

**School Choice Goes on Offense:  
Updating the Post-*Zelman* Landscape**

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### **Executive Summary**

For decades, critics have hammered away at U.S. elementary and secondary education as a public monopoly that resists innovation. By contrast, many Western European nations have subsidized free parental choice among private and public schools. However, with startling speed, the education monopoly has begun crumbling in the USA. More and more, America is joining Europe in pondering the advantages of government being a purchaser rather than provider of educational services, and of families benefiting as consumers able to choose from a wide array of services.

During 2002, three major developments have combined to advance true private choice in U.S. K-12 education: (1) the bold venture in privatization of troubled public schools in Philadelphia, (2) the historic June 27 decision of the U.S. Supreme Court upholding the constitutionality of letting parents use public vouchers to send their children to private, religious schools (so long as other school choices are offered), and (3) the federal No Child Left Behind Act, which for the first time in the Title I program uses public-school choice and private tutoring as instruments of accountability for failing schools – thereby empowering families who have been stuck with failing public schools.

This paper tracks the progress of these major steps toward what Chief Justice Rehnquist called “true private choice.” It also discusses new developments in Maine, Minnesota, Ohio, Washington, the District of Columbia, and elsewhere.

Details follow.

## Introduction

Many persons coming to America from abroad marvel at the vitality and resilience of the competitive, free-market U.S. economy. But for decades when they have looked at the primary and secondary schools, they have been startled to see something quite different - a state-dominated system that shuns virtually all choice and competition. In Europe, the situation is largely reversed: Governments have tended to favor extensive public intervention in markets; however, many of them foster a wide-open K-12 educational market, in which children have the free choice of attending private or public schools with state assistance.

One who has commented perceptively on this anomaly is Dr. Dirk C. van Raemdonck, a Belgian-born and educated scholar affiliated with the Michigan-headquartered Mackinac Center. In nations such as Belgium and France, he observed, government grants cover the annual operating costs of public and private schools, while each school's organizing body (whether a local public authority, a private foundation, or a religious institution) makes the necessary capital investments. A school's annual grant depends on the number of students it enrolls, and if a student decides to leave one school for another, the state grant goes with him to the new school. This portability furnishes a powerful incentive for schools to improve their service continuously and to maintain high standards.

As for the church-state question, public authorities distribute tax monies without regard to whether a school has a religious tie or not. Each school must offer a basic curriculum for accreditation; however, the option of including instruction on religion is permitted. No artificial church-state barrier is imposed to the exercise of free choice.

“By contrast,” Dr. Van Raemdonck wrote, “public education in the United States operates in a manner reminiscent of medieval feudalism. Students seem like indentured peasants, tied to the local manor (the school district) and unable to work (study) anywhere else than on the land of the manor. No outsiders are allowed access to the manor. Money and wealth remain with the manor. Only those who possess independent wealth have the freedom of choice to go elsewhere and find the best education available. This country, famous for its commitment to freedom and equal opportunity, allows near-monopolies in education that deliver a poor product, offer indifferent service, and resist innovation.”<sup>1</sup>

The Belgian-born analyst offered those observations on August 7, 2000. Much of what he said still holds true, but as schools re-opened across America in fall of 2002, it is astounding how rapidly the climate is improving for private educational choice - how rapidly a statist manor is having to make way for growing privatization.

Three major policy movements were converging into a potent force by the fall of 2002: (1) Philadelphia's turning over of failing public schools to private managers on an unprecedented scale as a new year began September 5, (2) the United States Supreme Court's June 27 ruling that nothing in the federal Constitution bars the use of publicly funded vouchers to enable children to attend private schools, including those with a religious orientation, and (3) the initial impact on public-school districts of the parental-choice provisions of the federal No Child Left Behind Act of 2001. These developments, though uncoordinated, all buttress the principle that children should not be trapped in unsafe and unproductive government-run schools year after year after year. When public schools fail, it is wholly reasonable for parents and education stewards alike to be able to look for private alternatives that work. The emergence of 2,400 public charter schools over

the past growth and the phenomenal growth of home schooling (from a few thousand home-schooled children 20 years ago to almost 2 million today) helped lay the groundwork for increasing privatization of K-12 education in the United States.

In short, education is far less a monopoly in the USA than it once was, and the grip of monopolists is falling under greater challenge every year. It is the purpose of this paper to examine the consequences of the three seminal developments of 2002, to put them into perspective, and to suggest ways this movement toward privatization could become even more productive.

First, let's look at the highly unusual, indeed historic, opening of school in the City of Philadelphia for the 2002-03 term:

## **I. Philadelphia Privatization**

On September 5, 2002, Philadelphia uneasily embarked on the nation's largest venture yet in the privatization of failing public schools. A district with 264 schools (178 of which perform below minimum state standards) turned 45 of the worst over to private education companies contractually committed to producing solid results. Another 25 struggling schools reopened as public charter schools or were reconstituted as wards of the district. Yet another 16 low-performing schools received additional remedial funding.

Drawing the largest share of press attention was the awarding of control over 20 of the Philadelphia schools to Edison Schools, Inc., the nation's largest operator of for-profit schools. The decline in Edison's stock (fed in part by the dashing of the company's hopes that it would get 45 or more of the Philadelphia schools) dominated much of the early reporting and analysis. Edison became a lightning rod for criticism of privatization. That obscured the fact that other companies were accepting the challenge of turning around failing schools.

One them -- Victory Schools, based in New York City, as is Edison -- now is operating five Philadelphia schools, as is Miami-based Chancellor Beacon Academies.<sup>2</sup> (Victory Schools' approach is the subject of further analysis later in this paper.)

In addition, four nonprofit institutions or groups are managing a combined 15 schools: Temple University, the University of Pennsylvania, Universal Companies (a neighborhood redevelopment specialist), and Foundations, Inc., a New Jersey-based provider of after-school services.

The process began December, 2001, with the state formally taking over the district because of its severe fiscal and academic problems. Under the plan, the Governor of Pennsylvania and the Mayor of Philadelphia appointed a five-member School Reform Commission (SRC) that took over from the local school board. The Governor got three appointees, and the Mayor two, and some key votes were 3-2 state/local splits.

