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# Fruits of a One-Vote Victory:
## How School Choice Survived Its Constitutional Challenge

Justice Clint Bolick

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*Justice Clint Bolick*[1]

I recently attended a conference in which education reform was a topic of major focus. I marveled over how the realm of the possible in terms of education policy had expanded over the past two decades. Nothing seemed off the table, from private school vouchers to education savings accounts, homeschooling, micro-schools, and even possibly religiously sponsored public charter schools.

Much of the spirited discussion and urgency was fueled by the challenges encountered by traditional public education during the COVID-19 pandemic, which caused profound educational losses.[2] Meanwhile, the U.S. Supreme Court put an end to race-based college admissions,[3] turning attention to the plight of minority schoolchildren in inner-city districts.

The extent to which the policy conversation over education reform can involve publicly funded nonpublic options is attributable to a 2002 Supreme Court decision[4] that upheld the inclusion of religious schools in school choice programs.[5] And as much as we take that essential feature of today's vibrant education reform debate for granted, it came down to a single vote on the Court. Had that decision come out otherwise, our nation's ability to provide high-quality educational options for American schoolchildren—especially those of modest economic means—would be sharply curtailed.

## I. IN DEFENSE OF SCHOOL CHOICE

I came to this issue through my atypical path to law school. Until my senior year of college, I planned to teach high school, which required me to take an array of education courses and to intern and student-teach in schools. Interning in an inner-city public school was eye-opening. Although my own public school experience was far from optimal, witnessing the disorder and poor educational quality in an inner-city school made me realize that we needed systemic change. Around the same time, I encountered the work of Nobel Prize-winning economist Milton Friedman, who proposed a

[1] Justice, Arizona Supreme Court. Most of the story recounted here is presented in greater detail in CLINT BOLICK, VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE (2003).

[2] *See* The Editorial Board, *The Startling Evidence on Learning Loss is In*, N.Y. TIMES (Nov. 18, 2023), https://www.nytimes.com/2023/11/18/opinion/pandemic-school-learning-loss.html.

[3] Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).

[4] Zelman v. Simmons-Harris*,* 536 U.S. 639, 662–63 (2002).

[5] "School choice" encompasses choices within traditional public schools (often called open enrollment); charter schools, which are less-regulated public schools operated by private entities; and programs that include publicly funded private educational options. The latter typically take the form of school vouchers, education savings accounts, or tax credits for private school expenses or scholarships. In this article, I focus on publicly funded private educational options, which have engendered (by far) the most legal challenges.

system of school vouchers to provide greater choice and competition.[6] Most importantly, in my junior year, I took a course in constitutional law. Studying *Brown v. Board of Education,*[7] which recognized a right to equal educational opportunities, inspired me to pursue a career as a constitutional lawyer.

After graduating from law school in 1982, the timing seemed propitious to combine my twin passions for school choice and constitutional law. A major 1983 study called *A Nation at Risk*[8] chronicled the abysmal state of American K-12 education and evoked widespread discussion over necessary reforms. I launched a career as a public-interest litigator, determined to defend school choice programs against constitutional challenges. The trouble was that there were no school choice programs to defend.

If and when such programs materialized, they faced daunting odds, especially to the extent they included religious options, by virtue of the Supreme Court's interpretation of the establishment clause of the First Amendment.[9] Commencing in the 1940s, the Court expanded the prohibition against establishing religion into a "wall of separation" between church and state. The Court's jurisprudence was often confusing.

Most worrisome from the school choice perspective was a 1973 decision in *Committee for Public Education v. Nyquist*.[10] The case involved New York and Pennsylvania programs designed to keep Catholic schools afloat. As parishioners moved to the suburbs and urban Catholic schools served an increasingly minority and non-Catholic student population, the financial base for the schools dissipated. The programs provided financial assistance to the schools and the parents patronizing them. The Court struck the programs down as a violation of the Establishment Clause, reasoning that their "primary effect" was to advance religion.

