RELIGIOUS LIBERTIES

SCHOOL VOUCHERS: PAST LESSONS AND FUTURE PROSPECTS
A CASE STUDY ON CONSTITUTIONALITY: *ZELMAN V. SIMMONS-HARRIS*

Mr. Richard Komer, *Institute for Justice*
Professor Steven Green, *Willamette University*
Mr. Marc Stern, *American Jewish Congress*
Professor Michael Paulsen, *University of Minnesota Law School*
Mr. James Ammeen, Jr., *Lewis & Kappes, moderator*

MR. AMMEEN: The fortunate timing of this conference is not a coincidence. Knowing that the Supreme Court would hand down its decision this week, we have assembled a panel of distinguished scholars and experts on religious liberties and constitutional law with respect to school choice. We will hear opening statements from each of the panelists and then the panelists will take questions from the audience.

Professor Steve Green is a Professor of Law at Willamette College of Law. Professor Green served for nine years as General Counsel and Director of Public Policy for Americans United for Separation of Church and State. He has extensive litigation and appellate experience in First Amendment law and has participated in several cases at the U.S. Supreme Court. Professor Green holds a J.D. from the University of Texas, and a M.A. and Ph.D in American Constitutional and Religious History from the University of North Carolina, Chapel Hill.

Richard Komer is senior litigation attorney for the Institute for Justice. Prior to his work at the Institute, Mr. Komer worked as a civil rights lawyer for the federal government, working at the Departments of Education and Justice, as well as at the Equal Employment Opportunity Commission as a Special Assistant to the Chairman, Clarence Thomas. His most recent government employment was as Deputy Assistant Secretary for Civil Rights at the Department of Education. Mr. Komer received his law degree from the University of Virginia in 1978, and his B.A. from Harvard College in 1974.

Marc Stern is co-director of the Commission on Law and Social Action of the American Jewish Congress. Mr. Stern is one of the country's foremost experts on the law of church and state. A graduate of Yeshiva University and the Columbia University School of Law, he has been attorney with the Congress since 1977, conducting litigation, preparing amicus curiae briefs, drafting legislation, and giving public testimony on the full range of church-state issues.

Michael Paulsen is the Briggs & Morgan Professor of Law at the University of Minnesota Law School, where he has taught since 1991. He is a graduate of, inter alia, John Marshall Elementary School (in Wausau, WI), Northwestern University, Yale Law School, and Yale Divinity School. Professor Paulsen is a former federal prosecutor, former senior staff attorney for the Center for Law & Religious Freedom of the Christian Legal Society, and a former Attorney-Advisor in the Office of Legal Counsel of the US Dept. of Justice (Bush I). He has been involved as counsel or amici in dozens of free speech and religious freedom cases, including, most recently, *Peter v. Wedl*.

I will now turn the time over to our panelists, Professor Green.

PROFESSOR GREEN: Some of us have been litigating these cases for quite a while. So some extent, this decision is surreal. I first became involved in voucher cases back in 1992, in a case out of New Hampshire. And I've been involved in most of the later cases. All along we realized that this issue would eventually go to the Supreme Court, so it's a strange experience after such a long time to finally have a decision — not that the outcome was that unexpected. We'd all been saying it would be a five-four decision, and it was a five-four decision. So, it's nice to know that we were right about some things.

Let me give you a brief overview of the case and the holding, and then I can get my five-minute observation.

The Cleveland voucher plan was enacted in 1995 and became effective in 1996. It provides a voucher of up to $2,250 for children to attend private schools in the Cleveland area. The amount of money depends on one's income level. I believe that 200 percent of poverty line is the priority cap for the $2,250 figure. If you make a little more income, then the amount of the voucher goes down to about $1,800. So, it's not a whole lot of money.

Low-income families are given a priority for their children to receive the voucher, although that has not always been the case. (Pardon me if I editorialize as I go along, but I can't resist. That has not always been the case because recently, only about 40 percent of the children who've received the vouchers have come from lower-income families. But that was the intent of the state legislature; at least it seemed to be.

By 2001, 56 private schools participated in the program, 46 of which are religious, which means that 82 percent of the schools are religious. However, that figure belies the actual number of the available seats in the various schools, because religious schools are far larger and have a greater number of seats — 96.6 percent, as the Court noted in its figures. Actually, this last year religious schools accounted for 99.4 percent of the available seats. So, if you were a parent and you received a voucher, then 99 percent of the available seats would be in religious schools.

You can thus see the constitutional issue: whether the voucher program, of providing funds that inevitably, eventually flow to private religious schools violates the Establishment Clause of the Constitution, the prohibition against funding religion, religious activities, worship and religious instruction.

As was mentioned in the previous panel and recognized in several cases, many religious schools — not all of them, but at least the traditional parochial schools — integrate religious values, traditions and teachings throughout their curriculum. They don't segregate them from the regular curriculum. The Court had traditionally held, since 1947 or 1948 until more recently, that it was unconstitutional to fund religious schools, at least through an unrestricted funding mechanism, because the money could be spent on religious education. In essence, there was no way to ensure that public funds were not paying for religious instruction and religious education.

As we will discuss, the Court has been slowly changing its case law over the years; however, as recently as two years ago in the case of *Mitchell v. Helms*, the Court reaffirmed that public funding of religious indoctrination and worship is unconstitutional, even if it takes place under a neutral program. What we mean by that is a program that is made equally available to recipients who participate in a private, religious private, non-religious or even public context. In essence, the court held that even though a program may be generally available, if government is funding religious instruction and religious worship, it would still violate the Establishment Clause.

And so, what Zelman came to then is what is the effect of private choice? What is accomplished by not providing the voucher directly to the school? If you give the money to parents and the parents turn around and give the money to the religious schools, does that a constitutional make difference? Does that action "break the circuit," as Justice Souter said in one of his decisions several years ago? Does it break the chain of responsibility such that it is now the private citizen's choice about how the money is being spent and where the money is being spent?

One of the arguments that we made in this case, is that for there to be truly effective private choice — and the Court has said that "genuine independent, true choice must exist," — is that there must be a true universe of options for parents. In essence, parents must be able to choose among a wide array of potential institutions to place their voucher monies.

Our argument was that when a parent qualifies for a voucher, and then, looks in the phone book and asks, where can I send my child, "that 99 percent of the available options are going to be religious schools. This situation does not provide a wide array of options. Rather, the limited options create incentives toward religious education that violate the Establishment Clause.

Well, let me provide some background to this case. As I mentioned, Zelman was filed in 1996. It was first filed in state court alleging violations of several provisions of the Ohio State Constitution — the comparable 1st Amendment provisions plus some specific funding prohibitions within the Ohio Constitution about public funds being used only for public purposes — those types of provisions that you offer find at the state level. What ended up being the kicker was what is called a single-subject rule in Ohio: that when you pass a piece of legislation. It has to appear in a free-standing bill as opposed to being thrown into an omnibus bill.