Prospects for eventual overall improvement in Philadelphia brightened when the School Reform Commission selected as chief executive officer Paul G. Vallas, a school reformer who achieved significant success while running the Chicago public schools and weeding a bureaucracy-encrusted system.

By far the bulk of media coverage zeroed in on the ever-shifting fortunes of Edison, which runs schools for 74,000 students in 62 school districts in 22 states. When Edison won contracts to run only 20 Philadelphia schools, as opposed to the 45 it openly sought, the value of its stock plummeted. It also crossed swords with the new administration of the school system at several points. Edison may or may not recover from this inauspicious start in Philadelphia, but the fate of privatization does not hinge on one company's performance in one city. Other providers bring new ideas and furnish hope for constructive change.

For example, consider another for-profit Philadelphia provider -- Victory Schools, Inc. Victory has concentrated its efforts heretofore on serving the most severely disadvantaged communities, particularly in New York City. To Philadelphia it has brought a bold spirit of innovation. It has converted one of the schools to which it is entrusted -- FitzSimmons Middle School -- into two single-sex schools. Each operates within the confines of the current four-story building, but two floors house instruction for boys, the other two floors are for girls. Each has its own principal. Currently there are just 15 single-sex public schools in the entire country; however, recent changes in federal law are supportive of such innovation.

"For the girls," said Lynn Spampinato, Victory's curriculum director and former Philadelphia district administrator, "it's a tremendous builder of self-confidence, and with the boys, the pressure is off in this culture, where sometimes it isn't cool to be smart."<sup>3</sup> (Dr. Spampinato is no novice in the field of single-sex education. In 1998, she led the institution of single-sex instruction at the Maria Mitchell Elementary School in Denver.)

FitzSimmons has the additional distinction of being Bill Cosby's middle-school *alma mater*, as well as that of two former presidents of the Philadelphia Board of Education. Other schools being operated by Victory are Pepper Middle School, and Wright, Pratt, and Bethune elementary schools.

FitzSimmons, located in a low-income neighborhood in North Philadelphia, typifies the challenges faced by reformers seeking to uplift the city's failing schools. During the past school year, more than 90 percent of its students scored "below basic" on Pennsylvania's eighth-grade mathematics test, while three-fourths of the students scored "below basic" on the reading test. Bomb threats disrupted classes at the school more than 40 times during the past year.

The principal of the new boys' school, Ernest Lowe, is a 1966 graduate of Philadelphia's Edison High School, which at the time was also an all-boys' school. Recalling his own experiences, Lowe says, "there was a sense of allowing us to grow up as boys, without the pressure of having to impress girls. It allowed us to really find ourselves as young men." Sandra Hall, principal of the new girls' school, has been principal of Girard Elementary School in South Philadelphia. She appreciates the spirit of open-mindedness in the new administration. "They're not afraid to tell us that they don't know {all the answers}," she noted.<sup>4</sup>

Victory, the largest operator of charter schools in New York State, seeks as part of its mission to combine the best private-sector performance-based management techniques with a curriculum drawing on research-proven educational approaches. A Victory school provides children with a longer-than-normal school day that runs to 4 p.m. or later to maximize time on task. At the elementary level, classes are limited to 25 pupils, with teaching assistants used to increase individualized instruction. Each student must wear a school uniform and stick to a behavior management plan designed to promote social development and maturity at an early age.

As a private provider, Victory Schools has been able to blend education programs proven to be highly successful but often snubbed by the orthodox education establishment.

These are:

1. Siegfried Englemann's Direct Instruction;
2. E. D. Hirsch, Jr.'s Core Knowledge;
3. An enriched thematic curriculum developed by Victory School personnel and used since 1993 at public elementary schools in East New York, Brooklyn.

Victory uses Direct Instruction (DI) to teach mastery of basic reading, math, and language skills. DI lessons follow a carefully scripted approach, field-tested to ensure that all children master the material. A teacher may ask 300 or more questions in a single day, in small-group sessions. Students answer individually or in chorus. Thereby, all students stay involved. Victory draws on Core Knowledge to impart the substantive facts of history and science. The Core Knowledge Foundation in Charlottesville, Va., has carefully determined through research the base of knowledge a child should acquire at each grade level. CK's well-documented belief is that children learn new information by building on a base of knowledge previously acquired. Less fortunate children who are not taught fundamental knowledge fall further behind each year - hence, the much-lamented "achievement gap." The Core Knowledge Sequence was constructed for the purpose of closing that gap.

Finally, Victory Schools supplement Direct Instruction and Core Knowledge with an educationally enriching concept developed in their own extended school-day schedule. A thematic approach combines reading, math, art, dance, music, computer play, and field trips in lessons that bring a sense of joy to learning. Consider, as one example, a unit about the rain forest: Children read a book about the rain forest, convert their classroom into a model of that environment using their artistic skills, construct a terrarium and use the scientific method to track results, learn a dance native to the rain forest, take a field trip to the Botanical Gardens, and write a rain forest poem or story. Not least in importance, they invite their parents to school for a celebration of their work.

Victory Schools bring both academic substance and hope to some of the most depressed schools in Philadelphia. If they can turn those schools around, all of urban education may gain from that inspiring example of what works.

## **II. The *Zelman* Decision**

*True private choice.* Those are the three words that describe school choice at its best. Chief Justice William Rehnquist used those words with precision in writing the 5-4 majority decision of the United States Supreme Court that on June 27, 2002, provided new momentum for the expansion of private choices in K-12 education.

In *Zelman v. Simmons-Harris*, a case from Cleveland, the Court concluded that tax-funded vouchers enabling families to escape miserably failing public schools may be used to pay for tuition at religious schools without violating the First Amendment's establishment-of-religion clause. The one caveat is that parents must have choice among a variety of public and private options.