*Nyquist* seemed to preclude school vouchers, and opponents argued in the legislative arena that they were impermissible. The only hope was a footnote buried in the opinion (note to lawyers and law students: always read the footnotes!), in which the Court reserved the question "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted."[11]

So, despite the setback, the Court appeared to give us something of a roadmap for future school choice programs. The question for school choice proponents was whether we could pry that

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[6] *See* Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST (Robert A. Solo ed., 1955). Professor Friedman and his wife Rose continued to advocate for school vouchers over the course of their amazing careers, and I was lucky to enjoy their friendship from the early 1990s until their passing.

[7] Brown v. Bd. Educ., 347 U.S. 483 (1954).

[8] Nat'l Comm'n on Excellence in Educ., U.S. Dep't of Educ., *A Nation at Risk: The Imperative for Educational Reform* (1983).

[9] "Congress shall make no law no law respecting an establishment of religion…." U.S. CONST. amend. I. The clause is applied to the states by way of "incorporation" under the 14th Amendment. *See* Everson v. Bd. Educ., 330 U.S. 1, 18 (1947).

[10] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[11] *Id.* at 782 n.38.

footnote open wide enough to drive public policy through. We would not find out definitively for nearly 30 years after *Nyquist*.

## II. THE ROAD TO *ZELMAN*

Indeed, it would take almost two decades for the first post-*Nyquist* urban school choice program to exist. The Milwaukee Parental Choice Program, championed by Wisconsin State Representative Polly Williams, a Democrat, and Governor Tommy Thompson, a Republican, was a pilot program that allowed one percent of the school district's public school students to use a portion of their state education funds as full tuition payment in participating private schools. The program, perhaps wisely, ducked the Establishment Clause issue by limiting eligibility to nonsectarian schools.

A legal challenge came anyway, based on an array of state constitutional provisions. I volunteered to represent parents and children who wanted to participate in the program as defendants-intervenors. This intervention strategy, which would be replicated in dozens of subsequent cases, was necessary because state attorneys general might not always defend the programs skillfully or enthusiastically, and the parents and children had a strong interest in protecting the programs. I recognized that we needed to defend the Milwaukee program successfully to lay the legal groundwork for future school choice programs. Luckily for me, the program was so small that almost no one was aware of it, so that despite my inexperience, I had no competition for the job of defending it.

Thanks largely to strong community support and a successful campaign in the court of public opinion, we prevailed against the state constitutional challenge in the Wisconsin Supreme Court by a 4-3 vote.[12] (Winning cases in the U.S. and state supreme courts by a single vote would become an anxiety-inducing feature of my litigation career.) Meanwhile, I had gained valuable experience. More importantly, my colleague Chip Mellor and I co-founded the Institute for Justice (IJ), bringing far greater legal resources to bear and vowing to defend the constitutionality of every subsequently enacted school choice program. Little did we realize that would entail dozens of lawsuits from Arizona to Puerto Rico, but we made good on our promise.

Following the Milwaukee victory, Wisconsin expanded the program to include religiously affiliated schools, and other states adopted a variety of programs, all of which included religious schools. So, the Establishment Clause was now at issue in every case. In addition to other state constitutional challenges that might present themselves in specific states, we were also confronted with so-called Blaine Amendments that are present in roughly two-thirds of state constitutions. Those provisions typically prohibit public funding for the use or benefit of sectarian institutions.

Because we had no idea which program would get to the U.S. Supreme Court, we had to defend them all, and overcome state constitutional challenges that might provide independent state grounds to prevent U.S. Supreme Court review. Along the way, I crossed litigation swords repeatedly with Robert Chanin, the highly skilled and effective general counsel of the National Education

[12] Davis v. Grover, 480 N.W.2d 460 (Wis. 1992).