We filed a law suit in 1996 in state court..

We lost at the trial level in Ohio. We took it to the Ohio Court of Appeals, and won — I believe it was three-zip, was it?

PANELIST: Two-zip.

PROFESSOR GREEN: Two-one. Anyway, we won at the Ohio Court of Appeals. The state appealed to the Ohio Supreme Court, and the Court struck down the voucher program based on the single subject rule issue. However, a majority of the justices opined that the program would likely be constitutional under the Establishment Clause.

We then refiled the case in federal court offer the Ohio legislature reenacted the same law the appropriate way. We obtained an injunction from a district court judge to halt the program. That was stayed by the Supreme Court a month or two later to allow the program to continue in operation.

We ended up prevailing at the district court, which held the program unconstitutional. The state appealed to the 6th Circuit Court of Appeals. The 6th Circuit affirmed in a two-one decision. So when we went to the Supreme Court we had a good idea that the Court would take the case, primarily beacuse they had already expressed an interest before. The Wisconsin voucher case had gone up to the Court two or three years earlier, in 1998, after the Wisconsin Supreme Court upheld the Milwaukee voucher plan. The Court denied cert in that case, so everyone thought there was a good chance that the Court would take the Cleveland case when it got to the Supreme Court.

As mentioned, the Supreme Court upheld the Cleveland voucher program five-four reversing the 6th Circuit Court of Appeals, the majority opinion being written by Chief Justice Rehnquist.

The Court held that this case, or at least this situation, falls within what the it has been saying for about 20 years. It referred to three cases primarily — a case called *Mueller*, a case called *Witters*, and a case called *Zobrest*. These three cases, the first one coming in 1983, is where the Court started to write about neutral programs and private choice, at least in a consistent manner. The Zelman Court held that the Cleveland program meets these criteria of neutrality and choice. The legal

issue was whether there is genuine independent choice or whether the program does not offer true choice but creates incentives for religious education.

The Court held — let me read a short excerpt — "*Mueller*, *Witters* and *Zobrest* make it clear that where a government aid program is neutral with respect to religion," in essence, it doesn't identify religion in the language of the law, "and provides assistance directly to a broad class of citizens who in turn direct government aid to religious schools wholly as a result of their genuine and independent private choice, then the program is not readily subject to challenge under the Establishment Clause."

So, focus of the arguments last February was to what extent should courts look outside the voucher program to consider whether there are available alternatives for parents. Justice O'Connor particularly, in her questioning during oral argument, wanted to know to what extent could, courts consider other types of alternative programs besides the voucher program and whether this sufficiently broadened the universe of options for parents.

The questions focused on the charter schools, the Cleveland community schools, the magnet schools, and a tutorial program. In essence, how much should these programs figure into the mix? The more that you pile on or broaden the universe of options, then fewer of those options are religious. This in turn will enhance the constitutionality. This is exactly what the court did — at least what the majority found — in its decision.

The majority said that one must view programs as a part of a whole. Courts must view them broadly, to see how a particular program fits within broadened educational alternatives. The Court said that it was appropriate to consider tutorial, magnet, charter and community schools, and consider all of them in this broad universe of options for parents. Once it did so, the court noted that the percentage of religious seats or religious participants drops from 96 percent down to 20 percent.

Chief Justice Rehnquist also said it could not look at a snapshot of any particular year — that participation is a dynamic process. The number and character of schools may change over time and may fluctuate. The Court also distinguished a case from 1974 called *Nyquist*, which was the primary impediment, for the voucher proponents to prevail in this case. There, the Court had struck down a very similar program, a tuition reimbursement program that gave tuition reimbursements for parents to send their children to private schools. The difference was that that program was limited to private schools, and in that case the Court did not consider the greater universe of educational options that were available to parents.

Justice O'Connor, who had been key in a couple of earlier school aid cases in the last five years, filed a concurring opinion. But unlike her vote in *Mitchell v. Helms*, Two years earlier, where she wrote separate concurring opinion without agreeing with the plurality, here she agreed with the reasoning of Chief Justice Rehnquist. However, she wanted to emphasize that "We must consider all the educational alternatives. Beneficiaries, however, must have a genuine choice in the matter." Interestingly enough, both Justice O'Connor and Chief Justice Rehnquist said that they did not see *Zelman* as being a significant departure from prior Establishment Clause jurisprudence.

Significantly, Justice O'Connor also emphasized that the case involved indirect aid, the implication being that a direct aid program, even under a neutral plan, still would raise constitutional problems.

In my remaining time, let me make a few comments about the decision. I believe Justice O'Connor is correct on one level. If you accept Chief Justice Rehnquist's decision and her concurring opinion at face value, it does not appear to be a major change in the law. As I mentioned, the Court has been speaking about neutral generally available programs that are not designed, at least in their language, to benefit religion or favor religion in any way. — They've been talking about neutral aid programs of general applicability with independent choice this for at least 20 years, since the Court upheld the Minnesota tax deduction case, the *Mueller* case.

Zelman is a rather cautious decision. The Court puts its analysis squarely within what it already said in the *Agostini* and *Mitchell* cases. In some ways, those were more path-breaking, especially Justice Thomas' plurality opinion in the *Mitchell* case.

I would almost argue that you could view the majority opinion, Chief Justice Rehnquist's opinion, in this case, as a step back from the *Mitchell* case, with, Justice O'Connor agreeing, because the majority seems to suggest that genuine independent choice is the key. Even though the program must be neutral and generally available, there must also be a wide array of programs that are available in order for independent free choice to work. In essence, neutrality of the program alone would be insufficient.

If you go back, though, and read Justice Thomas' plurality opinion in the *Mitchell* case from two years ago, you see the opposite emphasis. Justice Thomas emphasizes neutrality, and he sees choice as being a secondary, supportive mechanism that is not always necessary. Neutrality was determinative, at least, for the plurality in the *Mitchell* case. Private choice was helpful but it does not seem to be necessary. But here, in order to ensure the vote of Justice O'Connor, the Court had to emphasize the wide array of choices.

Therefore, I would argue — and you might say I'm putting the best face on this, and I guess I have been — that a program that does not provide a wide array of choices would not satisfy this decision. It would fail. You could argue, in fact, as a result of this decision that secular options must clearly predominate. The Court did not provide a litmus test, did not tell us exactly where that line is going to be, but both Chief Justice Rehnquist and Justice O'Connor emphasized that when you

consider all of the comparable programs, that only 20 percent were religious. That would seem to suggest that if you had a voucher program that was primarily religious and there weren't a sufficient number of alternative secular programs, that would be problematic.