Chief Justice Rehnquist's opinion for the majority that vouchers are fine under the federal Constitution when enabling individuals to exercise "true private choice" set the stage for decisive battles to determine the scope of this decision's impact. With the key federal constitutional

question now settled, the primary action moves to policy debates in the state legislatures and legal battles over how various church-state barriers in state constitutions will be interpreted.<sup>5</sup>

### **The Maine Battleground**

Maine likely will provide the first test. In September, 2002, the Institute for Justice, the public-interest litigation firm that has represented school-choice proponents in many battles the past dozen years, filed suit in a state court in Portland, Maine, on behalf of six families who have been denied state scholarships for their children because they have chosen religiously oriented schools. Via a practice known as “town tuitioning,” both Maine and Vermont have school voucher systems that are more than 100 years old. Parents can receive public funds to send their children to public or private schools in other localities when their hometowns do not choose to own or operate public schools. However, both states decided not to allow parents to use this mechanism to choose parochial schools. “Maine offers school choice to everyone except those who choose religious schools,” commented Richard Komer, Institute for Justice senior attorney and lead counsel for the litigation. “Under the Constitution, that’s religious discrimination and we intend to restore our clients’ religious liberty.”<sup>6</sup>

The Maine filing began to fulfill a promise, post-*Zelman*, by IJ and other school-choice advocates to be passive no longer in the face of threats and sweeping assertions from the other side. As Komer put it, “We intend to take the offensive.”

Offensive Strike No. 2 came just a week later in September when IJ filed suit in Washington State challenging provisions in the state’s constitution that require state-funded programs to discriminate against religious students. Plaintiff Donnell Penhallurick, a Seventh Day Adventist seeking teacher and special education certification at Eastern Washington University, finds himself barred from student teaching at a Seventh-day Adventist school. Plaintiff Carolyn Harrison, a teacher at a Catholic school in Tacoma, is studying for an administrative credential at the University of Washington. While most teachers can do their administrative internships at the schools where they teach, Ms. Harrison must leave her job every other day to intern at a public school simply because her home school is Catholic. IJ vice president Clint Bolick calls the student-teacher rules “absurd,” and notes that the “U.S. Constitution does not permit discrimination either in favor of or against religion.”<sup>7</sup>

The anti-choice forces made no secret of their intention to take advantage of provisions (like the State of Washington’s) in state constitutions deemed to be more restrictive than the federal Constitution regarding “aid” or “support” of religious institutions. All the states with the exceptions of Louisiana, Maine, and North Carolina either have 19th-Century Blaine Amendments in their constitutions forbidding aid to “sectarian” institutions, or prohibitions against “compelled support” of a religious ministry, or both. On July 9, less than two weeks after the *Zelman* decision, school-choice opponents argued before a Circuit Court Judge in Tallahassee that such language in Florida’s constitution ought to negate vouchers that are offered to students stuck in chronically failing public schools. They portrayed the vouchers as outright aid to religious schools rather than assistance to a parent in exercising “true private choice.” The Judge promptly ruled that the exclusionary language in Florida’s constitution prohibits vouchers; however, advocates of free choice filed an appeal.<sup>8</sup>

### **Florida: School Choice Central**

Florida is likely to become even more of a key legal battleground in the aftermath of the *Zelman* decision. In the words of Manhattan Institute researcher Jay P. Greene, the Sunshine State has become School Choice Central.

Not only does Florida, under Governor Jeb Bush's leadership, offer the A+ Opportunity Scholarship (voucher) to students stuck in public schools that flunk state achievement tests two years out of any four-year period, it has started a voucher program (the McKay Scholarship) for special-education families dissatisfied with their public schools' implementation of a child's Individualized Education Plan (IEP). The McKay approach (named for its chief advocate, the president of the State Senate) has become a key element of proposed choice-based reform of the federal Individuals with Disabilities in Education Act (IDEA), currently up for reauthorization by Congress. In addition, Florida recently adopted a corporate income tax credit scholarship program, described later in this paper. In the aftermath of *Zelman*, many states are looking at variations on the Florida theme.

In contrast to Florida's openness to choice, the Blaine Amendments have a dubious heritage in that they derive from a 19th Century backlash against Catholic schools that were trying to win a share of school funding. It is important to note that public schools of that era were not secular institutions. Rather, they were primarily non-denominational Protestant schools with openly religious activity, including daily Bible readings. The U.S. Supreme Court recognized in Justice Clarence Thomas's plurality opinion in *Mitchell v. Helms* (2000) that "sectarian" was code language for Catholic institutions that the dominant politicians of the late 1800s intended to disfavor. Given the Blaine provision's origin and exclusionary intent, perhaps it seems an ignoble (if perversely appropriate) weapon for those who wish now to exclude poor children from safe, productive schools their parents choose.<sup>9</sup>

Washington State is known for imposing severe restrictions on individuals being able to use public grants to pay for services at religiously oriented schools. In 1986, the U.S. Supreme Court held in the *Witters* case that the federal Establishment Clause did not preclude vocational rehabilitation services for a blind student preparing for the ministry at a small Christian college; however, the Washington State Supreme Court, considering the case on remand, ruled that the stricter dictates of the state's Constitution did bar such aid. Law professor Frank Kemerer, writing post-*Zelman* for *Teachers College Record*, noted that the U.S. Supreme Court's willingness in the cause of federalism to defer to state interpretation of state constitutional provisions in this and other cases could mean tough going for vouchers in state-level battles.<sup>10</sup>

To the contrary, in the federal context at least, *Zelman* had an immediate impact broadening choice in yet another key (and similar) case from Washington State. Joshua Davey had wanted to use his Promise Scholarship, awarded to low-income students ranking in the top 10 percent of their high school classes, to study theology at a religious college. The state ruled he couldn't do that. However, a three-judge panel of the 9th U.S. Circuit Court of Appeals (the same court that recently deemed unconstitutional the words "under God" in the Pledge of Allegiance) held that such a prohibition in Washington State's scholarship program "facially discriminates on the basis of religion" -- and therefore is unconstitutional.<sup>11</sup>

That finding from the most liberal Circuit in the land raised hopes of voucher proponents that the U.S. Supreme Court eventually will rule that stringent application of establishment provisions in state constitutions runs counter to the spirit of First Amendment free-practice guarantees and therefore is unconstitutional. The argument in essence is that states may not practice "viewpoint



discrimination,” noted Institute for Justice senior attorney Clark Neily. The new suit the Institute has filed in Thurston County Superior Court will give the state’s own courts a chance to reconcile the Washington State Constitution with the U.S. Constitution.