Association. I joked that we argued against each other so frequently that not only could I give Chanin's argument, but could do it in his voice (he had a dramatic style and pronounced New York accent). Over a decade of litigation, Chanin prevailed in more rounds than my colleagues and I, which was painful but made us even more determined to win in the end.[13]

Along the way, a closely divided Supreme Court decided several cases at the periphery of school choice, typically upholding assistance to private schools or their patrons.[14] The Court separated types of public aid as "indirect," meaning it was directed to private schools only through parents or students, versus "direct," which was sent directly to private schools. Indirect aid could be used for religious instruction, whereas direct aid could not. It also became clear the decisive vote would be Justice Sandra Day O'Connor, who usually voted to uphold such assistance but whose Establishment Clause jurisprudence was unclear.

In 1997, IJ convened a meeting of law professors and former Supreme Court clerks in Washington, D.C. to brainstorm Supreme Court strategy. My view throughout was that if the case was perceived to be about religion, we would lose; if it was perceived to be about education, we would win. For our adversaries, the most important precedent was *Nyquist*; for us, it was *Brown v. Board of Education*. We developed a consistent Establishment Clause theme focusing on two principles derived from post-*Nyquist* jurisprudence: aid that found its way to religious schools was permissible if it was (1) neutral—that is, religious schools were among the options but not the only option; and (2) true private choice—that is, funds would be transmitted to religious schools only as the result of individual choices.

Ultimately, we found our test-case in the Cleveland school choice program, which allowed low-income children to use their education funds in private schools in the city or in suburban public schools in districts that chose to participate. The program was championed by City Councilwoman Fannie Lewis, a Democrat who represented the impoverished Hough neighborhood.

The case had one especially helpful fact and one unhelpful one. The Cleveland public schools were among the worst in the nation, and low-income children attending them had nearly no chance of graduating with senior-level proficiency. This supported our argument that the program was about expanding educational opportunities. The unhelpful fact was that (unsurprisingly) none of the two dozen public school districts surrounding Cleveland elected to participate. So the overwhelming majority of participating students attended religious schools.

After months of painstaking briefing, coalition and amicus brief organizing, media engagement, and mock arguments, we were ready for Supreme Court argument. Among the many arguments in our brief, we analogized the case to *Brown*. "There, children were forced to travel past good neighborhood schools because the children happened to be black," we stated, whereas here,

[13] A school choice critic recently published a book that contains a chapter entitled "Bolick vs. Chanin," depicting the lengthy litigation battle. CARA FITZPATRICK, THE DEATH OF PUBLIC SCHOOL: HOW CONSERVATIVES WON THE WAR OVER EDUCATION IN AMERICA 193-203 (2023).

[14] *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997) and *Mitchell v. Helms*, 530 U.S. 793 (2000).

"many poor children are forced to travel past good schools to attend inferior schools because the schools happen to be private. In the quest to fulfil the promise of equal educational opportunity, we must enlist every resource at our disposal."[15]

At argument in spring 2002, all eyes were on Justice O'Connor. Having attended many Supreme Court arguments, I knew she had a "tell": if she said, "Wait just a minute," that advocate was in trouble. And sure enough, she did exactly that to Robert Chanin, asking why the Court shouldn't look at the wide array of educational choices—including public magnet and charter schools—rather than merely private schools.[16] When Chanin argued that the better solution was giving more money to public schools, Justice Antonin Scalia interrupted him: "It's not a money problem. It's a monopoly problem."[17]

The oral argument had gone well. Outside on the Court's front steps, hundreds of parents and children from Cleveland and around the country were rallying for school choice. Fannie Lewis emerged from the Court and raised her hands in the air proclaiming, "We won!"

But in the ensuing months, doubt crept in. Credible rumors emerged that Justice O'Connor had changed her mind. The decision was released as the last one on the final day of the Court's Term on June 27, 2002. That morning, I practiced statements for the media, one if we lost, another if we won. As Chip Mellor and I waited for the decision near the press office in the Court's basement, time passed slowly—we realized that one of the justices must be reading a dissent from the bench. Knowing that Justice Scalia did so frequently, our hopes plunged.

But as the decision was released, we scanned the caption and saw that Justice O'Connor had joined Chief Justice William Rehnquist's majority opinion: the Cleveland School Choice Program was constitutional. Within seconds I was delivering to news reporters from around the nation the hopeful message I had practiced that morning: "Today was the Super Bowl for school choice, and the kids won."