O'Connor also emphasized the seamless web that existed between the charter schools, community schools and voucher schools, that these were all of the same kind, even though they didn't appear in the same statute or were not established at the same time. She emphasized that these were very similar programs. In fact, two of the largest private schools in the Cleveland area changed into charter schools because they were non-religious. This shift from private into charter, in Justice O'Connor's mind, made it very hard to distinguish between private schools and charter schools.

Of course, we argued that the Court was comparing apples and oranges. Even if you consider charter schools and community schools in the mix, they are still state controlled, state run schools, so that there are different types of accountability, financial performance, testing standards, things like that. There are different eligibility requirements sometimes, especially for magnet schools. They may make a preference for certain types of students. So to say that all voucher parents have the option of putting their children in a magnet school is not necessarily true.

And on the flip side, under the voucher program, there's a preference for siblings of children who already attend the private school. If you look at the law, low-income children are the third in line when it comes to priority.

Also, between charter, magnet schools and private voucher schools, there are differences in student and parental rights issues: access to information, the right to a due process hearing, the type of punishment system, certain definitions of public control, and certainly being exempt from anti-discrimination laws that may apply. So we argued that there are significant differences between private schools and magnet and charter schools, which are still part of the public system — that the Court was comparing apples and oranges.

Well, is this a significant decision? As I said, it may not be in the law, but from a practical standpoint, it is a significant decision. Certainly, it opens the door to an extensive transfer of public funds to private institutions. Granted, some of that's been going on for a while. But this case is different in two important respects.

First, the total amount of funds transferred may represent a significant shift in the money that will go to private schools. The Court mentioned that within Cleveland, the average religious school receives close to $600 per-capita in various forms of public aid separate from the voucher program. Such aid, according to the earlier Supreme Court decisions, is restricted to discrete types of secular services, which traditionally have been hot lunches, text books, transportation — you know, the litany of things the Court has upheld as able to go to religious schools. Here, however, we're not talking about $400 or $500 per student; we're talking about, as in Milwaukee, $6,000 or $7,000 per student. In essence, the voucher pays for the entire educational experience.

In essence, the decision may lead to significant transfers of money, which leads to the second point, that for the first time, putting aside the *Witters* case, which was a college case, public funds will pay for the entire educational experience. Once again, vouchers are not a discrete program. It pays for the full panoply of what is being offered. Religious instruction and worship is integrated into the curriculum. The prior barrier had prevented payment for religious activity, being limited, as under the *Agostini* case, under Title 1 services, and in *Mitchell*, under Title 6 services, to secular services and activities.

In *Zelman*, both the majority and Justice O'Connor reject the substantiality argument, that it makes no difference whether substantial amounts of money flow to religious schools. This aspect makes this case significant. Justice Souter is correct in his dissenting opinion that this does represent a change. The Court has in the past been concerned about divertability and substantiality, and here the Court seems to reject both concerns.

It is also unclear what to include in the universe of options. If you read the opinion the majority looked to magnet schools, to charter schools, tutorial programs. At one point, Chief Justice Rehnquist makes a passing reference to public schools, but you don't see him relying on public as part of the universe. Justice Souter, however, is correct, that the principle has no end, and it logically flows to considering public schools as one of the options we. And if you throw all potential options into the mix, all public schools, then you can easily justify a religion-only voucher program because if you look at everything, then it will not matter that some of the programs may be entirely religious.

Well, what's the practical fallout of this decision? I think it will reinvigorate a voucher movement that has stalled over the last several years — at least renew the interest in vouchers. I question whether it's going to affect significant legislative change, though, because the emphasis has been toward charter schools.

As some of the questions in the earlier panel intimated, there will be increased concern by public officials, about control, and accountability. There will be greater control with magnet and charter schools than within voucher programs. And with today's economy — I live in Oregon and our legislature is in the third special session trying to come up with $860 million to correct a budgetary shortfall, and is slashing public school spending left and right. I don't believe there's going to be a great groundswell (among people) to provide money to voucher schools, especially when you see, as in Cleveland, that the $15 million that funded the voucher school came out of disadvantaged student funding. Thank you.

MR. KOMER: Hi. I'm Dick Komer, and you've been subjected to the usual Institute for Justice bait-and-switch. You came expecting to see Clint Bolick, who is Litigation Director and Vice President at the Institute for Justice, and instead, you get me.

This happens to me all the time.

Clint makes commitments and I fulfill them.

It is, however, unusual for us. The Institute for Justice was founded roughly 11 years ago. One of the things we've been litigating ever since is school choice cases against these fellows on my left — and it's been a traveling road show all over the United States. Yesterday was the culmination of a war for us that was longer than the Trojan War for the Greeks, and it's not over. There is ongoing litigation involving one of the six voucher programs that currently exist in the United States in the state of Florida, which I'll talk about briefly at some point.

What I'd like to focus on today is the "what next", from our perspective. We support school choice in its myriad forms — charter schools, tax credits and voucher programs. The litigation has largely involved vouchers and tax credits because the legal issues involving charter schools are substantially different and don't really require our specialized skills. But what we have today, I think, is a fairly incremental decision, as Steve pointed out. On the other hand, it was an essential step for voucher programs to continue because they have always suffered under a constitutional cloud. I agree with Steve that this decision in some ways is less far-reaching than *Mitchell* was, but for a different reason, I believe.

The Supreme Court has always distinguished between institutional aid programs, like *Mitchell*, where the aid is to a school, and individual aid, student assistance type programs. And the voucher programs, we believe, are in fact individual assistance type programs. For us, the relevant analogous programs tend to be in higher education, or even pre-education.

We don't see voucher programs as different in structure or principle than Pell Grants or guaranteed student loans or the sorts of vouchers that people received under the Community Development Bloc Grant that can be used for pre-school activities, which can be used at religious schools. Everyone understands and has no real difficulties with the idea that Pell Grants and GSLs can be used at religious schools to pursue religious studies. It was only at the elementary and secondary level that doubts remained. And because this program was in fact a student assistance type program, they didn't have to go as far as they did in *Mitchell*, in allowing institutional aid to go to religious institutions, because it fit within their prior decisions in *Mueller*, *Witters* and *Zobrest* much more closely.

This was our fifth cert petition, and the fifth time we tried to get the Supreme Court to take up one of these cases. I think one fact that Steve did not mention that may have swayed the Court in granting cert this time, besides the increase in conflict among lower courts, was the fact that this was the first time that, if they did nothing, the lower court decision that they would be leaving in place would have changed the status quo.