Other states pose inviting targets for choice proponents. IJ noted that 10 states have construed their state constitutions to bar religious options even in aid programs for college students (in contrast to the federal Pell Grants, which may be used for such a purpose). In addition to Washington, they are: Alaska, Colorado, Iowa, Kentucky, Michigan, Missouri, Oregon, Texas, Virginia, and Wisconsin. Adding Vermont, where the state supreme court came to a comparable decision regarding K-12 education, the Institute dubs these states the Terrible Twelve.

Even before *Zelman*, appellate or supreme courts in Arizona, Illinois, Ohio, and Wisconsin held in reviewing school-choice programs that the state constitutions imposed no greater limitations than did the federal Establishment Clause. Vermont and Puerto Rico are two that construed the state provisions more restrictively. Courts of many other states have not taken up the issue definitively or at all.

### **The Monopolists Strike Back**

As further battles loom on both the political and legal fronts, it is clear that the big Washington-based organizations representing the producers of government education will continue to resist choice via any means at their disposal. Even before the *Zelman* ruling, they had made it clear that losing the constitutional case would not lessen in any degree their resolve to fight to the death against free-choice vouchers.

The National School Boards Association (NSBA) is an example of the hard-core nature of this resistance to educational freedom. The NSBA has a Voucher Strategy Center website, which was up and running before the *Zelman* decision, that is dedicated to seeing to it that students in the government schools do not receive the opportunity to take vouchers. The Center offers a toolkit of anti-voucher material along with updates on “what is happening on the school voucher front in every state in the nation.” It can be found at [www.nsba.org/novouchers](http://www.nsba.org/novouchers).

Another member in good standing of the education establishment, the National PTA, quickly expressed its “unequivocal opposition” to vouchers. Its statement issued the day of the *Zelman* decision said National PTA president Shirley Igo and all the PTA presidents also would urge Congress “to oppose any legislation that includes a voucher.” As it typically does in its pronouncements, the National PTA noted that it has 6.5 million members “working in” 26,000 local chapters in all 50 states.<sup>12</sup> As research by Charlene Haar of the Education Policy Institute has established, the National PTA collects dues from local parents but then uses that money without consulting the grassroots to pursue big-government policies in tandem with the 2.7-million-member teachers union, the National Education Association, on parental choice, teachers strikes, and everything else.<sup>13</sup>

As for the NEA, *Zelman* did not soften the union’s opposition to vouchers for children in failing public schools. Keynoting its annual convention in Dallas the week after the High Court’s ruling, NEA President Robert Chase struck a belligerent stance: “We stand in principled opposition to vouchers,” he declared. “And to the voucher ideologues, we make this promise: We will expose your false promises. We will lay bare your lies. And as we have done in California, Michigan, and everywhere else that vouchers have been on the ballot -- we will defeat you!”<sup>14</sup>

The NEA is putting millions of dollars behind its fighting words. Mike Antonucci, director of the online Education Intelligence Agency, totaled up campaign reports and figured that the teacher unions and their local affiliates spent more than \$30 million to defeat the California and Michigan voucher initiatives in 2000. The NEA imposed a \$5 per member dues increase in 2000 primarily to fight ballot and legislative battles against parental choice. The dues hike continues in effect, generating about \$7.5 million a year for continuing campaigns against reforms the NEA deems threatening, such as a free choice of schools for all.

For her part, Sandra Feldman, president of the American Federation of Teachers (AFT), the NEA's sister union, threatened to use "accountability" (to bureaucrats, not parents) as a weapon with which to beat back vouchers: She said private schools that accept voucher students must account to government bureaucrats exactly as the public schools must do.<sup>15</sup>

The AFT's assertion indicated that where advocates are successful in expanding choice, the teacher unions will try to suffocate the schools of choice in layers of regulation. That is the strategy they have used to try to contain the growth of charter schools and to limit their influence. Charter schools are schools set up within the public system with their organizers accorded a degree of independence in return for a contractual commitment to be held accountable for results. But the AFT and NEA -- while sometimes claiming to support charter schools -- have worked to stifle their ability to innovate. For example, they insist that the teacher-certification monopoly that largely controls entrance to regular public schools ought also to prevent charter-school principals from hiring bright people who haven't been through schools of education.

The AFT's stance no doubt also was intended to chill enthusiasm for vouchers on the part of private and religious schools that might be interested in accepting voucher students. While Catholic schools have been overwhelmingly receptive to voucher programs, seeing them as consistent with their mission of serving needy inner-city residents, the leaders of some other religious schools have been cautious.<sup>16</sup>

## **Political Action**

Advocates of choice plan to take the offensive even before the results of test cases are known. A state-by-state roundup in *The Friedman Report*, a publication of the Milton and Rose D. Friedman Foundation, found interest in voucher legislation in the following states: Alabama, Alaska, California, Colorado, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, New Jersey, New Mexico, Ohio (expansion of the Cleveland experiment to other malfunctioning school systems), Oregon, Pennsylvania, South Carolina, and Texas. Several of the above states, in fact, had legislative and gubernatorial races scheduled this November (2002) that pit candidates with diametrically opposing views on vouchers.<sup>17</sup>

Texas could become one hotbed of voucher activism. "I think you can expect vouchers are going to be a policy proposal we'll be hearing about every legislative session from now on," the president of the Texas Public Policy Foundation, Jeff Judson, told the Scripps Howard Austin Bureau. Political control of the legislature is up for grabs -- Republicans have a 16-15 margin in the Senate, Democrats 78-72 in the House.

Ohio, where the legislature in 1995 authorized the Cleveland voucher program that the Supreme Court now has upheld, figures to be another battleground. School-choice supporters like state

Senator Jim Jordan say bills will be introduced to increase the size of the vouchers in Cleveland (currently capped at \$2,250 per child) and expand the scholarship program to other low-performing urban school districts. The limited amount of the voucher was a prime reason that few private schools other than the low-cost religious ones chose to accept voucher students. All the House seats and half of those in the Senate will be up for election this fall in Ohio; thus, as in many states, the immediate prospects for voucher initiatives may rest with the electorate.

In Minnesota, where vouchers have lost before but an education tax credit was enacted in the mid-1990s, state Representative Tony Kielkucki has developed a voucher plan in cooperation with the Minnesota Business Partnership. Students who met federal poverty guidelines and are stuck in chronically failing public schools would become eligible for a \$5,950 voucher to attend private schools. In Louisiana, voucher proponents hope to expand a \$3 million pilot school voucher program for preschoolers in New Orleans -- begun last year with the use of federal welfare funds -- into a K-12 pilot in Orleans Parish. And in New Jersey, the Camden City Council unanimously adopted a resolution calling on the state legislature to provide \$6,000 vouchers to students stuck in low-performing schools.

