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

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

Since the drafting of Professor Green’s Article, the Supreme Court has obviously laid to rest the first contention; one might thus be tempted to ignore that aspect of his Article entirely so as not to benefit unfairly from its timing. But my disagreement with his constitutional analysis goes much beyond the fact that I have the benefit of hindsight. Accordingly, in Part I, I argue that, properly understood, the constitutional questions he raises should not even have been a close call.

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

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1. This Article is a response to the Article, The Illusionary Aspect of “Private Choice” for Constitutional Analysis, 38 WILLAMETTE L. REV. 549 (2002), written by Associate Professor of Law Steven K. Green.
2. Green, supra note 1, at 551-52.
3. Green, supra note 1, at 551.
4. Green, supra note 1, at 551.