For the past six years, the program has been providing an escape hatch to school children in Cleveland. We represent actual school children in Cleveland in this litigation, as opposed to the State of Ohio, and it mattered very much to us that they take the case because otherwise 4,300 kids were going to return to really bad public schools.

I think that they may have taken it because there was something very real at stake. In the previous decisions, including Milwaukee, which is very similar, we had prevailed below and denial of the cert petition did not affect the kids in the program.

The importance of the distinction between institutional and student aid will be critical to future legal issues involving school cases, both in the Florida case and in any further efforts at the state level, for the complicated reason that a number of the state constitutions, including Florida, have their own religious clauses, their own religious language.

There are about 38 states — people argue over two or three of them — that have language which is called Blaine Amendments, and which, roughly paraphrased, say that the legislature shall not appropriate any public funds to any sectarian institution or school. Sometimes they say both institution and school; sometimes one or the other. But the thrust is there.

Now, that language is language that clearly is aimed at any form of institutional aid. It in fact derives from the efforts of the Catholic schools to receive the same sorts of direct aid that the then-Protestant, public schools received. Most of us — especially those less than 50 years old, which does not include me — don't know much about the history of American public education. But the Catholic schools were originally established in contrast to the public schools, which were deliberately created as Protestant institutions. They were deliberately created to civilize the heathen, which at that point included Catholics.

So you had the Catholic schools created to provide their kids with the same sort of religious education the Protestant denominations were providing their kids in the non-denominational, non-sectarian public schools. They were called non-sectarian to distinguish the fact that all different sects of Protestants were supposed to be comfortable in the public schools; not to distinguish themselves as non-religious schools from religious schools.

As a result, there was a movement in the second half of the 19th century to get equal rights, basically, on an institutional basis for Catholic schools. The Blaine Amendments were a reaction to that, to reserve all public funding for the Protestant public schools rather than give equal money for the Catholic schools. That's why their language is the way it is. Well, this very distinction between student aid or student assistance and institutional assistance is the one that the Supreme Court has been developing in its establishment clause jurisprudence all along.

The majority of states that have Blaine Amendments as well as others also have religious language that can be called "compelled support language," which says no person shall be compelled to support a ministry without his consent.

This is older language and it's found in some of the older state constitutions. Since 29 states have "compelled support" language, and 38 states have Blaine Amendments, you can see a number of states have both. There are only three that don't have either, as far as I can tell. That's Maine, North Carolina and Louisiana, for whatever peculiarities of those states.

The compelled support language is generally less problematic. But what we have is a long history now of the U.S. Supreme Court accepting certain forms of assistance. The state legislatures are then passing those forms for their state, and then a challenge is being brought by entities similar to those represented on my left here, and sometimes succeeding.

For example, in 1947, when the Supreme Court upheld transportation subsidies for all students, including those attending religious schools, a number of states passed similar legislation. But under their state constitution that legislation was sometimes struck down. For example, Alaska, Georgia, Hawaii, Idaho, Kentucky and Washington State all struck down those under their state constitutions. Similarly, in 1968 in the *Allen* decision, when secular textbook loans to all students were approved by the Supreme Court, a number of states implemented the same sort of program — it was a New York program — but it was struck down by state supreme courts in California, Kentucky, Massachusetts, Missouri and Nebraska.

Then the Supreme Court in *Witters* upheld the use of vocational rehabilitation funds to become a pastor at a religious college, and a number of states had parallel state Pell grant-type programs that they then found could not fund students at religious schools; for example, Alaska, Virginia and Washington. Once again, Washington.

Washington is a particularly good example of how the Blaine Amendments operate in a non-parallel fashion sometimes. The *Witters* case came from Washington. Mr. Witters received a unanimous decision from the U.S. Supreme Court that it was okay for him to use his money to pursue a religious vocation at a religious school, but they remanded it to the Washington Supreme Court for a determination under their Blaine Amendment. Washington then determined that it was not okay under the state constitution in a four-three decision.

So, what does this portend for us? Florida has a Blaine Amendment. These folks are involved in litigation against one of the two voucher programs in Florida and they are now left solely with a state constitutional issue. They will argue that the aid to the individual families that are using it at religious schools is in fact a violation of the state Blaine Amendment, which we will in turn argue is aimed at aid to schools, not aid to parents.

We also expect that we will need to affirmatively begin attacking those interpretations of state Blaine Amendments that we believe exceed the federal Constitution's Establishment Clause interpretation. We will use against those other Supreme Court decisions that have been developing in the same modern period, such as the *Widmar v. Missouri* decision and the *Rosenberger* decision. In *Widmar*, you may recall, the University of Missouri refused to let student religious organizations use their facilities on an equal basis with non-religious organizations. The Supreme Court struck that down on the basis that it discriminated against religion, and refused to accept the argument of Missouri that their state constitution required it because it was more restrictive.

Similarly, in *Rosenberger*, the University of Virginia, my alma mater, refused to fund student religious publications when it was funding all other student publications. And that was struck down despite the fact that the Virginia Constitution has Blaine Amendment language, as well as compelled support language. We will need to bring law suits like that in some of these other states that I've mentioned in order to bring the two constitutions into alignment.

We believe that drawing religious lines violates the Federal Constitution's Free Exercise Clause, the Free Speech and the Equal Protection Clause. It's a privilege for me to be here today with Michael Paulsen, who's on the panel, because he's actually succeeded in some cases like that in the federal courts, particularly the *Peter v. Wedl** decision. So, I'll shut up at this point so that other people can talk, and I'd be happy to take your questions later.

MR. STERN: Let me just pick up where Richard ended because state constitutions will clearly be an important area of litigation. The state constitutional provisions which restrict in fairly explicit terms state aid to religion will clearly be a crux of future fights over vouchers. Notwithstanding that broader language, some state courts have tended to bring their constitutions in line with the federal constitution. That clearly happened in Ohio and Wisconsin, notwithstanding fairly clear evidence, historically, that a more restrictive intention was embodied in those provisions. We may escape this problem with constitutional misinterpretation by state courts.

One of the provisions in the original Ohio voucher plan by the Ohio Supreme Court in the course of opining that plan did not violate the Establishment Clause violation, is a provision that permitted religious discrimination by participating schools. The Ohio Supreme Court volunteered that that would be unconstitutional and ordered it struck, if the legislature reenacted legislation, leading to the anti-discrimination provision they talked about in the earlier session.

Notwithstanding the confident predictions we heard earlier this morning that the states will not be able to enforce and will not willingly enforce the religious non-discrimination provisions on the schools, even a court prepared to uphold a voucher program is apparently not prepared to sanction religious discrimination. In any event, it's going to be very difficult for legislators to do that directly.