Vouchers could also become the focus of debate in some surprising places. For instance, Maryland is considered one of the most choice-averse states, given the power the teacher unions exert there and the fact that the General Assembly has refused even to pass enabling legislation for public charter schools. However, among states where voucher referenda have been on the ballot, Maryland continues to mark the high-water level of support, with a 45 percent “yes” vote in 1972. Since then, discontent with the quality of public education in urban centers like Baltimore has grown.

*Baltimore Sun* writer Mike Bowler pointed out in a July 3 column the similarities of Cleveland and Baltimore in terms of parental demand for private choices. In Baltimore that demand became clear when the Children’s Scholarship Fund established by Wall Street financier Ted Forstmann and businessman John Walton of the Wal-Mart founding family offered 400 private scholarships and received an astounding 20,000 applications. The program has continued to grow without fanfare, with another 500 children to enter school this fall with the private help. It is not a stretch to conclude that with the constitutional question now resolved, tax-funded vouchers targeted to distressed urban schools like Baltimore’s could garner considerable bipartisan support.

Notably, Bowler mentioned state legislator Howard P. Rawlings, a West Baltimore Democrat who chairs the House Appropriations Committee and twice introduced voucher bills in the mid-1990s. Rawlings says he won’t sponsor voucher bills again, but he still supports the concept. “Poor families ought to have the same options as rich families,” he says. Notes Bowler: “...It wouldn’t take many legislators from places like Baltimore, Prince George’s, or even Montgomery County to put vouchers at the top of the agenda.”

### **D.C.: Voucher Pilot for the Nation?**

Capitol Hill could be one of the first places where lawmakers ponder the merits of vouchers as a lifeline for families trapped in dysfunctional inner-city schools. Hours after the *Zelman* decision came down, House Majority Leader Dick Armey introduced a bill that would provide D.C. families with incomes below the poverty line school-choice vouchers of up to \$5,000 per child. He envisions at least 8,300 of these “tuition scholarships” being awarded needy children in the first five years. For Armey, this initiative represents a second attempt to convince the federal

establishment to exercise its ultimate responsibility for the federal city. Potentially, Washington, D.C. could be a logical site for a large-scale voucher demonstration project for the nation.<sup>18</sup>

In 1997, Arney's District of Columbia Student Opportunity Scholarship Act passed both the House and Senate (where Senator Joseph Lieberman, Connecticut Democrat, was the bill's co-sponsor) but was vetoed by President Clinton. This time, President Bush surely would sign such a bill, given his strong endorsement of *Zelman* in a July 1 appearance in Cleveland and his support for parental choice as a component of reformed federal aid to education. However, support from moderate Democratic Senators is in doubt, perhaps partly because of the certainty a President would sign the bill into law this time. In becoming Albert Gore's running mate in the 2000 presidential election, Lieberman renounced his support for vouchers even though in a September 30, 1997 floor debate, he had called the proposed D.C. vouchers "a lifeline for 2,000 children who are trapped in a school system where none of us would let our kids be..."<sup>19</sup>

While support for vouchers is high among inner-city parents, suburban parents are thought to be more wary. Law professors James E. Ryan of the University of Virginia and Michael Heise of Case Western Reserve University have concluded from their studies that suburbanites often perceive choice plans, as currently structured, as a threat to their neighborhood public schools and to property values. "School choice," they wrote in a *Washington Post* op-ed piece, "threatens the independence of suburban schools by creating the possibility that outsiders, particularly urban students, will enter them and that local funds will exit them." They noted that school desegregation and finance reform plans often have cracked up on the shoals of suburban opposition, and unless suburbanites can be convinced that they will receive benefit rather than harm, school choice is likely to have limited effect, too.<sup>20</sup>

That analysis identifies the fears of suburbanites, but ignores the reality that city parents typically do not want their children to have to travel far from home in order to secure a decent education. In the 1970s and '80s, when federal courts were ordering long-distance busing in an attempt to achieve racial balance in K-12 schools, parents in the cities often were as opposed to such an extreme resort as were parents in the suburbs. A place in a safe, well-run private or parochial school just around the block is likely to be more appealing to most parents than a 90-minute bus ride for their children to unfamiliar turf.

### **The Tax Credit Alternative**

For a variety of reasons, tax credits may be the post-*Zelman* initiative favored by choice advocates across a broad demographic spectrum in many states. Depending on how they are structured, credits can broadly benefit parents of modest or meager means as they exercise private choices about their children's schooling. To date, six states have enacted tax credits to facilitate school choice: Arizona, Florida, Illinois, Iowa, Minnesota, and Pennsylvania. Among these six, there are substantial differences of approach.

Illinois, Iowa, and Minnesota provide for general tax credits or deductions for parents bearing the costs of education. Illinois parents can receive a state income tax credit of up to \$500 for tuition, textbooks, lab fees, and other approved educational expenses.

A differing approach, pioneered in 1997 by Arizona, makes individual taxpayers eligible for a dollar-for-dollar tax credit of up to \$500 for contributions to recognized organizations awarding scholarships to worthy students. This scholarship emphasis also provides a \$200 tax credit for

contributions to public schools or extracurricular activities. A Cato Institute study found that during the program's first three years, the tax credit generated \$32 million for scholarship organizations, which awarded 19,000 scholarships.<sup>21</sup>

In 2001, both Pennsylvania and Florida adopted versions of scholarship credits that seek to tap corporate giving. Pennsylvania corporations can receive up to 75 percent tax credits for donations to scholarship organizations, rising to 90 percent if they make a two-year commitment. In Florida, corporations as of January 2002 could receive a credit worth up to 75 percent of tax due (up to a \$50 million cap) for contributions to eligible scholarship-granting organizations.

Because they are not grants from the public treasury, as vouchers are, tax credits are an appealing alternative for parental-choice advocates in states that have formidable constitutional barriers to vouchers. In Virginia, Republican House of Delegates members Kirk Cox (a public schoolteacher), William Janis, and Scott Lingamfelter have indicated they will champion a scholarship tax credit. Kentucky and Utah are among other states likely to be considering tax-credit proposals.

