. There's no question about that.

MR. SCOTT: But I thought that the question he was asking was whether that necessarily spells doom in the context, say, of Notre Dame, which obviously should have, or I assume, has kids who are on federal student loans, or maybe even have kids who are subsidized by state programs as well. The student loan program is huge but it hasn't crashed higher private education like Notre Dame, or even public institutions?

PROFESSOR RICE: It has crashed Notre Dame, hasn't it?

AUDIENCE PARTICIPANT: You think it has? Maybe it has crashed Notre Dame, but —

PROFESSOR PAULSEN: But not like the University of Minnesota's crash.

AUDIENCE PARTICIPANT: But the other question is that there is a very vibrant state-supported system of higher public education, right? So, public education can work at some levels. Why could it not work at all levels?

PROFESSOR RICE: We're talking here, first of all, about Notre Dame. Let me mention one thing that might be helpful on that business of Pell Grants and tuition and colleges. The college tuitions have gone up multiples of the inflation rate. It's out of sight. I've got kids coming out of law school now with debt of \$150,000. It's unbelievable. Two law students who got married now have \$250,000 in debt. Now, how did that happen? You know how it happened? Congress gave a subsidy.

Congress gave the subsidy, and then in the 1980s, they took the income limits off the subsidies so that you didn't have to be poor to get the federal guaranteed loans. And do you know what happened? The colleges raised the tuition and the limits went up, and they raised the tuition and the limits went up again. The colleges responded to this federal subsidy by relying on it. And they built these Taj Mahals on the backs of the students who borrowed the money to pay for it. The reason it's all messed up is because the government got involved. The government went in and started to subsidize it.

AUDIENCE PARTICIPANT: I agree that the government has messed up the lives of some of these students who are saddled with this huge debt. The legal profession having a situation where, in order to pay off their debts, some of the really good graduates can't afford to clerk because they have to make the money — often three times what their judge is getting. They have to go straight into private practice to get the \$150,000, \$180,000 to pay off their debt.

But have the schools been compromised? The students have been suckered into a situation which is sort of a Faustian bargain, but have the schools? Has Notre Dame been compromised? Has the University of Virginia been compromised? Has Harvard been compromised? I mean, there are a lot of problems with Harvard, but I don't think they're caused by student loans.

PROFESSOR RICE: It depends on how you look at it. Now, let me level with you in terms of Notre Dame. What Notre Dame is now is not what it was 30 years ago. What Notre Dame is now is a research university. They promote themselves —

AUDIENCE PARTICIPANT: That's because they are taking all this money from the federal government directly, but not through —

PROFESSOR RICE: — that's right. And it's part of the same business in terms of the gigantism that results from this money that becomes available through the subsidies. But you've got plenty of state institutions that are splendid colleges and universities. There's no question about it.

When you look at the voucher, we're talking about elementary and secondary. There you're talking about education, which is different in a formative sense. And I think there are different issues that arise there.

AUDIENCE PARTICIPANT: One of things that some people do not realistically see in their everyday lives but something that needs to be addressed — this gentleman talked about what has happened over the years that has made things different. Professor Rice, you talked about relativism, and actually out in what I call the world, we have a godless society. You have a lot of situations now — and it doesn't seem to matter what socioeconomic you are in. There are no families. So, we need to look at the situation where we have people who are involved in education, who are intact families, who are home-schooling or whatever they're wanting to do, and we do have to help them.

I believe decreasing taxes would be the best way because, again, they would have more money in their pockets. But when you look at the higher proportion of people, these kids do not come from families. These kids do not come from families. There are no interested parents. And it is not just your inner city; it's everywhere. So if we are going to fix public schools, I think you need to look at the fact that, in concert with that, you need to fix the American family and buoy that because without parental participation, children do not value education.

PANELIST: I couldn't agree with that statement more.

PROFESSOR RICE: I agree with that. And the thing about the whole family business is that that's a product of the cultural development — the secularism, the relativism, the autonomous individualism. The ultimate answer to these problems is, in the broad sense — I'm not talking about the sectarian sense, but rather the conversion of the American people back to the realization that there is a God and He is in charge, and there are rights and wrongs.

PROFESSOR PAULSEN: I agree with that. I'm just a humble constitutional lawyer, so let me try to bring this families observation back to the voucher thing. Here is where I am headed on this. The point of our education reform policies and the point of vouchers is to empower families to make education choices. It's very important to see the right of education and communications of messages to the next generation as a right that inheres in parents and in families; that the parents own the

school system, not the school system owning the children.

I think, however, that in a system of predominantly government-run schools, you're going to have exactly that upside-down situation where the government runs the schools, the government runs the kids, and the parents are not the consumers. That's why I think we have to move toward a decentralized, more privatized system of education in which the parents are the sovereigns, so that in terms of the legal directions in which we should go, we should build on *Zelman*'s language of true private choice. To the extent there are these problems of government regulating, let's fight the regulations, not accede to government domination of the education marketplace.

MS. SMITH: We have time for one more question.

AUDIENCE PARTICIPANT: This has been a fascinating discussion. I'm going back to the metaphor of the Titanic. I wonder, is the Titanic the fact that it's government or is it the fact that it's monopoly? Now, it happens that the monopoly is even worse because it's a government monopoly. And it's even worse because there's a lot of extra weight on deck, such as the relativism of society. But I think the premise of *Zelman* and the premise of those of us who have supported vouchers and charter schools and other forms of reform is that the monopoly is the worst thing about it, and anything that breaks up the monopoly is the most important solution. Fixing the government will help, too, but getting rid of the monopoly is most important.

MR. SCOTT: I think that's part of the patchwork quilt concept that I talked about. I mean, you are trying to break up that monopoly by creating competition and empowering people to make choices, and there are many different ways to accomplish that. Charter schools are one; voucher programs are another; religious schools; private non-religious schools — magnet programs within the existing public system is another way to do it also. So there are ways outside the system and inside the system to try to do those things. But I think that breaking up the monopoly and giving choices and empowering people to make those choices is what is going to reform the system.

PROFESSOR RICE: You put your finger on a big point. The public school system, the state school system, was founded on compulsory attendance and compulsory taxation, so everybody has to support it and kids have to go to it. What we are talking about in terms of the voucher is how do we liberate parents and students from this system? I don't think it is a real liberation to say, well, instead of a 10-foot leash, we are going to give you a 25-foot leash, because you are still on a leash. That is not the answer. The answer is to continue with these great developments that have sprung up by themselves in terms of private schools and home schooling, rather than to climb back on board the Titanic.

PROFESSOR PAULSEN: I agree that monopoly is part of the problem, but I'm actually quite a radical on this. As long as government retains any control over the content of education and exit options are costly and burdensome, it is an interference with the 1st Amendment rights of families and parents to direct and control the upbringing of their children.

I favor private alternatives to government, but eventually, in the end, I'm deeply suspicious of the idea that government retains the ultimate or primary control over the content of the education of the next generation. I wouldn't accept a government-dominated marketplace in newspapers, and I wouldn't accept it in education, either.

¹ *Newton v. United States Congress*, 292 F.3d. 597 (9th Cir. 2002).

² *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).

³ 515 U.S. 819 (1995)

⁴ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

⁵ *Mitchell v. Helms*, 530 U.S. 793 (2002).

⁶ *Committee for Public Ed. And religious Liberty v. Regan*, 444 U.S. 646 (1980); *Bob Jones University v. United States*, 461 U.S. 574 (1983).

* This panel was part of a conference sponsored by the Federalist Society's Religious Liberties Practice Group and Indianapolis Lawyers Chapter. It was held on June 28, 2002 in Indianapolis, Indiana.