I have many scars on my body from the fights over Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, in which we tried to preserve civil rights claims under those statutes. That is, a religious citizen could challenge application of civil rights statutes under those religious freedom statutes. We failed miserably. We

could not find a single senator, Republican or Democratic, prepared to resist an amendment to the bill that would exclude the civil rights laws from coverage. As many of you know, the most politically potent argument against charitable choice has been the argument that it will permit religious discrimination.

I represent an organization that's opposed to charitable choice. We also happen to believe that religious organizations ought to be able to engage in religious discrimination. Those two positions have found absolutely no treadway together. Our position has been politically untenable.

If Professor Paulsen is confident that he can prevent religious schools from being regulated, it will be in the courts. It is very unlikely that it will be in state legislatures. It's very difficult for legislators to get up and vote in favor of religious discrimination. If you're advising a client, you've got to tell him that for a couple of years you're probably going to have to put up with the rules or take the chance that nobody will notice.

I turn to yesterday's opinion and apply it to charitable choice, which I think is probably going to be the most immediate impact. Justice Rehnquist engaged in a highly formalistic, other-worldly analysis of the Constitution. One of the most astounding things he's ever written is that facts don't matter in constitutional law. That applies in any case in which he wants to uphold the statute. In case civil liberties plaintiffs are bringing facial challenges to the statute, Justice Rehnquist is quick to remind us that we need facts to decide cases. That's somewhat editorial, but still accurate.

There is a tension between *Zelman* and cases like *Salerno*, which says we can't throw anything out on its face unless we've got a lot of facts, and most circumstances will lead to an unconstitutional application of the act and *Zelman*'s willingness to litigate constitutional issues in the abstract. In decisions like *Mueller* and *Zelman*, the Court refuses to be bothered by the actual operation of the program.

That's important for a couple of reasons. One is how real the choices have to be. I am now litigating a charitable choice case in Texas, involving direct funding of a program to offer transitional welfare-to-work programs. The nearest secular alternative is 50 miles away. That's a choice; it's theoretically available. It's not really available to people who are on welfare and can't own a car that will go 100 miles a day and can't afford the gas. But it's a theoretical choice. Now, which counts under *Zelman* and Justice Rehnquist's rather theoretical approach? That's an unanswered question.

Remember, of course, you need Justice O'Connor to get five. Everybody needs Justice O'Connor to get five. I was asked after oral argument what the result was going to be. The reporter wanted to know if the result would be dictated by Justice O'Connor? I said indeed. And so will lunch in the Justices' dining room today be dictated by Justice O'Connor.

For charitable choice, it's going to be a particular problem, not for legal reasons but for practical ones. When you're dealing with dysfunctional populations, which is most of the social welfare services, you're not necessarily dealing with people you can hand the voucher and expect them to find a useful program. If you're thinking of running a program like that, and you have to invest substantial money up front to hire teachers and get a building and equipment, then you're relying on, say, reformed drug addicts to know that you've got a better program than the fly-by-night guy down the street. You may not think that's a worthwhile investment of your money.

While it's a theoretically fairly easy way to voucherize charitable choice, there are a lot of practical problems between here and there.

In much of rural America, distances are large, public transportation doesn't exist, and there aren't going to be a whole lot of people to serve. So, there may not be enough to justify competition, particularly when you've got to make the investment on the chance that somebody will come. It's not clear that the voucher alternative will offer very much. That will not be as true in urban areas, where there's mass transportation and enough people around that you may be able to have several alternatives.

Steve Green also referred to the fact that this is a very modest opinion, and I think that's right. I detect almost an apologetic note in Justice O'Connor's opinion, trying to justify how she could be here when much of what she's written would seem to point her in another direction. Let me point to some issues that I think are open. I think the question of the viability of the pervasively sectarian doctrine is left open. Four justices in *Mitchell* say that the pervasively sectarian doctrine is gone. It clearly is not, because Justice O'Connor clearly does not endorse that rejection. She has not either rejected or endorsed its continued existence. Three justices clearly believe the doctrine is still valid.

In the charitable choice area, *Bowen* says clearly that funding of pervasively sectarian institutions is unconstitutional. Some circuits have treated the pervasively sectarian doctrine as still binding on the lowers courts. The Fourth Circuit regards it as an abrogate doctrine.

As Steve mentioned, direct funding of religious education through per capita grants is very much open. That clearly divides the *Mitchell* plurality from Justice O'Connor and the dissenters. Justice Thomas says in *Mitchell* that a per capita grant directly to the school is the same as private choice. Justice O'Connor begs to disagree. Whether she's changed her mind on that or not, whether that will have continued legs, we just don't know.

One of the things that I think is illustrative of the difficulty in reading these opinions is that you can read them three different ways. You can read them line by line, as lawyers tend to do when they're writing a brief or law professors when they're writing a law review article, you can read them by comparing to what went before, and you can read them the way public officials read them.

Public officials read Supreme Court decisions the way baseball standings are read. There's a new column. It's not so new but it's new because it didn't exist when I was really following baseball. The new column in major league standings is win-loss streak. My view is that most public officials read the "streak" column only when it comes to Supreme Court decisions - which side won the last decision or the last couple of decisions. They never read the whole decision, given the length of the decisions, I think it's excusable.

Public officials will say, hey, the Supreme Court said anything goes. If you read it line by line, it says what it says, and I think Steve has covered it well. If you read it comparatively, life becomes more difficult. Just two examples: In *Mueller**, there is a series of distinctions between the tax decision at issue in *Mueller* and the tax credit invalided in *Nyquist*. The Court refers to the special deference owed to state officials when it comes to taxation. It's indirect; there's no money that is actually transferred. The Court placed a fair amount of weight on that in M*ueller**.

All of those distinctions disappear in this opinion. *Mueller* stands now simply for the proposition that if there's choice and it's real and the statute is neutral on its face, that's enough. Now, does that mean that those distinctions in *Mueller* are gone forever, or is it just enough to get rid of this case that you don't have to talk about them, and those are still issues in the law.

In *Rosenberger*, the Court was at pains, both in the opinion of Justice Kennedy and in the opinion of O'Connor, to point out that that was, at issue was not a tax; it was a student activity fee. The Court is careful to say, this opinion should not be read to control the case of a program based on real tax laws.

There was however, a grant, vacate and remand order last year in Albuquerque that involved access to a part of tax funds run as a limited public forum. We don't know if the Rosenberger tax funds caveat has disappeared forever or not. It's not mentioned here. Is that gone? Was it just a convenient, for-the-moment distinction? Is that still an issue that's in the law?