At the federal level, interest is mounting in federal income tax credits to facilitate private choice in education. President Bush included \$3.5 million in his Fiscal 2003 budget for a refundable tax credit targeted to children in designated failing schools; however, from among several proposals circulating in Congress, one championed by Representative Bob Schaffer, R-Colorado, attracted the most interest. The Education Freedom Act (HR5192) would provide a 50 percent income tax credit for contributions to scholarship-awarding "education investment organizations," or directly to any public or private school. There would be a cap of \$250 for individuals, \$500 for married couples, and \$50,000 for corporations. The measure stalled in the House Ways and Means Committee and Schaffer is not running for another term in the House. However, a similar proposal could come to the fore in the next session of Congress.

In summary, the historic *Zelman* decision has increased the likelihood that through a variety of mechanisms "true private choice" will come to be the rule, not the exception, in American education.

### **III. The No Child Left Behind Act**

On January 8, 2002, President Bush signed into law a reform of federal aid to elementary and secondary education that declares in its title a lofty goal: No Child Left Behind (NCLB). It constitutes a five-year reauthorization of the 1965 Elementary and Secondary Act (ESEA), but more than that, it represents an attempt to inject accountability into a federal program that has cost taxpayers more than \$130 billion but achieved little or nothing in the way of the intended narrowing of the learning gap for low-income and minority children.

The reform significantly boosts the idea that private choices will enhance the quality of schooling in America. NCLB is meant to ensure that parents can find improved opportunities for their children when they are trapped in chronically failing public schools that are subsidized by the mammoth Title I program.

Under terms of the Act, each state has to define what constitutes "adequate yearly progress" (AYP) in assessing the achievement of each school district and each school. After a school has failed for two straight years to satisfy its state's definition of AYP, local districts must offer

families the choice of a better-performing public school within the home district, plus free transportation. President Bush wanted that choice to extend to private schools or public schools in adjoining districts, but congressional leaders adamantly opposed the use of vouchers.<sup>22</sup>

With a continued year of failure, schools must allow parents to use up to \$1,000 of their Title I subsidy to purchase supplemental educational services, such as private tutors or after-school programs.

Bipartisan NCLB negotiators decided that these accountability provisions should apply immediately -- retroactively applied to state standards in place under the 1994 version of federal education law -- so that no child would have to wait for a clock to tick for years before finding relief. The law specifies that with regard to students eligible for choice, priority must go to the lowest-achieving students from low-income homes. A school district must devote up to 20 percent of its Title I, Part A administrative funds to provide transportation to new schools of choice and/or for the supplemental services such as tutoring. When choice within a school district is not feasible, districts are encouraged to enter into cooperative arrangements with nearby districts to facilitate transfers, but such interdistrict plans (which would be highly controversial in suburban districts asked to receive students) are not required by the federal law.

Newspaper reports from all over the country indicated that only small numbers of eligible children were benefiting in the fall of 2002 from a fresh start in a new school. Reasons ranged from willful efforts of school officials to frustrate choice to the lack of space in better public schools to understandable confusion about parental rights or district responsibilities under NCLB.

In Ohio, where the state legislature funded the private-choice voucher experiment in Cleveland that the U.S. Supreme Court upheld as constitutional in the June 27 *Zelman* decision, many parents had not been informed by their districts of their right to public-school choice under NCLB.

“Even parents who are aware of the law have, in some cases, been thwarted in their efforts to take advantage of the transfer, leaving them baffled and angry,” reported *The Cleveland Plain Dealer*.<sup>23</sup>

### **Chicago's Three-Mile Limit**

In Chicago, Mayor Daley termed “ridiculous” the federal law's mandating that 125,000 children in 179 failing Chicago schools be offered transfers to other public schools. There just isn't room; besides, many of the recipient public schools also are “non-performing,” he complained. Ultimately, the city offered just under 3,000 transfer slots spread across 90 schools by not permitting transfers to schools more than three miles away from a failing school.<sup>24</sup>

In response, Fritz Steiger, president of Children First America, a corporate-led foundation that supports school choice, said Mayor Daley had recognized the problem with government schools but failed to “make the logical leap to the obvious solution.” Catholic schools have been closing in the Diocese of Chicago - 14 just last January. Vouchers could ensure students private as well as public-school choice while preserving options in the private sector.

“How many of these schools would still be there to provide these students with an option for a quality education were there a voucher program in place in Chicago?” Steiger asked.<sup>25</sup>

### **Foot-Dragging in Vermont**

In Vermont, the state took advantage of a loophole to delay offering choice at six public schools that had been identified as needing improvement. Education Commissioner Ray McNulty said U.S. Secretary of Education Rod Paige agreed to let Vermont officials wait until mid-year for an analysis of 2001-02 test scores. That angered Libby Sternberg, executive director of Vermonters for Better Education.

“While several prominent champions of our public school system (and opponents of school choice) send or sent their own children to private schools, Vermont has slammed the door in the face of low-income parents who would merely have had the opportunity to choose another public school,” Sternberg noted in a letter to McNulty. “This is shameful.”<sup>26</sup>

The numbers are small in Vermont, but huge in Los Angeles. There, almost 230,000 children qualify for publicly financed transfers, but fewer than 100 seats were available in better-performing schools. Superintendent Roy Romer's comments to the *Los Angeles Times* echoed the argument of many public educators: “Just to move children from one building to another building does not guarantee that they are going to learn that much better. We can take the existing school and make it work.”<sup>27</sup>

### **Better Chance to Win the Lottery?**

Baltimore school officials said they could accommodate transfers by only 194 students out of the 30,000 eligible under NCLB. *Baltimore Sun* columnist Mike Bowler commented that “this isn't school choice any more than the Maryland Lottery gives players a choice of winnings.” A more genuine solution would use Title I money to transport children from Baltimore's 83 failing schools to better-performing ones in neighboring districts, he said. The NCLB urges districts to seek compacts with neighboring districts for inter-district exchanges of students but does not require such transfers.<sup>28</sup>

Similarly, Cincinnati officials said they had space to accommodate transfers by only 198 children out of the 10,000 eligible for relief under NCLB. District spokesman Janet Walsh told *The Cincinnati Enquirer* that the district had made every effort to abide by the spirit and letter of the law.<sup>29</sup>

“We have been encouraging choice in Cincinnati Public Schools for decades,” she added. “A lot of parents have already exercised choice. The law does not ask them to leave.”