## III. THE DECISION AND ITS AFTERMATH

The 5-4 decision embraced the two principles we urged: neutrality and true private choice. As the majority viewed it, the Cleveland School Choice Program was part of a "multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district,"[18] conferring "educational assistance directly to a broad class of individuals defined without reference to religion."[19]

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[15] CLINT BOLICK, VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE 172-73 (2003). The brief in its entirety is appended at 223-61.
[16] *Id.* at 181.
[17] *Id.* at 182.
[18] *Zelman*, 536 U.S. at 653.
[19] *Id.*

The four dissenters argued that the program impermissibly advanced religion, and a bit histrionically predicted it would lead to "religious strife" along the lines of what occurred in "the Balkans, Northern Ireland, and the Middle East."[20] That did not come to pass, but school choice programs proliferated, as did lawsuits challenging them, based now primarily on state constitutional grounds.

Nine years after *Zelman*, in Arizona, a school voucher program was struck down under the state constitution's version of the Blaine Amendment.[21] That led my colleagues and I (now at the Goldwater Institute) to develop the idea of education savings accounts, which allow families to use their public education funds not just for tuition but for an array of education expenditures. Education savings accounts were enacted and subsequently upheld by the Arizona Court of Appeals,[22] and have since been adopted in several other states.

Meanwhile, my former colleagues at the Institute for Justice challenged the exclusion of religious schools from a number of aid programs that included nonreligious private schools. Their efforts came to fruition in *Carson v. Makin*,[23] which held that excluding religious schools from a state program that provided tuition for private nonreligious schools violated the First Amendment's Free Exercise Clause. As a result, Blaine Amendments have lost much of their vigor in constraining school choice programs.

I find it remarkable that in only two decades, the Supreme Court went from upholding the *inclusion* of religious options in a school choice program by only a single vote, to forbidding the *exclusion* of religious schools from such programs. The realm of possibility for education reform has never been broader—nor has the need been greater.[24]

## IV. CONCLUDING THOUGHTS

The litigation campaign over school choice illustrates the potential for great change effectuated through America's legal system—not in contradiction to our Constitution, but in vindicating its precious yet often unfulfilled guarantees. Properly understood, the Establishment Clause does not preclude school choice. Properly understood, the equal protection guarantee never should have tolerated racial or sex discrimination. Properly understood, the Fourteenth Amendment's Privileges or Immunities Clause should protect freedom of enterprise and the Bill of Rights. The list could go on.

One of our legal system's features is the presence of public interest litigation as a means to accomplish jurisprudential change. I was inspired by Thurgood Marshall's long-range strategy to

[20] *Id.* at 686 (Stevens, J., dissenting).
[21] Cain v. Horne, 202 P.3d 1178, 1185 (Ariz. 2009).
[22] Niehaus v. Huppenthal, 310 P.3d 983, 988–89 (Ariz. App. 2013).
[23] Carson v. Makin, 596 U.S. 767, 789 (2022).
[24] *See generally* CLINT BOLICK & KATE J. HARDIMAN, UNSHACKLED: FREEING AMERICA'S K-12 EDUCATION SYSTEM (2020) (describing some proposals for systemic education reform).

eradicate separate but equal;[25] by Ruth Bader Ginsburg's brilliant campaign to accord equal protection to women; and by the American Civil Liberties Union's constant efforts to protect the freedom of speech (though we were good-faith opponents in the fight over school choice). Today, similar efforts are active in areas such as fighting eminent domain abuse, curbing the administrative state, promoting religious liberty, and many others.

I can personally attest that lawyers can experience no greater gratification than defending the rights of those they represent. Lawyers possess great power to right wrongs, and the courtroom is the most level playing field. Whether as a vocation or avocation, I hope all lawyers will commit time and resources over the course of their careers to vindicating the protections of our laws.

[25] *See generally* MARK A. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1956-61 (1994) (presenting an excellent account of those efforts).