Finally, I want to point to what I think is not going to be a secret for very long. Justice Rehnquist relies on a very formal, as I said, other-worldly form of neutrality. In fact, you have to be deliberately blind to reality to think that this program is neutral. There are in fact journalistic accounts that became available after we tried the case. This program was carefully negotiated between the Catholic bishops in Ohio and the Governor. This happened to have been reprinted in the *American United* magazine, but the articles were done independently by journalists in Ohio. For example, the value of the tuition is within a couple hundred dollars of the average Catholic school tuition in the United States. It's probably a little bit higher in the Northeast, so it's probably pretty close to the average tuition in Ohio. It's less than a third of the tuition in the average Protestant school, and less than a third in the Jewish schools.

The Court nevertheless says this program is religiously neutral. That is so if you ignore the real world. The prohibition on religious discrimination makes perfect sense for schools who have as one of their missions taking the Gospel to all of mankind. For schools that have as a mission serving believers, creating a community of believers, that provision is distinctly non-neutral. There's not a single Jewish school in Cleveland — even if they were in the city of Cleveland itself, but they're not; they're in the suburbs — that they could take advantage of the voucher program with any credibility and integrity. They all, to one degree or another, exclude non-Jews.

One of the internal debates we had in deciding how to argue the case was that I thought that absence of real neutrality should have been given a higher priority in our argument. I don't know whether that would have persuaded Justice Rehnquist, who tends to view the Constitutional law in very abstract terms. I don't know whether that argument would have appealed to a Justice O'Connor. How that will play out remains to be seen. But that, I think, is another uncertainty that we face.

PROFESSOR PAULSEN: Hello again. I am Michael Paulsen. I am not Gregory Katsas. This is a real bait-and-switch. He's the Deputy Assistant Attorney General for the United States. He couldn't make it, so I would like to offer the official views of the United States Department of Justice.

That's what I would like to do. I'm not authorized to do it, so I'm just pinch-hitting. I scribbled out some notes between the two talks and during this morning's panel. Here are my short insights on this element, for what they might be worth. I think this was a very easy case, and nothing that Steve Green or Marc Stern has said is inconsistent with this. When the decision came out and I read it, I thought there was really very little new here. It's a kind of pedestrian, workman-like, classic Rehnquist majority opinion. When he has to hold five votes together, he writes fairly narrowly and in a straightforward manner and puts in his little subtleties and distinguishes the cases that aren't helpful, and drops little notes that will help him in the future and some of his agenda.

And it really felt like *deja vu*. I was still a law student 19 years ago reading *Mueller v. Allen*. It was quite a piece of work to distinguish *Nyquist* and get that five-four decision that held on to Lewis Powell and to Sandra Day O'Connor, distinguishing carefully the contrary cases and establishing for future use this principle of neutrality. This case reads exactly the same. It read like reading *Mueller v. Allen* all over again, with a few wrinkles and about 19 years of consistent precedent reinforcing all along the way. It made me wonder, why was anybody worried that this case would turn out this way? It was sort of like watching Tiger Woods sink a four-foot putt. You know, it's theoretically possible that he'll miss it, but you don't

have to watch very closely; you know that it's going to go in. That's the way that this opinion reads, as a very easy case following from the principles of neutrality that existed before.

There are only a couple of points or nuances that I think are interesting and to some limited extent new. One is the emphasis on true private choice and the implications it has for other issues. We discussed that in the first panel. Another had been this distinction between tax credits and tax deductions and is a voucher more like a deduction or a credit, or are the vouchers different? Most of that does seem to be gone. The one line of distinction they say may still exist is direct grants. They don't say it definitely does exist. They say that's a different issue; that might be a harder issue. But this issue, the issue of indirect funding through private voluntary choices is an easy Establishment Clause issue. That's five-four.

The other points that are interesting are what I call the baseline question, the baseline for how you judge neutrality. One point that Rehnquist makes, and this goes back to *Mueller v. Allen*, is as long as the program is neutral in terms of its operational requirements, the breakdown of usage does not affect neutrality or else you would make constitutionality dependent upon the way schools and parents make their choices in particular years. That should not be the governing criteria.

Now, Marc Stern sees that as abstract and unrealistic, but I think it's just a realistic, good approach to constitutional law of not making the operation of a constitutional principle vary year to year with actual usage. I think that's sound and an important principle.

In addition, in terms of the baseline against which neutrality is judged, they are careful to look at the full universe of options. This was important to Justice O'Connor. And it does seem to me, as Steve Green and Marc Stern said, that it does seem to have the implication that when you're judging the validity of a private school choice program, the fact that public education receives substantial overwhelming assistance is relevant to your inquiry as to whether or not this is neutral in terms of the choices it provides. That, I think, is a great step forward for the school choice movement.

The other thing that is interesting is Rehnquist, bless his heart. He sneaks in reference to the coercion standard. Now, most of it is cast in terms of the Lemon/Agostini test of purpose and "effects." But when he gets to effect, he recasts what counts as an effect in terms of whether or not any individual is coerced into attending religious schools. Now, as a law professor, this is very interesting doctrinally, and I think it should be for litigators, too. The coercion test is the least law-invalidating test that the Supreme Court uses, sometimes, for evaluating constitutional challenges.

Here's Rehnquist's language. I don't have correct pagination. I just pulled this off of Westlaw. "The Establishment —

PANELIST: That's page 14.

PROFESSOR PAULSEN: — page 14 of the slip op., okay. "The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools,"coercing", and that question must be answered by evaluating all options Ohio provides Cleveland's school children." I think that's very significant language. And if Rehnquist sticks around for a while, you'll see him pick that up and say, "We have evaluated school choice and voucher programs in terms of coercion of parents. As long as parents are not coerced into sending their children into religious schools, it is a voluntary neutral program." You can hear it. It might be eight years from now; it might be four years from now; it might be 12 years from now. But Rehnquist has dropped one of his nuggets that he always picks up a few years later.

The other thing that's significant is that *Nyquist* is dead. Dead. Dead as a doornail. They don't overrule *Nyquist*, but *Nyquist* is limited not only to its facts but to the Supreme Court's 1973 mischaracterization of its facts. And you know, they said this case means virtually nothing in terms of future principles for neutral private choice programs. As long as you draft it right — and here's the roadmap — these will be upheld.

Other things that are interesting — Justice Thomas has an interesting concurrence. I don't know quite what to make of it yet. One thing that I do appreciate that's very central to the Cleveland facts of the case is that this was a tremendous opportunity for poor inner-city minorities. This was important. He begins his concurrence by quoting Frederick Douglass, "Education means emancipation." I think that's an important principle the school choice movement will pick up on. It's similar to a recent book by — I'm blanking on is first name — Viteritti —

PANELIST: Joseph.

PROFESSOR PAULSEN: — Joseph Viteritti.

PANELIST: It starts with the word of equality.

PROFESSOR PAULSEN: The whole idea is that the school choice movement is in part about equality and fulfilling the promise of equal opportunity in education, especially for the poor and minorities.