Outside the big cities, issues sometimes come into a different focus. Philip Shortman, superintendent of the Hays-Lodgepole district in Montana, said he expects his elementary and middle schools to work their way off the failing list by next year. And he supports the new NCLB requirements.

“It's good,” he told *The Billings Gazette*. “It's common sense. It's made school districts more accountable. It's about time. People have been too lax.”<sup>30</sup>

### **Different Standards**

To be sure, some of the school administrators' puzzlement as to whether the law's initial impact were legitimate was perfectly rational.

Consider, for example, the U.S. Department of Education's enumeration state-by-state of the 8,600 Title I-aided schools deemed to have fallen short of state-defined AYP. The numbers differ wildly from one state to another. This may be the most egregious contrast: Michigan had 1,513 failing schools (41 percent of the state's total schools), while Arkansas had none --zero-- it identified as failing. And there are more numbers to cause head-scratching. For instance, Massachusetts had 259 failing schools, but West Virginia had only 13. Georgia had 625 failing schools while neighboring South Carolina reported just 31.

Ohio's Department of Education did nothing to ease qualms when it had to admit that it had mistakenly labeled 203 schools as failing when actually some of them had made commendable gains. The U.S. Department of Education provided only the raw numbers of schools reported by the states and left it to the states to release names of the schools.<sup>31</sup>

High numbers could be a cause for legitimate pride, a sign that a state takes standards seriously and sets the bar high. However, in Michigan a coalition of public education groups is urging the state to lower the standards so as to cut the number of schools in need of improvement.<sup>32</sup>

On the other hand, are low numbers sometimes the product of a state's hard work to raise the bar? When Virginia linked school accreditation to student achievement, most schools came up short. But after four years of concentration on meeting the Standards of Learning, only 122 of 1,700 schools still face a warning of the loss of state accreditation. That may help explain why only 34 Title I schools in Virginia wound up on the NCLB sanctions list this summer.

The disparate and debatable numbers are a byproduct of lingering respect for local control. If the feds decreed uniform standards and assessments, Washington would be in charge of a national curriculum, which would violate the tenets of federalism and pose the danger of political manipulation.

### **Confirming Test**

Eventually, the National Assessment of Educational Progress (NAEP), a voluntary gauge of student knowledge run by a nonpartisan board since 1969, may generate enough comparative data after all states begin testing all children annually in grades 3-8 to show which states are serious about standards and which are merely fooling their customers. That could encourage pro-reform activism state by state.

Certainly, No Child Left Behind -- a product of a Washington-style compromise that attempted for political reasons to minimize the number of failing schools -- does not present states an ideal blueprint for high standards. This is how a DoEd document describes the benchmark: "Each state chooses where to set the initial academic achievement bar based on the lowest-achieving demographic group or based on the lowest-achieving schools in the state, whichever is higher. Once the initial bar is established, the state is required to 'raise the bar' gradually to reach 100 percent proficiency at the end of 12 years...."<sup>33</sup>

Yet, despite its shortcomings (inevitable with any government program) and the initial glitches in implementation, No Child Left Behind almost certainly will be a catalyst for continued expansion



of private choices in education. It emphatically makes the point that a child's opportunity for an excellent, well-rounded education must not be limited by a government school's willingness to settle for mediocrity or mere custodial care. The more private choices that families have, the stronger the government-run schools will become as a consequence of competition.

As U.S. Secretary of Education, Rod Paige, said of the NCLB Act, "We are witnessing a shift in the culture of education. People are going to look back years from now and see that this was a time when things changed."

As the requirement kicks in that each state test all children annually for reading and math achievement, Secretary Paige foresees that improved data collection coupled with the use of NAEP as a confirming device for reported progress will bring the reform into better balance. Parents will become better-informed consumers who can demand changing from government schools that lag. As an example of this already beginning to happen, Dr. Paige cited Colorado Springs, where principals of failing public schools promised their parents that the schools would improve. "This is a new phenomenon in public education," said Secretary Paige, who emphasized accountability for academic results when he was superintendent of Houston's public schools.<sup>34</sup>

### **Supplemental Services: The Wild Card?**

Ultimately, NCLB's biggest boost for private choices may come from a section labeled, rather unexcitingly, "supplemental services," and initially derided by some skeptics as "after-school choice." But this section establishes in federal education law the principle of portability - the idea that subsidies should follow a child to an education service that pledges good results.

Under NCLB, eligible students from low-income homes may go for help to private providers of educational services that have a track record of effectiveness. They may use faith-based providers if they wish. They can receive this help before or after school, on weekends, or during summers.

Tutoring is likely to be the service of choice of the great number of families. In search of the best possible education, Americans already spend more than \$5 billion a year on private tutoring. Now, with the tutoring options in NCLB, this private choice is sure to become more of a growth enterprise than ever.

The Department of Education estimates that NCLB will pump an additional \$1 billion per year into public funding for tutoring. There is little doubt many education consumers see tutoring as essential to filling in intellectual gaps left by modern schooling. A *Newsweek* poll in 1999 showed that 42 percent of adults are convinced a "great need" exists for children to receive private tutoring outside school.

The timetable works like this: After a public school has failed for two straight years to make adequate progress toward meeting the state's standards, low-income families are supposed to be offered the choice of a better-performing public school and a free ride to it. With a third year of failure, NCLB requires that school districts let parents use up to \$1,000 of their Title I subsidy to purchase the supplemental services. In effect, the stipends become remedial vouchers, albeit ones that must be used outside the regular school day. School officials will have to furnish parents a list of providers from which they may choose. (A policy issue to watch will be the extent to which school officials may seek to limit choice among providers offering differing approaches.)