Thomas also would grant states broader latitude than the federal government in terms of the application of consti-

tutional requirements. It's interesting; it's doctrinally peculiar. He's all alone. It might not have much consequence.

There's one aspect of the opinion that's disturbing to me, and that's footnote five. Now, the way my Westlaw printout is that I get the footnotes at the ends of these things and go, oh my gosh, what is this? I read Thomas as referring to his opinion in *Troxel*, the "grandparents" case. Does he make it "but of" or a "but see?"

PANELIST: But see.

PROFESSOR PAULSEN: — implying that the principle of *Pierce v. Society of Sisters*, of recognizing parental rights to direct or control the children's education is something that, if push came to shove, he would not agree with as a constitutional issue. It's a very cryptic footnote and I hope I'm over-reading it. But I find this interesting.

The last thing I find interesting, and disturbing, though not at all surprising, is the four dissents. There are four votes in dissent. This is a five-four decision. The position of the four dissenters essentially says that the Establishment Clause requires what amounts to discriminatory exclusion of private schools from a generally applicable, facially neutral benefit program.

It continues to strike me as extraordinary that anybody would embrace that principle as actually being what the Establishment Clause requires. It strikes me as particularly extraordinary that justices who ostensibly, in other contexts, are committed to principles of *stare decisis*, like Justice Souter purports to be, would take a position that is contrary to *Widmar v. Vincent*, 1981; *Mueller v. Allen*, 1983; *Witters v. Washington*, 1986; *Mergens*, 1990; *Lamb's Chapel*, 1993; *Rosenberger* and *Pinette, 1995; Agostini*, 1997; *Mitchell v. Helms, Good News v. Milford*. There has been a succession of now 11 cases where I count. I mean, talk about a streak. They only go up to 10 in my baseball standings. There have been now 11 cases in a row.

There have now been 11 cases in a row where the Supreme Court has rejected the proposition that the Establishment Clause authorizes discrimination against religion. Now, hopefully that now seals the deal. But what is disturbing is that there are still four votes that are intransigent on this point, and also how easily a single change in membership could reverse that or a single change in Justice O'Connor's clerks could change that result.

MR. AMMEEN: At this point, we've got about 15 minutes for questions. To get it started, I'll throw out the first one. I think the observation of three of the panelists that *Zelman* is a modest decision, that there was not something earth-shaking or ground-breaking here, is pretty interesting. I've got a question about three passages Chief Justice Rehnquist put into the decision, at pages 7, 11 and 21, where he refers to a consistent and unbroken chain of jurisprudence. He states, essentially, that the Court has *never* found a program of true private choice to offend the Establishment Clause. In the opinion's next-to-last sentence, on page 21, Chief Justice Rehnquist writes, "In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause." I'm curious if this is one of those "nuggets" that is designed to foreclose for all time issues concerning the "true, private choice" type of voucher program here.

PROFESSOR PAULSEN: Can I jump in? It may be. I don't think Justice Rehnquist thinks that the dissenters will now come along simply because there have been 11 decisions in a row. I think that sort of language is classic Rehnquist craftsmanship to make sure to hold shaky votes. Justice O'Connor is sometimes very *stare decisis* focused, and this opinion — you know, the Chief held it for himself. Those of us who do nose counting thought that this had to have been assigned to Scalia or Kennedy in terms of the number of opinions they'd written on February-heard cases. But wisely, Rehnquist keeps it for himself. He's very good at holding votes on board, and I think this is Justice O'Connor language.

MR. SCOTT: Mike is right. There's also, though, of course, more than one tradition out there. And I think that's the thing; there are parallel traditions. So you read this opinion and think, oh, my God, as Mike said, how could they have come to any other decision? How could this be a five-four decision? Well, there also are some other traditions out there in our establishment clause jurisprudence besides this one, and we're seeing, of course, the neutrality theory rise to the top here.

MR. STERN: I'm going to say one last thing about this, that sitting under a picture of Madison, I don't find it hard at all to understand how that can be discrimination against religion. I think that Jefferson (who wrote the constitution in Virginia that *Rosenberger* challenged) and Madison in fact intended that sort of discrimination. They also intended to provide preferred treatment of religion under the free exercise clause. One of the prices that we have paid for the emphasis on equality and neutrality under the Establishment Clause is essentially gutting the Free Exercise Clause.

Scalia's theory in *Employment Division v. Smith*, that neutral laws don't require special justification even when they impinge on religious practice, is the mirror image of his Establishment Clause theory. Indeed, it would be difficult to maintain neutrality under the Establishment Clause and non-neutrality under the Free Exercise Clause. I think it's a bad bargain for religion in the long-run.

You're much better off with the ability to repel legislation that stops you from doing what you're doing privately and

give up the government subsidy. I don't think it's possible to separate the one from the other, nor as Steve has said, is the notion of discrimination against religion, which is what it is, alien to our constitutional tradition. That's what Jefferson and Madison fought about in the post-Revolutionary era.

AUDIENCE PARTICIPANT: I'm a philosopher of law, and I was surprised at what strikes me as the Court being so caught up in so many irrelevancies in trying to decide a legal decision like this. But we have protagonists on both sides of the decision because of its political consequences.

I admit that Professor Rice switched this morning from the legalities to the political ramifications of the case. I rejoiced, even though I sort of expected the decision. My wife considers it a disaster. She teaches in the inner-city school system and thinks the private schools won't take any disabled kids for which the public school has to spend a lot of extra money.

But we have a Muslim private school in Columbus, Ohio. Judging the way the judges themselves get involved in irrelevancies, the political community will be even more involved in those. I can foresee very easily if Ohio tried to expand this to the inner-city of Columbus, not only the legislature but the entire community would have some very serious questions about whether this Muslim school has teachers like the 700 Imans educated in Saudi Arabia.

If the schools are teaching that the Nation of Israel is illegitimate according to international law, or that males and females should be mutilated sexually, there will be real questions about the content of what private schools are teaching. And the legislature would be very much concerned with that. And I think the entire community would be, too.

So, his warning — I've read things critical of you going this way. Professor Rice's warnings were frightening to me, and I had to sort of agree that going this way is going to be very dangerous, at least in our temporary situation.

PROFESSOR GREEN: You know, I don't hold much out for Professor Paulsen's future litigation insofar as forcing public school districts to allow for funding for private schools if they don't want to. But I do think this is one area where he is going to be successful because you can't start making distinctions between religious groups, and the Supreme Court doesn't know what to do with free speech. It's going to be almost impossible to figure out where you draw these lines, which is exactly right. There will be, of course, Islamic academies. There is in Cleveland — and Milwaukee?

PANELIST: They were in Cleveland.

PROFESSOR GREEN: — in Cleveland there's one, yes. Of course, there's going to be. And how you're going to go about trying to exclude those religiously affiliated institutions with which some people may have some concerns about what's being taught, I don't know, but that will be a case that certainly will be litigated.

MR. STERN: I don't know if we have to respond. His wife has already overruled him.

AUDIENCE PARTICIPANT: I wanted to direct this question to Steve and Mark. I was intrigued by Marc, or one of you, who criticized Justice Rehnquist a little bit for ignoring the facts. I'd been listening to your presentations and reading the arguments that were made in the briefing and so on, up through the various courts, and it struck me that you all along had ignored reality.

Obviously in Marc's case, and apparently in Steve's, you have some deeply held religious or theistic beliefs of your own. But as a practical matter, public education has become exactly what theologian Alexander Hodge predicted or prophesied a century ago — the most massive engine for the propagation of atheism that the world has ever seen. It creates a clearly atheistic world view in which students are taught.

It is easy to pick out a specific program like the one in question, identify a few overtly theistic schools and say that clearly government is acting selectively in relation to religion. But this whole focus is not merely ignoring the forest for the trees; it's picking out a single tree and scraping it for fungus.

The idea that we are somehow perpetuating this wonderful state neutrality towards the religious beliefs of individual school children is just sheer nonsense.

Secondly, moving away from a religious perspective and on to the economic perspective, again, if you pick out a single discrete program like this and identify only those specific schools and children involved in that discrete program, you can say yes, in that small universe there is a net transfer of dollars from someone else to individuals who are practicing their religion. But if you simply step back and analyze it the way that probably a more Libertarian entity would — IFJ or the Freedman Foundation — and say, look, what is the net effect of all state action in regard to education?

As Justice Rehnquist says, put all the activities and all the options on the board. Look at the taxation that government does from private individuals, to transfer that wealth to other private individuals to carry out the benefits or the viewpoints that they espouse. You have in government action in the various states a massive transfer of wealth from individuals who wish to practice theistic religions to those who are perfectly satisfied with an atheistic viewpoint perpetu-

ated by public education.

The thing that frustrates me to no end is what I view as the intellectual dishonesty of this entire area of litigation. I do not for a moment question your own personal integrity involved in this. But the way that this litigation is conducted in general, the real questions never arise. And this almost frenetic focus on these miniscule issues and little programs seems to me to be lancing a boil on an elephant; you're worried about spreading germs in your house when the elephant's stomping the place into oblivion. So, I think you've got my point. I'll let you respond.

MR. STERN: To take the smaller point first, if you look at the brief that I helped write, we do not make the argument that you look at the voucher program in isolation from the other choices. Our submission was, it didn't matter what the other choices were. One thing the Constitution says the government can't spend its money on is religious education. We did not think that the court of appeals effort to distinguish between statutes and section numbers had any appeal. It had none to us and we didn't make that argument.

Second, this is not a decision about the ability of the government to use taxing power to transfer wealth from one group to the other. The Establishment Clause is not about libertarianism or non-libertarianism. I have thought for a long time that the voucher argument is really not about the Establishment Clause; it's about two different conceptions of the role of government. Anybody who's listening to today's argument has heard very eloquent defenses from a libertarian position of that point of view. It's not a point of view I share at all.

The blaming of all that ails the public schools on their non-theistic — not atheist but non-theistic nature — wholly ignores other factors like racism, which clearly infected the Cleveland schools; they have been under desegregation order for a decade or more. Wealth disparities too play in role. The reason why the suburbs didn't take any kids from Cleveland has nothing to do with monetary amounts. It has to do with the fact it's the most segregated urban area in the United States. It was entirely foreseeable that the suburban schools are not going to take poor children from Cleveland.

The Cleveland schools have won a lawsuit against the State of Ohio for systematically underfunding this. To say that John Dewey is responsible for all that ails the Cleveland public schools or any other urban public school system seems to me to be just so unrealistic.

Let me move to the last argument, which is the crux, I take it, of the speaker's position that the public schools are a sort of engine aimed at the destruction of religion in the United States and they represent the non-theist, John Dewey — all that stuff. I have no doubt that there are public school teachers who have that view, maybe public school superintendents who have that view, though most public school superintendents that I've met are not at that level of theory.

They get to be where they are because they offend nobody.

There is no such plot out there. It defies reality to say that there is.

There is a serious question of constitutional theory here, between a bipolar and a trivalent view of religion and society. The questioner's assumption is you're either with us or against us and you have to fit everything you do into you're with us or you're an enemy.

The Constitution doesn't make any sense that way. The only possible model that makes sense is three positions — the government as an agent or propagandist for religion; the government as an agent or propagandist against religion; and government is disinterested, neutral, toward religion.

What the courts have meant by neutrals is that third position.

There are people who have religious views that are incompatible with that trivalent position. They cannot for legitimate and sincere religious reasons, accept the possibility that there is some sphere where religion doesn't control or their religious beliefs don't have to control. That's fine. But if you don't agree with that, then we have a very fundamental disagreement about the constitutional order. That's just one of those fundamental debates that we will have to debate.

MR. AMMEEN: I'm going to break in for a second here. We've got three people in line; we're starting to run over a little bit but we want to get through the questions of the folks who've been standing at the mic. So I just ask that the questions be kept short, and then after we finish the discussion we'll move down to the State Room, where lunch and a third panel will begin.

AUDIENCE PARTICIPANT: Thank you. I'd like to offer one brief comment and then a question. This is based on scanning the case during the panel here. Stephen Breyer, in the first paragraph of his dissent, says that he wants to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. And all the dissenters seemed to pick up on this. I think that's misplaced significantly. I mean, it's the plurality of choice that dissipates strife in our society. There's nothing more likely to create dissention as when you put everybody of different beliefs in one pot, in one public school, and expect them to get along. For example, are you more likely to have Jewish kids and Muslim kids in this country fighting today in a public school in light of what's going on in the Middle East, or would it be better if their parents had them attend their own schools and then mix with the rest of society to the extent they want to? I mean, to me it's the latter option that's much more clear.

The question I'd like to ask was something that Clarence Thomas, who I think obviously is the most emotionally charged judge in this case, got into, and that is whether the incorporation doctrine, the application of the 14th Amendment through the 1st Amendment or vice versa to the states really applies in this case to the extent of the Establishment Clause or not. He seems to be the only judge who got into that, and I don't know — for those of you who have a better background in this area, is that a doctrine that has any legs with any of the other justices, or is he the only one who sees a distinction between the Free Exercise Clause and the Establishment Clause?

MR. KOMER: This has no legs.

PROFESSOR PAULSEN: No legs.

MR. STERN: Zip.

* 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.