A new book by Dr. Edward E. Gordon, *Tutor Quest: Finding Effective Education for Children and*

*Adults* (Phi Delta Kappa Educational Foundation; Bloomington, Indiana; 2002), lays out detailed information for education consumers seeking to find the best tutor for their needs. Gordon analyzes 10 different types of tutoring programs found in most communities. Volunteer non-profit tutors do about 30 percent of the tutoring in the U.S. each year. Teachers or groups of teachers do another 30 percent, while 34 percent of tutoring comes in the form of university clinics, workforce programs, and peer tutoring, where children teach other children. Franchised tutoring centers handle from 3 to

6 percent of students tutored each year. (Something to watch will be the extent to which NCLB may increase the prevalence of for-fee tutoring.)

Prices for professional tutoring range from \$20 to \$75 per hour for private home tutoring to \$40 to \$60 per hour for services at a tutoring center. Additionally, there is a fast-emerging field of cyber-tutoring on the Internet. Many parents work late, their children in need in tutoring are too young to drive, and the idea of contracting with a stranger for one-on-one tutoring raises security concerns. For these and other reasons, cyber-tutoring is becoming an attractive option. *The Chicago Tribune* profiled a Chicago family that found help for their 14-year-old son via eSylvan, the online division of Baltimore-based Sylvan Learning Centers. With a teacher in Williamsville, N.Y. (whom he never met in person) as his tutor, the youngster was able to raise his English grade significantly.

Concluded *Tribune* business writer Lee Copeland:

“Parents across the country are increasingly looking to the Web as a just-in-time learning tool. They point to the convenience, thoroughness, and safety of Web-based programs - which typically conduct background and credential checks on staffers - as big drawing points for online learning. They’re also getting savvier by equipping their homes and kids with the latest tech gear to boost grades and improve the quality of their school work.”<sup>35</sup>

NCLB will open new doors to parents seeking such options. In addition, the private choice of tutoring should provide healthy alternatives to institutionalized schooling gone awry.

For example, consider those children who have been diagnosed, often under subjective criteria, as being “learning disabled.” Based on his 30 years experience in tutoring, Ed Gordon offers astute observations on helping LD children, especially those diagnosed with “attention deficit hyperactivity disorder” (ADHD). Gordon’s experience leads him to believe a majority of ADHD children have a “combination of various learning disabilities that have been either incorrectly diagnosed or improperly treated.” He has found that a carefully sequenced tutoring program -- i.e., visual or auditory training followed by remedial reading followed by individual/family counseling - often results in symptoms of hyperactivity fading away and the child becoming a successful classroom learner.

As tutoring becomes a key element in empowering parents to choose the best educational opportunities for their children, consumer information will become more and more valuable as parents and children exercise their private educational choices.

#### **IV. Concluding Thoughts**

The three major steps of 2002 toward true private choice in elementary and secondary education added impetus to a trend already well underway.

Twenty years ago, for example, the home-schooling movement was in its infancy. Only the bravest parents dared to risk public scorn or even legal sanctions by educating their children at home. Now, there are almost 2 million home-schooled children in America, and an estimated 5 to 10 percent of them are members of racial or ethnic minorities often thought to be prime constituents of the government schools.

Twelve years ago, there was no such thing as a charter school, an independent school within the public system whose operators promised to deliver results in exchange for freedom from unnecessary bureaucratic rules. Today, there are more than 2,400 public charter schools, and hundreds more will be coming into being in the next few years as school systems seek to rescue the failing schools the No Child Left Behind Act will be identifying.

A phenomenon of recent origin and bearing potential for fostering enormous change is the cyber school. These are sometimes charter schools, sometimes purely private entities. These are schools that are available for students anywhere in the world who have access to a computer and the desire to learn. Currently, about four dozen cyber schools are up and running, and where public monies are involved, the education establishment is fighting them bitterly, fearing the loss of money, guaranteed jobs, and control. Nevertheless, cyber schools are likely to grow, because (as the legions of home schoolers know) the technology of the Internet is liberating for individuals.<sup>36</sup>

The movement toward more private choices is giving rise to the “edupreneur,” the entrepreneur who can help meet the market demand for varied educational services and products. A Cato Institute study a few years ago found that these education companies constituted 10 percent of a \$740 billion education market. Their growth is brisk but could be even greater were not the government educational system throwing up every regulatory obstacle it can devise to block or slow the rise of edupreneurs. Analyst Carrie Lips concluded that tax cuts or universal tuition tax credits could return education purchasing power to individuals and allow the full blossoming of a vibrant educational market.<sup>37</sup>

One defender of the existing state-run system, David G. Imig, president and CEO of the American Association of Colleges for Teacher Education, has described quite skillfully the growing challenge to the status quo posed by expanding private choices in education. Vouchers and school-choice proponents, he has noted, “are promoting a fundamental shift in the idea of schooling in the United States.” It is similar to the paradigm shift already widely embraced in Western Europe, where politicians of diverse ideology advocate that the state become a purchaser rather than a provider of schooling.<sup>38</sup>

Private providers such as those in Philadelphia are sometimes known as Education Management Organizations (EMOs). Citing Edison's much-advertised setbacks, Imig clearly is among the leaders of the existing system who hope that one company's difficulties will help bring down the whole privatization movement. However, he added, quite candidly, “If Edison and other private providers... do succeed, states will be encouraged to withdraw from their role as the direct provider of education and shift to 'purchasing' schooling. The charter school movement, increased reliance on school choice, vouchers and tax credits, school outsourcing, the use of private providers for supplementary services, and emerging state-level accountability policies are encouraging the growth of EMOs.”

Exactly so. Indeed, the wisest strategy of those who favor private choices in education will be to encourage further progress on all those fronts, rather than putting all eggs in one basket, whether

that be Philadelphia-style takeovers or even vouchers. There's plenty of room for voucher experiments, education tax credits for parents, tax credits for scholarship donors, continued brisk expansion of charter schools, a favorable regulatory environment for further growth of home schooling, subsidies for private tutoring services, and outsourcing ranging from specific services like food and transportation right up to whole schools and entire school districts. A rising tide of choice will lift all boats. A disappointment in one area will not dampen success in another.

Of course, Imig and other apologists for monopoly education decry the growing importance of private choice. Imig warns darkly of the “risks of inequality and exclusion,” and of education being driven by business interests instead of democratic ideals. However it is the one-size-fits-all system that has delivered huge inequality between the best and the worst schools. It is the expansion of private choice in education that offers the greatest hope for making good education more available to all Americans.

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